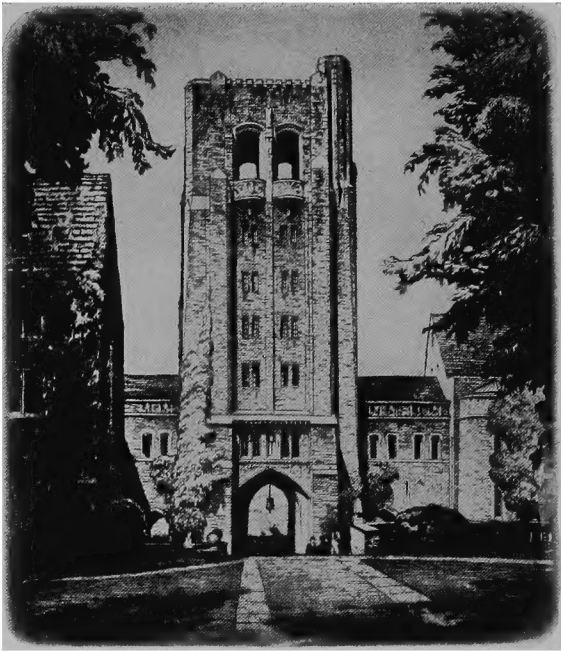


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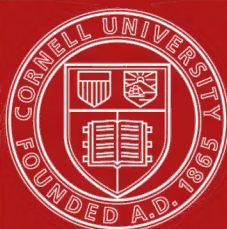
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A TREATISE ON THE LAW
OF
TAXATION BY LOCAL AND
SPECIAL ASSESSMENTS

INCLUDING

Assessments for Streets, Sidewalks, Alleys, Sewers and all other City
Improvements, as well as Assessments for all Rural Im-
provements, such as Roads, Ditches, Drains,
Bridges, Viaducts, Water Systems
and Irrigation

BY

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IN TWO VOLUMES

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CHAPTER XIII.

APPORTIONMENT.

§ 651. Theory of apportionment.

The underlying theory of the law of assessments, as has already been stated,¹ is that they are exactions upon property owners, in return for special benefits which their property receives by reason of the public improvements for the cost of which the assessment in question is levied. While the power of levying local assessments is a branch of the taxing power,² the foregoing restriction is not one which is devised by the courts as an unwritten restriction upon the taxing power of the legislature. It is an essential and intrinsic part of the general theory of local assessments and is the justification for the well recognized view that local assessments are not within the operation of the constitutional provisions which apply to general taxation and provide that it must be levied in proportion to the value of the property taxed.³ Accordingly, since local assessments are based upon the theory of benefits, they must in theory at least be apportioned according to the amount of the special benefits conferred upon each separate tract of property assessed by the improvement for which the assessment is levied, and in theory, at least, the amount of the assessment cannot exceed the amount of such special benefit.⁴ As has already been

¹ See § 11.

² See § 89.

³ See § 147.

⁴ *Ritter v. Drainage Dist. No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Little Rock v. Katzenstein*, 52 Ark. 107, 12 S. W. 198 [1889]; *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 80 Pac. 467 [1905]; *Ferguson v. Stamford*, 60 Conn. 432, 22 Atl. 782 [1891]; *Dann v. Wood-*

ruff, 51 Conn. 203 [1883]; *Cone v. City of Hartford*, 28 Conn. 363 [1859]; *City of Atlanta v. Hanlein*, 101 Ga. 697, 29 S. E. 14 [1897]; *Wathen v. Allison Ditch District No. 2*, 213 Ill. 138, 72 N. E. 781 [1904]; *City of Chicago v. Adcock*, 168 Ill. 221, 48 N. E. 155 [1897]; *Barber v. City of Chicago*, 152 Ill. 37, 38 N. E. 253 [1894]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Washington Ice Company v. City of Chicago*, 147 Ill. 327, 37 Am. St.

noted,⁵ this theory has been repudiated by the courts of some states and it has been held that a direct special benefit need not necessarily exist in the case of assessments for local improvements.⁶ Where this latter theory obtains, the existence of local benefits does not affect the apportionment of the assessment in the absence of a statute specifically requiring such form of apportionment.⁷

Rep. 222, 35 N. E. 378 [1894]; City of Bloomington v. Latham, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]; Updike v. Wright, 81 Ill. 49 [1876]; Quill v. City of Indianapolis, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; Law v. Madison, Smyrna and Graham Turnpike Company, 30 Ind. 77 [1868]; City of New Albany v. Cook, 29 Ind. 220 [1867]; Stutsman v. City of Burlington, Iowa, 127 Ia. 563, 103 N. W. 800 [1905]; City of Louisville v. Bitzer, 115 Ky. 359, 61 L. R. A. 434, 73 S. W. 1115, 24 Ky. Law Rep. 2263 [1903]; Heming v. Stengel, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64 [1902]; Munson v. Board of Commissioners of the Atchafalaya Basin Levee District, 43 La. Ann. 15, 8 So. 906 [1891]; City of Auburn v. Paul, 84 Me. 212, 24 Atl. 817 [1892]; Mayor and City Council of Baltimore v. Smith & Schwartz Brick Company, 80 Md. 458, 31 Atl. 423 [1894]; Lincoln v. Street Commissioners of the City of Boston, 176 Mass. 210, 57 N. E. 356 [1900]; Holt v. City Council of Somerville, 127 Mass. 408 [1879]; Powers v. City of Grand Rapids, 98 Mich. 393, 57 N. W. 250 [1894]; Hook v. Chicago and Alton Railroad Company, 133 Mo. 313, 34 S. W. 549 [1895]; Zoeller v. Kellogg, 4 Mo. App. 163 [1877]; Kirkendall v. City of Omaha, 39 Neb. 1, 57 N. W. 752 [1894]; City of Omaha v. Schaller, 26 Neb. 522, 42 N. W. 721 [1889]; State, Morris, Pros. v. Mayor and Common Council of the City of Bayonne, 53 N. J. L. (24 Vr.)

299, 1 Mun. Corp. Cas. 299, 21 Atl. 453 [1891]; Loweree v. City of Newark, 38 N. J. L. (9 Vr.) 151 [1875]; Hoffeld v. City of Buffalo, 130 N. Y. 387, 29 N. E. 747 [1892]; People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse, 63 N. Y. 291 [1875]; People ex rel. Griffin v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; City of Wilmington v. Yopp, 71 N. C. 76 [1874]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902]; Walsh v. Barron, Treas., 61 O. S. 15, 76 Am. St. Rep. 354, 55 N. E. 164 [1899]; Kummer v. Cincinnati, 27 Ohio C. C. R. 683 [1905]; Price v. Toledo, 25 Ohio Cir. Ct. R. 617 [1903]; Philadelphia to Use v. Pemberton, 208 Pa. 214, 57 Atl. 516 [1904]; Boyd v. Board of Wilkinsburg, 183 Pa. St. 198, 38 Atl. 592 [1897]; Beechwood Avenue Sewer, (1) Pittsburgh's Appeal, 179 Pa. St. 490, 36 Atl. 209 [1897]; City of Houston v. Bartels, 36 Tex. Civ. App. 498, 82 S. W. 323 [1904]; (rehearing denied 82 S. W. 469); City of Dallas v. Kahn, 9 Tex. Civ. App. 19, 29 S. W. 98 [1894]; *In re* City of Seattle, — Wash. —, 91 Pac. 548 [1907].

⁵ See §§ 12, 118.

⁶ Oliver v. Monona County, 117 Ia. 43, 90 N. W. 510 [1902]; Kelly v. Chadwick, 104 La. 719, 29 So. 295.

⁷ Oliver v. Monona County, 117 Ia. 43, 90 N. W. 510 [1902]; Chicago, Milwaukee & St. Paul Railway Company v. Phillips, 111 Ia. 377, 82 N. W. 787 [1900].

§ 652. Nature of benefit.

The special benefit which is the basis of the local assessment must furthermore be direct and immediate.¹ It must not be merely remote,² contingent,³ or speculative.⁴ Thus, the benefits which may be received in the future from an improvement which may be or may not be constructed cannot be a basis for special assessment.⁵ When such subsequent improvement is in fact completed, it is, on the other hand, proper to consider the benefits caused by the original improvement as affected by the subsequent improvement.⁶ Thus, if a street is opened across a river and subsequently a bridge is built connecting the two ends of the street, the building of such bridge may be considered in determining the benefit caused by opening the street.⁷ So, if final provision for such subsequent improvement has been made by the public corporation, benefits therefrom may be considered in levying the assessment.⁸ It has been said that the benefit to be considered is that which is contemplated and intended by the improvement and not that which in point of fact actually results from the improvement as constructed.⁹

§ 653. Increase in price as test of benefit.

What shall be taken as the test for the existence and amount of local benefits in apportioning an assessment is a question upon which there has been very wide divergence of judicial authority. The existence and amount of benefits is essentially a question

¹ *City of Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687 [1878]; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900].

² *City of Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687 [1878]; *City of Bridgeport v. The New York & New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869].

³ *City of Hartford v. West Middle District*, 45 Conn. 462, 29 Am. Rep. 687 [1878].

⁴ *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

⁵ *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900]; *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897]; *Title Guarantee and Trust Co. v. City of Chi-*

cago, 162 Ill. 505, 44 N. E. 832 [1896]; *Wright v. City of Chicago*, 48 Ill. 285 [1868]; *Swenson v. Board of Supervisors of Town of Hallock*, 95 Minn. 161, 103 N. W. 895 [1905]; *Vreeland v. Mayor, etc., of Bayonne*, 58 N. J. L. (29 Vr.) 126, 32 Atl. 68 [1895].

⁶ *Philadelphia and Reading Coal and Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895].

⁷ *Philadelphia and Reading Coal and Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895].

⁸ *Reed v. City of Cedar Rapids*, — Ia. —, 111 N. W. 1013 [1907].

⁹ *Mayor and City Council of Baltimore v. Hughes' Adm'r*, 1 Gill & Johnson (Md.) 480, 19 Am. Dec. 243 [1829].

of fact.¹ Nevertheless, there are recognized legal principles controlling the determination of the amount of benefits; though there is a marked difference of judicial opinion as to what these principles really are. Undoubtedly, the simplest, fairest and most just rule, and one that best conforms to the underlying theory of the local assessment, is that the existence and amount of special benefits is to be determined by the effect of the improvement upon the market value of the property which it is claimed is benefited by such improvement. If the construction of such improvement increases the market value of such property, such property receives a benefit and the amount of such benefit is measured by the amount of such increase.² In such cases the effect of the public improvement upon both the land and the improvements thereon, considered as an entirety, must be considered.³ If this theory is applied, perfect justice is secured. The property owner pays as his assessment the exact amount which he could obtain for his property in excess of the amount he could

¹ *Kuhns v. City of Omaha*, 55 Neb. 183, 75 N. W. 562 [1898].

² *City of Seattle v. Board of Home Missions of Meth. Protestant Church*, 138 F. 307, 70 C. C. A. 597 [1905]; *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902]; *City Council of Montgomery v. Foster*, 133 Ala. 587, 32 So. 610 [1901]; *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899]; *Ahern v. Board of Improvement District No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901]; *Little Rock v. Katzenstein*, 52 Ark. 107, 12 S. W. 198 [1889]; *Doyle v. Austin*, 47 Cal. 353, [1874]; *Hurt v. City of Atlanta*, 100 Ga. 274, 28 S. E. 65 [1896]; *Lingle v. West Chicago Park Commissioners*, 222 Ill. 384, 78 N. E. 794 [1906]; *Chicago Union Traction Company v. City of Chicago*, 207 Ill. 544, 69 N. E. 849 [1904]; *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711 [1898]; *Fahnestock v. City of Peoria*, 171 Ill. 454, 49 N. E. 496 [1898]; *Chicago and Alton Railroad Company v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *Thomas*

v. City of Chicago, 152 Ill. 292, 38 N. E. 923 [1894]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Leitch v. Village of La Grange*, 138 Ill. 291, 27 N. E. 917 [1892]; *Marion Bond Company v. Johnson*, 29 Ind. App. 294, 64 N. E. 626 [1902]; *City of Auburn v. Paul*, 84 Me. 212, 24 Atl. 817 [1892]; *Mayor and City Council of Baltimore v. The Smith & Schwartz Brick Company*, 80 Md. 458, 31 Atl. 423 [1894]; *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124 [1901]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *State, New Jersey Railroad and Transportation Company, Pros. v. Mayor and Common Council of the City of Newark*, 27 N. J. L. (3 Dutch.) 185 [1858]; *Matter of Furman Street*, 17 Wend. (N. Y.) 649; *Price v. Toledo*, 25 Ohio Cir. Ct. 617 [1903]; *McMakin v. City of Cincinnati*, 7 Ohio N. P. 203 [1900]; *City of Allegheny v. Black's Heirs*, 99 Pa. St. 152 [1881]; *Extension of Hancock Street*, 18 Pa. St. (6 Harr.) 26 [1851].

³ *Doyle v. Austin*, 47 Cal. 353 [1874].

have obtained for it had the improvement not been constructed. Thus, it has been said that an assessment should be regarded as valid and as apportioned in a proper manner where it does not appear that there is any case where the property assessed "has not been so far benefited by the work done as to be increased in value more than the cost of the work assessed."⁴ Conversely, under this theory if there is no increase in the market value of the property which it is sought to assess, no special benefit exists and no assessment therefor can be levied.⁵ An assessment in excess of the increase in value of the property assessed cannot be upheld under this theory.⁶ In applying this theory, the increase in value which is regarded as the test of special benefit, must be the increase which is due solely to the improvement for which it is sought to levy the assessment.⁷ An increase in value which is due to other causes,⁸ such as to the general advance in the price of land,⁹ as that which is occasioned by the general development of the neighborhood,¹⁰ cannot be regarded as the test of the amount of special benefit conferred by such improvement. On the other hand, in the application of this theory, the fact that owing to a general and widespread depreciation in the price of land, the property which it is sought to assess sells for less after the improvement has been constructed than it did before such improvement, does not show that no special benefit exists.¹¹ Where the theory that the test of special benefit is the amount of the increase in the market price is adopted, it has been held that such test cannot be applied where the property which it is sought to assess is devoted to a special and peculiar use by reason of which the market price of such property is not affected by the improvement as long as such use continues.¹² Thus, where property is used as a church, and has been purchased under a restricted power as to

⁴ *New Orleans Draining Company Praying for the Confirmation of a Tableau*, 11 La. Ann. 338 [1856].

⁵ *City of Atlanta v. Hanlein*, 101 Ga. 697, 29 S. E. 14 [1897]; *Zoeller v. Kellogg*, 4 Mo. App. 163 [1877]; *City of Butte v. School District No. 1*, 29 Mont. 336, 74 Pac. 869 [1904].

⁶ *Spence v. City of Milwaukee*, — Wis. —, 113 N. W. 38 [1907].

⁷ *Cole v. City of St. Louis*, 132 Mo. 633, 34 S. W. 469 [1895].

⁸ *Mittel v. City of Chicago*, 9 Brad-

well (Ill.) 534 [1881]; *Cole v. City of St. Louis*, 132 Mo. 633, 34 S. W. 469 [1895].

⁹ *Cole v. City of St. Louis*, 132 Mo. 633, 34 S. W. 469 [1895].

¹⁰ *Dawson v. City of Pittsburg*, 159 Pa. St. 317, 27 Atl. 951 [1893].

¹¹ *Borger v. Columbus*, 27 Ohio C. C. R. 812 [1905].

¹² *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875]. See § 578.

the use to be made thereof and the alienation thereof, it has been held proper to ignore the rule that the increase in market price is the test of the amount of special benefit.¹³ In some jurisdictions, it has been said that the increase in market price is not the test of the amount of special benefit,¹⁴ and that the assessment cannot be limited thereto.¹⁵ In some jurisdictions, the increase in price is regarded as the theoretical test, subject, however, to the determination of the council as to the amount of special benefit as determined on this basis.¹⁶ However, statutes which provided for assessing such land as the council should determine was increased in market value by the improvement, have been held to be unconstitutional as not limiting the assessment to the land actually benefited.¹⁷ In some jurisdictions, it has been said that the proper test of the amount of special benefits is the fair cost of the improvement of the kind in question which reasonable owners would make for the better enjoyment of their property.¹⁸ If the jury is told to consider the increase in market value, it is to be understood that the present market value is intended, though not expressly so stated.¹⁹ In many cases the theory that the increase in market price is the test of the amount of special benefits is not formally repudiated, but it is tacitly ignored. In these cases, the courts have themselves endeavored to determine the amount of special benefits or have acquiesced in the determination of the legislature or the public corporation levying the assessment as to the amount of such benefits without regard to the effect of the improvement upon the market price of the property. It has been said that the question of what special benefits are depends on the circumstances of each case.²⁰ Nevertheless, a number of rules have been laid down in

¹³ *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875].

¹⁴ *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Webster v. City of Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; *Rolph v. City of Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898].

¹⁵ *Rolph v. City of Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898].

¹⁶ *Grand Rapids School Furniture Company v. City of Grand Rapids*,

92 Mich. 564, 52 N. W. 1028 [1892]; *McMaken v. Hayes*, 29 Ohio C. C. 535 [1907].

¹⁷ *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876].

¹⁸ *State, Hunt, Pros. v. Mayor and Common Council of the City of Rahway*, 39 N. J. L. (10 Vr.) 646 [1877].

¹⁹ *Thomas v. City of Chicago*, 152 Ill. 292, 38 N. E. 923 [1894].

²⁰ *Stutsman v. City of Burlington, Iowa*, 127 Ia. 563, 103 N. W. 800 [1905].

order to determine as well as can be done by general rules, what the benefits are for which assessments may be levied.

§ 654. General and special benefits.

Assessments cannot be levied for general benefits.¹ Within the meaning of this rule, general benefits are those which the owner receives in common with the community at large.² General benefits are enjoyed as a member of the community and not as the owner of property which is specially benefited. Accordingly, if provision is made for levying and apportioning an assessment upon the basis of benefits, without specifically providing whether general or special benefits are intended, it will be presumed that special benefits are intended since assessments cannot be based upon general benefits.³ Thus, it has been held that increased facilities for travel which the general community can enjoy as well as the owner of any specific tract of land,⁴ or increased healthfulness of the neighborhood which may be enjoyed by any member of the general public who may be present therein,⁵ are general benefits and not special ones. It is, however, practically impossible to construct an improvement which shall confer a benefit upon the owner of one tract of land alone to the exclusion of all others. This, indeed, is not what is meant by the definition of general benefits. Benefits which one receives as the owner of property are in most jurisdictions regarded as general even though similar benefits may be received by other owners

¹ *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Ferguson v. Borough of Stamford*, 60 Conn. 432, 22 Atl. 782 [1891]; *Udike v. Wright*, 81 Ill. 49 [1876]; *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160 [1885]; *Law v. Madison, Smyrna and Graham Turnpike Company*, 30 Ind. 77 [1868]; *Friedenwald v. Mayor and City Council of Baltimore*, 74 Md. 116, 21 Atl. 555 [1891]; *City of South Omaha v. Ruthjen*, 71 Neb. 545, 99 N. W. 240 [1904]; *Kirkendall v. City of Omaha*, 39 Neb. 1, 57 N. W. 752 [1894]; *Dawson v. Pittsburg*, 159 Pa. St. 317, 27 Atl. 951 [1893]; *City of Houston v. Bartels*, 36 Tex. Civ. App. 498, 82

S. W. 323 [1904]; (rehearing denied, 82 S. W. 469 [1904]).

² *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Ferguson v. Borough of Stamford*, 60 Conn. 432, 22 Atl. 782 [1891]; *Law v. Madison, Smyrna and Graham Turnpike Company*, 30 Ind. 77 [1868].

³ *Ferguson v. Borough of Stamford*, 60 Conn. 432, 22 Atl. 782 [1891].

⁴ *Friedenwald v. Mayor and City Council of Baltimore*, 74 Md. 116, 21 Atl. 555 [1891].

⁵ *State, Skinkle, Pros. v. Inhabitants of the Township of Clinton in the County of Essex*, 39 N. J. L. (10 Vr.) 656 [1877].

of property in the neighborhood.⁶ An assessment may be levied for special benefits conferred upon the property assessed even though general benefits are also conferred thereby upon the community at large.⁷ It may be provided by statute that in appropriating land for an improvement such as a sewer, the benefit which such land receives, differing from that received by owners of other land in the neighborhood, such as the release of such land from the maintenance of a sewer for the benefit of adjoining estates, may be set off against the value of the land taken; while an assessment may be levied for the benefits conferred upon such property in common with other property drained by such sewer.⁸ In some cases, however, it has been suggested that benefits which are common to several tracts of adjoining property cannot be regarded as special benefits.⁹ This view seems to be fundamentally unsound since a benefit which a land owner receives by virtue of his ownership of property ought to be regarded as special, although the improvement is constructed in part for the benefit of a number of persons all of whom are in fact benefited thereby. If this view is correct, special benefits are those received by the land owner by virtue of his ownership of the property assessed over and above those which he receives as a member of the community at large without regard to his ownership of specific land.¹⁰ A party who has submitted his case to the board below, upon the theory that the increase or decrease of the market value is the test of benefit or damage, cannot be heard in the court of last resort to complain that under such

⁶ *Bacon v. Mayor and Aldermen of Savannah*, 105 Ga. 62, 31 S. E. 127 [1898]; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281 [1893]; *Beals v. Inhabitants of Brookline*, 174 Mass. 1, 54 N. E. 339 [1899]; *Abbott v. Inhabitants of Cottage City*, 143 Mass. 521, 58 Am. Rep. 143, 10 N. E. 325 [1887]; *Kirkendall v. City of Omaha*, 39 Neb. 1, 57 N. W. 752 [1894].

⁷ *Lincoln v. Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900]; *Kirkendall v. City of Omaha*, 39 Neb. 1, 57 N. W. 752 [1894].

⁸ *French v. City of Lowell*, 117 Mass. 363 [1875].

⁹ *City of Omaha v. Schaller*, 26 Neb. 522, 42 N. W. 721 [1889]; *City of Houston v. Bartels*, 36 Tex. Civ. App. 498, 82 S. W. 323, 82 S. W. 469 [1904].

¹⁰ *Creighton v. Manson*, 27 Cal. 614 [1865]; *Dann v. Woodruff*, 51 Conn. 203 [1883]; *Mittel v. City of Chicago*, 9 Bradwell (Ill.) 534 [1881]; *Holt v. City Council of Somerville*, 127 Mass. 408 [1879]; *Butchers' Slaughtering and Melting Association v. Commonwealth*, 169 Mass. 103, 47 N. E. 599 [1897]; *Dawson v. City of Pittsburg*, 159 Pa. St. 317, 27 Atl. 951 [1893].

theory benefits which were not special to his property have been considered.¹¹ The cessation of the performance of wrongful acts cannot be regarded as a special benefit since this was what the owner was entitled to without regard to the construction of the improvement in question.¹² Thus, where a city had used a street abutting certain lots as a dump for waste matter, prior to the improvement of such street, and the valuation of such lots was thereby depreciated, the city cannot regard the increase in value due to its ceasing to use such street as a dump, as determining the amount of special benefits due to the street improvement.¹³ The performance of wrongful acts cannot be regarded as affecting the amount of special benefits.¹⁴ Thus, in an assessment for benefits for laying out an improved channel of a brook, the fact that the old channel has been wrongfully obstructed since the construction of a new channel cannot be considered.¹⁵

§ 655. Special use as affecting benefits.

Whether the special use which is made of the land which it is sought to assess may be considered in determining the amount of special benefits is a question upon which there is a want of harmony. Where the use in question is one which is voluntarily made by the owner of the property and which he may change at any time, it is held in most jurisdictions that such special use cannot be considered as affecting the amount of benefits but that such amount is to be measured by the benefit which would be received by the property if devoted to any use which might reasonably be made of it.¹ In some jurisdictions, however, the special use which is voluntarily made by the owner of the property assessed, has been regarded in determining the amount of benefit re-

¹¹ *Fuess v. Kansas City and the Brooklyn Avenue Railway Company*, 191 Mo. 692, 90 S. W. 1029 [1905].

¹² *Kummer v. Cincinnati*, 27 Ohio C. C. R. 683 [1905].

¹³ *Kummer v. Cincinnati*, 27 Ohio C. C. R. 683 [1905].

¹⁴ *Quinn v. James*, 174 Mass. 23, 54 N. E. 343 [1899].

¹⁵ *Quinn v. James*, 174 Mass. 23, 54 N. E. 343 [1899].

¹ *Chicago Union Traction Company v. City of Chicago*, 207 Ill. 544, 69

N. E. 849 [1904]; *Chicago Union Traction Company v. City of Chicago*, 202 Ill. 576, 67 N. E. 383 [1903]; *Sanitary District of Chicago v. City of Joliet*, 189 Ill. 270, 59 N. E. 566 [1901]; *Thomas v. City of Chicago*, 152 Ill. 292, 38 N. E. 923 [1894]; *Leitch v. Village of La Grange*, 138 Ill. 291, 27 N. E. 917 [1892]; *Powers v. City of Grand Rapids*, 98 Mich. 393, 57 N. W. 250 [1894]; *City of Memphis v. Bolton*, 9 Heisk. (56 Tenn.) 508 [1872]. See § 578.

ceived.² Thus, where property is used for a homestead, it has been said that its increased value for business purposes cannot be considered.³ If property is acquired by the owner thereof in such a way that it can be devoted only to a specified use, it is generally held that the special benefit must be considered with reference to such use.⁴ Even this view, however, is open to objection. In such cases, the former owner and the present owner between them are undoubtedly able to free such property from such restrictions. Accordingly, if this theory is correct, it is possible for parties by their voluntary acts so to restrict the use of property as to limit or destroy the right of assessment thereof. Except where the restriction upon the use of the property is due to the act of the government, such restriction should not under the general theory of our taxation laws be permitted to hamper the government in its exercise of the taxing power.

§ 656. Benefits from combination of improvements or division thereof.

If two or more different types of improvement may be grouped as one entire improvement and are in fact constructed together as a whole, the special benefit which accrues from the construction of such improvement as a whole is that which must be taken as a test with reference to the amount and apportionment of the assessment.¹ Thus, the owner of property which is benefited by the construction of a street cannot have his assessment reduced on the ground that certain cuts in the street at a distance from his property were of no especial benefit thereto.² So the fact, that, in an improvement consisting of the widening of a street, the construction of a culvert over a brook did not benefit certain property assessed, does not entitle the owner of such property to

² *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *City of Dallas v. Kahn*, 9 Tex. Civ. App. 19, 29 S. W. 98 [1894].

³ *City of Dallas v. Kahn*, 9 Tex. Civ. App. 19, 29 S. W. 98 [1894].

⁴ *Illinois Central Railroad Company v. City of Chicago*, 141 Ill. 509, 30 N. E. 1036 [1893]; *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895].

¹ *Philadelphia and Reading Coal and Iron Co. v. City of Chicago*, 158

Ill. 9, 41 N. E. 1102 [1895]; *Wells v. Street Commissioners of City of Boston*, 187 Mass. 451, 73 N. E. 554 [1905]; *Lincoln v. Board of Street Commissioners of the City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900]; *Boyd v. Borough of Wilkinsburg*, 183 Pa. St. 198, 38 Atl. 592 [1897]; *Alden v. City of Springfield*, 121 Mass. 27 [1876].

² *Boyd v. Borough of Wilkinsburg*, 183 Pa. St. 198, 38 Atl. 592 [1897].

a reduction of his assessment if the benefit caused by the improvement as a whole exceeds the assessment.³ So, if a union station may be built and the streets leading thereto changed as one common improvement, the benefit received from the entire improvement must be regarded.⁴ It is sometimes provided specifically by statute that the expense of one-half of an improvement may be assessed upon the property abutting such improvement upon that side, the other half to be assessed upon the property upon the opposite side of the improvement. Where the statute provides specifically for such a form of apportionment, it is regarded as valid.⁵ In the absence of specific statutory authority, however, such a method of apportionment cannot be resorted to, as the assessment must be levied for the improvement as an entirety.⁶

§ 657. Benefits enuring from street improvements.

The access to given property which may be obtained from laying out a street is a special benefit.¹ A property owner whose land is given access by opening a street receives a special benefit, although he has no such vested right in the street that he could maintain an action against the city for vacating such street subsequently.² The fact that on account of a street improvement, a street railway company is willing to extend its line may be considered as an element of benefit to property which will thereby obtain increased facilities for transportation.³ The fact

^{*} *Alden v. City of Springfield*, 121 Mass. 27 [1876].

^{*} *Sears v. Street Commissioners of the City of Boston*, 180 Mass. 274, 62 L. R. A. 144, 62 N. E. 397 [1902]; *Wells v. Street Commissioners of the City of Boston*, 187 Mass. 451, 73 N. E. 554 [1905].

^{*} *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339 [1894]; *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408 [1906]; *Lindenberger Land Co. v. R. B. Park & Co.*, 27 Ky. L. Rep. 437, 85 S. W. 213 [1905]; *Town of Central Covington v. Busse*, — Ky. —, 80 S. W. 210, 25 Ky. Law Rep. 2179 [1904]; *First National Bank of Kansas City v. Nelson*, 64 Mo. 418 [1877]; *Scully v. City of Cincinnati*, 1 Cin. Sup. Ct. Rep. (Ohio) 183 [1871]; *Boyd v. City of Milwaukee*, 92 Wis. 456, 66 N. W. 603

[1896]; *The Oshkosh City Railway Company v. Winnebago County*, 89 Wis. 435, 61 N. W. 1107 [1895].

^{*} *San Diego Investment Company v. Shaw*, 129 Cal. 273, 61 Pac. 1082 [1900]; *Klein v. Nugent Gravel Co.*, 162 Ind. 509, 70 N. E. 801 [1903]; *Marion Trust Co. v. City of Indianapolis*, 37 Ind. App. 672, 75 N. E. 834, 836 [1905]; *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904].

¹ *Harris v. City of Chicago*, 162 Ill. 288, 44 N. E. 437 [1896]; *Mayor and City Council of Baltimore v. Smith & Schwartz Brick Company*, 80 Md. 458, 31 Atl. 423 [1894]; *Seibert v. Tiffany*, 80 Mo. App. 33 [1879].

² *Shurtleff v. City of Chicago*, 190 Ill. 473, 60 N. E. 870 [1901].

³ *In re Harvard Avenue, North*, — Wash. —, 92 Pac. 410 [1907].

that the owner of property through which a street passes is enabled to lay out another street upon his own land running off such street as laid out and that he can thereby increase his salable frontage and increase the market price of his property as a whole may be considered in determining the amount of special benefit which he receives.⁴ The owner of property to which access is given by a street, is not allowed to show that other property is brought into the market by such improvement and that the value of his property is thereby diminished.⁵ If access is impaired by reason of a change of grade in improving a street along the side of a corner lot, and the chief benefit consists of the improvement in appearance, these facts may be considered as showing that the benefit is slight.⁶ In an assessment for laying out an alley, the fact that, to construct such improvement, a large barn and stable on the ground of another, which is in dangerous proximity to the property assessed, must be removed, may be considered as an especial benefit.⁷ If a street or highway crosses a railroad the probable increase of travel on such road,⁸ or the fact that the new road crosses the railroad in such a way as to give a better view, thus diminishing the probability of accident, and enabling the trains to run at a higher rate of speed, such matters being ultimately in control of the railroad commission,⁹ or the probability that at a public crossing fewer cattle would be killed than at a farm crossing, because the gates at the latter crossing were not always kept shut,¹⁰ can, none of them, be considered as special benefits. If a highway as constructed affords drainage, this may be considered as a special benefit,¹¹ but the probability that such highway will afford drainage in the future cannot be regarded as a special benefit.¹² Widening a street is generally regarded as conferring an especial benefit upon the property ad-

⁴ *City of Allegheny v. Black's Heirs*, 99 Pa. St. 152 [1881].

⁵ *Seibert v. Tiffany*, 8 Mo. App. 33 [1879].

⁶ *Lanfersiek v. City of Cincinnati*, 28 Ohio C. C. 822.

⁷ *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875].

⁸ *Old Colony and Fall River Railroad Company v. Inhabitants of the County of Plymouth*, 80 Mass. (14 Gray) 155 [1859].

⁹ *City of Bridgeport v. New York and New Haven Railroad Company*, 36 Conn. 255, 4 Am. Rep. 63 [1869].

¹⁰ *Hook v. Chicago and Alton Railroad Company*, 133 Mo. 313, 34 S. W. 545 [1895].

¹¹ *Swenson v. Board of Supervisors of Town of Hallock*, 95 Minn. 161, 103 N. W. 895 [1905].

¹² *Swenson v. Board of Supervisors of Town of Hallock*, 95 Minn. 161, 103 N. W. 895 [1905].

joining or near such improvement.¹³ The fact that the owner of land abutting on such widening, holds under a deed which forbids him from building for thirty years within twenty feet of the traveled portion of the street renders an appropriation of a strip of land twenty feet, along the entire length of the street for the purpose of beautifying it, a special benefit.¹⁴ If, in straightening a street, land on one side thereof is released from a public easement, such release constitutes a benefit.¹⁵ The access afforded by the paving of a street confers a special benefit upon the property to which access is given.¹⁶ The paving of a boulevard confers such benefit, although a strip is left along the center of such boulevard for a park, at least if such construction costs less than paving the entire width of the street.¹⁷ The fact that certain land is contiguous to the paved portion of the street does not establish as a matter of law the fact that it receives a benefit therefrom.¹⁸ The fact that the paving contract contains a provision for two years' repair free of charge to the city, does not alter the fact of benefit, if the viewers consider merely the benefits caused by the paving, without including any benefits from future possible repairs.¹⁹ Increase in value of real property caused by a change of grade in the street upon which such land abuts is an element of special benefit.²⁰ Where special emphasis is placed upon the necessity of an increase in the market value of the property, it has been said that sprinkling cannot be regarded as increasing the market value and therefore confers no benefit.²¹

¹³ *Piper's Appeal in the Matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Blanchet v. Municipality No. Two*, 13 La. 322 [1839]; *Bancroft v. City of Boston*, 115 Mass. 377 [1874]; *Alden v. City of Springfield*, 121 Mass. 27 [1876].

¹⁴ *In the Matter of the City of New York*, 106 App. Div. 31, 94 N. Y. S. 146 [1905]; (affirmed without report in *In re Clinton Avenue in City of New York*, 185 N. Y. 601 [1906]).

¹⁵ *Cook v. Sloeum*, 27 Minn. 509, 8 N. W. 755 [1881].

¹⁶ *City of New Albany v. Cook*, 29 Ind. 220 [1867]; *Downing v. City of Des Moines*, 124 Ia. 289, 99 N. W. 1066 [1904]; *Mayor, etc., of Baltimore v. Moore and Johnson*, 6 Har-

ris & Johnson, 375 (Md.) [1825]; *Mayor and City of Baltimore v. Hughes*, 1 Gill & Johnson, (Md.) 480, 19 Am. Dec. 243 [1829].

¹⁷ *Downing v. City of Des Moines*, 124 Ia. 289, 99 N. W. 1066 [1904].

¹⁸ *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897].

¹⁹ *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311 [1897].

²⁰ *Stowell v. Milwaukee*, 31 Wis. 523 [1872].

²¹ *New York Life Insurance Co. v. Prest*, 71 Fed. 815 [1896]; *Witter v. Mission School District*, 121 Cal. 350, 66 Am. St. Rep. 33, 53 Pac. 905 [1898]; *Kansas City v. O'Conner*, 82 Mo. App. 655 [1899]; *City of Butte v. School District No. 1*, 29 Mont. 336, 74 Pac. 869 [1904].

§ 658. Benefits enuring from sewer.

The opportunity of draining land into a sewer is an especial benefit for which an assessment may be levied.¹ Whether an assessment may be levied for the increased price of a sewer due to the fact that it is to furnish drainage to other land is a question upon which there is a divergence of authority. In some states it is held that since the cost of a system of separate sewers from each land would be greater than the cost of a general system consisting of a main sewer and laterals, the cost of such main sewer may be included in the assessment since it confers a benefit equal at least to that arising from a system of separate sewers for each tract of land and at a much less cost.² In other jurisdictions, it seems to be held that any increase of cost in the sewer due to the fact that it is constructed for the drainage of other property cannot be included in the assessment on the ground that such increase in size confers no corresponding benefit.³ Such an assessment has been said to be invalid as assessing the most on those who need the improvement the least and assessing the least on those who need the improvement the most.⁴ Where the latter view is entertained, it is nearly always occasioned either by specific statutory provisions or by the fact that the public corporation or legislature has abused its discretion in laying out a sewer district and has included too little land therein.⁵ Thus, the cost of a main sewer has been said to be improperly assessed on land abutting thereon, to the exclusion of land drained into such main sewer by laterals.⁶ Whether improvement in conditions of healthfulness due to the construction of a sewer is a special benefit is a question upon which there seems to be some divergence of opinion; the view being entertained in some juris-

¹ *Leitch v. La Grange*, 138 Ill. 291, 27 N. E. 917 [1892]; *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351 [1897]; *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690 [1885]; *Workman v. Worcester*, 118 Mass. 168 [1875]; *City of St. Joseph v. Owen*, 110 Mo. 445, 19 S. W. 713 [1892]. Hence land which cannot as yet be connected with a new sewer cannot be assessed therefor; *Langmead v. City of Cincinnati*, 29 Ohio C. C. 64 [1906].

² *Park Ecclesiastical Society v. City of Hartford*, 47 Conn. 89

[1879]; *Patton v. City of Springfield*, 99 Mass. 627 [1868].

³ *Park Avenue Sewers*, Appeal of *Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895]; *Boyden v. Village of Brattleboro*, 65 Vt. 504, 27 Atl. 164 [1893].

⁴ *Park Avenue Sewers*, Appeal of *Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895].

⁵ *Clay v. City of Grand Rapids*, 60 Mich. 451, 27 N. W. 596 [1886].

⁶ *State, Schlapfer, Pros. v. Town of Union in the County of Hudson*, 53 N. J. L. (24 Vr.) 67, 20 Atl. 894 [1890].

dictions that such benefit is one which is common to the general public and therefore is not a special benefit;⁷ while in other jurisdictions, if the system of sewerage removes a nuisance affecting the property assessed, such removal constitutes a special benefit.⁸ The fact that the waterworks system is extended to the land drained by the sewer may be considered as affecting the amount of benefits which enure by reason of the construction of such sewer,⁹ although the fact that the waterworks system has not been so extended does not show that no benefits can be received from the sewer.¹⁰

§ 659. Benefits enuring from drains.

The drainage which land receives from a system of drains confers a special benefit thereto.¹ In assessing property used for railway purposes the relative cost of maintaining a road upon the land in question when such land is drained and when it is not drained may be shown as elements of special benefit.² So the fact that on account of the system of drainage a smaller bridge opening may be constructed than could otherwise have been constructed may be considered as a special benefit.³ If a system of drainage does not drain the property in question, but drains other property, the overflow of which injures the

⁷ Beechwood Avenue Sewer, Pittsburgh's Appeal, 179 Pa. St. 490, 36 Atl. 209 [1897].

⁸ Hungerford v. City of Hartford, 39 Conn. 279 [1872].

⁹ Reed v. City of Cedar Rapids, — Ia. —, 111 N. W. 1013 [1907].

¹⁰ Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741 [1893].

¹ Case of Isle of Ely, 10 Rep. 141 a; Laguna Drainage District v. Charles Martin Co., 144 Cal. 209, 77 Pac. 933 [1904]; Drainage Commissioners of District No. 3, etc. v. Illinois Central Railroad Company, 158 Ill. 353, 41 N. E. 1073 [1895]; Drainage Commissioners of Drainage District No. 2 v. Drainage Commissioners of Union Drainage District No. 3, 211 Ill. 328, 71 N. E. 1007; (affirming 113 Ill. App. 114 [1904]); Illinois Central Railroad Company v. Commissioners of East Lake Fork

Special Drainage District, 129 Ill. 417, 21 N. E. 925 [1890]; Spear v. Drainage Commissioners, 113 Ill. 632 [1886]; Commissioners of Spoon River Drainage District in Champaign County v. Conner, 121 Ill. App. 450 [1905]; Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Machler, 158 Ind. 159, 63 N. E. 210 [1901]; Beals v. James, 173 Mass. 591, 54 N. E. 245 [1899]; Hoagland v. Wurts, 41 N. J. L. (12 Vr.) 175 [1879]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902].

² Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Machler, 158 Ind. 159, 63 N. E. 210 [1901].

³ Drainage Commissioners of District No. 3 v. Illinois Central Railroad Company, 158 Ill. 353, 41 N. E. 1073 [1895].

property in question, such drainage is a benefit to such undrained property.⁴ If the land which it is sought to assess is not drained by the drainage system and if no other benefit is shown no benefit can be presumed to exist and no assessment can be levied.⁵ Other benefits besides mere drainage may arise, however, from a system of drainage. If the drain increases the market value of the property,⁶ or makes it more desirable for agricultural purposes,⁷ or for purposes of residence,⁸ or if such drainage carries off the water from a slough and thereby relieves the owner of the land from the necessity of constructing a bridge so as to reach other land belonging to him,⁹ these may be regarded as special benefits. According to some authorities increase in the general healthfulness of the locality is a special benefit.¹⁰

§ 660. Benefits enuring from levee.

Freedom from inundation is a special benefit conferred by the construction of a levee.¹ However, if land receives a special benefit in some other way from such construction,² increasing the market value of the property assessed,³ as by increased facility of access;⁴ special benefit exists, although such land was not subject to overflow.

§ 661. Damages caused by public improvements.

If, by reason of a public improvement injury is caused to private property for which the public corporation constructing the improvement is liable in damages, the measure of damages is the difference between the market value of the property as

⁴ *Roly v. Shunganunga Drainage District*, — Kan. —, 95 Pac. 399 [1908].

⁵ *City of Chicago v. Adcock*, 168 Ill. 221, 48 N. E. 155 [1897]; *Zinser v. Board of Supervisors of Buena Vista County*, — Ia. —, 114 N. W. 51 [1907].

⁶ *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898].

⁷ *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898].

⁸ *Culbertson v. Knight*, 152 Ind. 121, 52 N. E. 700 [1898].

⁹ *Spear v. Drainage Commissioners*, 113 Ill. 632 [1886].

¹⁰ *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908]. See § 564.

¹ *Charnock v. Fardoche and Grosse Tête Special Levee District Company*, 38 La. Ann. 323 [1886]; See also, *Smith v. Willis*, 78 Miss. 243, 28 So. 878 [1900].

² *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894].

³ *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893].

⁴ *Chambliss v. Johnson*, 77 Ia. 611, 42 N. W. 427 [1889].

it was before the alteration and as it was immediately afterwards, subject to deduction for special benefits caused by such improvement.¹ If land is taken, the value of the land thus taken is the measure of such damage.² If land is owned by the city in fee for use as a public park, it has been held that it cannot be said as a matter of law that no damage exists where part of such land is taken to widen a public street.³ If an alley is taken for the purpose of opening a street in its place, it has been held that land abutting on such alley is not thereby damaged, since the street will furnish the same access as the alley did.⁴ It may be provided by statute that after a map is filed showing streets which it is intended to open, damages cannot be recovered for injury to buildings erected upon land included within the limits of such proposed streets after the filing of such map.⁵ One who has an easement of land, air and a right of way in certain land is damaged by its being taken for a street.⁶ In estimating damages to buildings situated on property which is taken for opening a street, the appraisers may assume that the property owner will retain the buildings and remove them at his own expense.⁷ The fact that constructing a street across a railroad will oblige it to move its switch, construct a culvert instead of ditches, lay planking to protect its rails and erect a sign board should be considered as items of damage,⁸ since by opening a street across a railroad, the railroad company is not excluded from use of the land taken for a street, as is the ordinary land-owner, and the value of the land occupied by the

¹ *Town of Eutaw v. Botnick*, — Ala. —, 43 So. 739 [1907]; *Village of North Alton v. Dorsett*, 59 Ill. App. 612 [1895]; *Godbey v. City of Bluefield*, — W. Va. —, 57 S. E. 45 [1907]; *Stowell v. Milwaukee*, 31 Wis. 523 [1872].

² *Watson v. Crowsore*, 93 Ind. 220 [1883]. The real issue is what "was the market value of the property for any purpose for which it was adapted or might be used." *Chicago and Evanston Railroad Company v. Jacobs*, 110 Ill. 414, quoted in *Kankakee Stone and Lime Company v. City of Kankakee*, 128 Ill. 173, 20 N. E. 670 [1890].

³ *In the Matter of Ninth Avenue and Fifteenth Street*, 45 N. Y. 729 [1871].

⁴ *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

⁵ *In the Matter of One Hundred and Twenty-Seventh Street*, 56 Howard (N. Y.) 60 [1878]; *In the Matter of Flatbush Avenue*, 1 Barb. (N. Y.) 286 [1847].

⁶ *In re Perry Avenue in City of New York*, 103 N. Y. S. 1069 [1907].

⁷ *Kansas City v. Napiecek*, — Kan. —, 92 Pac. 827 [1907].

⁸ *State, Central Railway Company of New Jersey, Pros. v. Mayor, etc., of Bayonne*, 51 N. J. L. (22 Vr.) 428, 17 Atl. 971 [1889].

street is, therefore, not the test of damages. If the grade of a street is changed and the public corporation is liable therefor in damages, impairment of access to and from a lot abutting on such street is an element of such damage.⁹ Failure to award damages to property in front of which the grade is changed has been held in some jurisdictions to be arbitrary and unlawful.¹⁰ Under such statutes it has been held that the action of the assessors in determining the amount of damage is final and cannot be retried by the court.¹¹ Since damages cannot be allowed twice for the same injury,¹² it follows that if damages have been allowed for a proposed change of grade when a street was opened damages cannot be allowed subsequently for the physical change of grade from the actual grade to that fixed by the public corporation.¹³ If provision is made for determining the question of damages in a condemnation proceeding, the question of damages cannot be raised in a subsequent proceeding to levy an assessment for benefits.¹⁴ Since an assessment is in theory a compensation for benefits,¹⁵ the fact that property abutting upon a street which has been opened is liable to an assessment for improving such street is not an element of damage.¹⁶ If a ditch is constructed across a tract of land of such width and depth that a bridge is necessary to enable the owner to have full access between the two parts of the original tract separated by the ditch, this fact is an element of damage.¹⁷ The cost of temporary changes in a railroad bridge to allow the construction of a ditch improvement is an element of damage.¹⁸ A public corporation having power to construct improvements of speci-

⁹ *Town of Eutaw v. Botnick*, — Ala. —, 43 So. 739 [1907]; *Coyne v. City of Memphis*, — Tenn. —, 102 S. W. 355 [1907]; *Crowe v. Corporation of Charlestown*, — W. Va. —, 57 S. E. 330 [1907].

¹⁰ *Friedrich v. City of Milwaukee*, 114 Wis. 304, 90 N. W. 174 [1902]; *Pittlekow v. City of Milwaukee*, 94 Wis. 651, 69 N. W. 803 [1897].

¹¹ *In the Matter of the Petition of Cruger to Vacate an Assessment*, 84 N. Y. 619 [1881].

¹² See § 64 *et seq.*

¹³ *In re Sedgley Avenue*, 217 Pa. 313, 66 Atl. 546 [1907].

¹⁴ *In the Matter of Pike Street*, Seattle, 42 Wash. 551, 85 Pac. 45 [1906].

¹⁵ See § 11.

¹⁶ *Cushing v. City of Boston*, 144 Mass. 317, 11 N. E. 93 [1887]; *Kansas City v. Kansas City Belt Railway Company*, 187 Mo. 146, 86 S. W. 190 [1905]; *Huddleston v. City of Eugene*, 34 Or. 343, 43 L. R. A. 444, 55 Pac. 868 [1899].

¹⁷ *Pinkstaff v. Allison Ditch District No. 2 of Lawrence County*, 213 Ill. 186, 72 N. E. 715 [1904].

¹⁸ *Lake Erie and Western Railroad Company v. Cloggish*, 143 Ind. 347, 42 N. E. 743 [1895].

fied kinds can make compensation only for damages caused by the improvements constructed by such corporation.¹⁹

§ 662. Option to assess or to tax for local improvement.

It is generally held in most jurisdictions that the legislature may confer upon the city or other public corporation the power to construct public improvements by general taxation or by local assessment according to the discretion of such public corporation. Where this view obtains and where the legislature has given such discretion, the public corporation may construct an improvement by either method which it may see fit to adopt,¹ and the fact that certain improvements have been constructed at the expense of the owners of the property benefited does not prevent such corporation from constructing other improvements by general taxation. If the legislature imposes certain restrictions as to the method of exercising such option the public corporation must, of course, conform to and comply with such restrictions.² Thus, if the legislature provides that a public corporation may construct a public improvement by general taxation or by local assessment, but that it can levy local assessments only if it declares formally that the revenues of such public corporation are insufficient to justify payment of the cost of such improvement out of the public treasury, an assessment cannot be levied unless such formal declaration is made.³ So if the statute provides that certain improvements shall be paid for by assessment unless the council determines to pay for them out of the general funds, such order to pay out of the general funds should be made of record.⁴ In some jurisdictions it has been held

¹⁹ *State, Ropes, Pros. v. Essex Public Road Board*, 37 N. J. L. (8 Vr.) 335 [1875].

¹ *People ex rel. Thatcher v. Village of Hyde Park*, 117 Ill. 462, 6 N. E. 33 [1887]; *Ricketts v. Village of Hyde Park*, 85 Ill. 110 [1877]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876]; *Sefton v. Board of Commissioners of Howard County*, 160 Ind. 357, 66 N. E. 891 [1903]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899]; *Hubbard v. Norton*, 28 O. S. 116 [1875]; *State ex rel.*

City of Columbus v. Strader, 25 O. S. 527 [1874]; *Beers v. Dallas City*, 16 Or. 334, 18 Pac. 835 [1888]; *Borough of Greensburg v. Young*, 53 Pa. St. (3 P. F. Smith) 280 [1866]. See § 236.

² *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088 [1898].

³ *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088 [1898]; *City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead*, — Mo. App. —, 100 S. W. 506 [1907].

⁴ *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861].

that even if such option as to methods of paying for the cost of a public improvement is given to a public corporation, such option is not to be exercised in an arbitrary manner; but that the power to construct improvements by general taxation is to be exercised only where local assessment would amount to confiscation.⁵ Where the latter view obtains, it has been held that the legislature, even though not prevented from passing local statutes, cannot provide for the improvement of streets generally only upon petition of the majority of the property owners and further provide that one specific street may be paved at the cost of the property owners without petition if the city council vote therefor unanimously.⁶ However, even where this view obtains the cost of a public thoroughfare may be paid for by general taxation, even though the cost of constructing other streets has been paid by local assessment.⁷ If the legislature has not given to the city the option between general taxation and local assessment, such option cannot, of course, be exercised. Under such statutes, the improvement cannot be constructed only in the manner provided for by statute.⁸

⁵ *City of Covington v. Worthington*, 88 Ky. 206, 10 S. W. 790, 11 S. W. 1038 [1889]. See also, *City of Lexington v. McQuillan's Heirs*, 9 Dana (39 Ky.) 513, 35 Am. Dec. 159 [1840].

⁶ *Howell v. Bristol*, 71 Ky. (8 Bush.) 493 [1871]. "A law imposing taxation on the general public, the evident intent and legitimate result of which is to equalize the burden so far as practicable, will not be held as violative of the fundamental law merely because that desirable end may not be attained. But when, as in this case, the most probable if not the necessary consequences of the law is to produce the most oppressive inequality and to compel a small minority of taxpayers to provide at their sole expense, an improvement of general utility and public interest, the construction of which costs more than double as much as the character of such improvements in general use, and from which, when constructed, the general public derives almost as much advantage as themselves, it assumes the

character of an attempted exercise of arbitrary power over the property of this minority; it becomes, in the constitutional sense, a taking and appropriation of their property to the public use without compensation and it cannot be sustained so long as the safeguards placed around the citizen by our fundamental law are respected. No such power over the property of the citizen can be constitutionally exercised by any department of our state government and whenever it is attempted it is the imperative duty of the judiciary to interpose in behalf of those whose constitutional rights are being thereby prejudicially affected and upheld." *Howell v. Bristol*, 8 Bush. (71 Ky.) 493, 499 [1871].

⁷ *Frantz, Jr. v. Jacobs*, 88 Ky. 525, 11 S. W. 654 [1889]. See to the same effect *Maybin v. City of Biloxi*, 77 Miss. 673, 28 So. 566 [1900].

⁸ *Heman v. Handlan*, 59 Mo. App. 490 [1894]; In the Matter of Application of Drake, 69 Hun (N. Y.) 95, 23 N. Y. S. 264 [1893].

§ 663. Apportionment between public corporation and property owners.

It is frequently provided that a part of the cost of a public improvement is to be paid for by local assessments upon the property benefited thereby and in part by the public corporation out of funds raised by general taxation.¹ Various methods have been employed by the legislature in determining what proportion of the cost is to be paid by the public corporation and what proportion of the cost is to be paid by the property owner. It is frequently provided that a certain fixed proportion of the cost, sometimes a tenth or a fourth, more frequently a third, a half, or even two-thirds of the cost is to be borne by the city and paid for out of funds raised by general taxation, while the rest is to be assessed upon the owners of property which is benefited by the improvement. Such statutes are in many jurisdictions held to be valid on the theory that the legislature has power to determine the question of the existence of benefits, and that such a statute is a legislative determination that the benefit arising from the improvement is shared by the public corporation and the property owners in the same proportion as that in which the assessment is to be borne.² Under a statute which provides

¹City of Peoria v. Smith, 232 Ill. 561, 83 N. E. 1061 [1908]; People ex rel. v. Nortrup, 232 Ill. 303, 83 N. E. 843 [1908]; Richardson v. Morgan, 16 La. Ann. 429 [1862]; Morse v. Charles, — Mass. —, 83 N. E. 891 [1908]; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204 [1895]; Edwards House Co. v. City of Jackson, — Miss. —, 45 So. 14 [1907]; Savage v. City of Buffalo, 59 Hun. 606, 14 N. Y. S. 101 [1891]; City of Toledo for the use of Gates v. Lake Shore & Michigan Southern Railway Company, 4 Ohio C. C. 173 [1889]; Blount v. City of Janesville, 31 Wis. 648.

²Chadwick v. Kelly, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming Kelly v. Chadwick, 104 La. 719, 29 So. 295 [1901]); Wight v. Davidson, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (reversing Davidson v. Wight, 16 App. D. C. 371 [1900]); Bauman v. Ross, 167 U. S.

548, 42 L. 270, 17 S. 966 [1897]; (reversing District of Columbia v. Armes, 8 App. D. C. 393 [1896]; Bauman v. Ross, 9 App. D. C. 260 [1896]; Abbott v. Ross, 9 App. D. C. 289 [1896]); Mattingly v. District of Columbia, 97 U. S. 687, 24 L. 1098 [1878]; Harton v. Town of Avondale, 147 Ala. 458, 41 So. 934 [1906]; Mayor and Aldermen of Savannah v. Weed, 96 Ga. 670, 23 S. E. 900 [1893]; Hayden v. City of Atlanta, 70 Ga. 817 [1883]; Durrett v. Kenton County, (Ky.), 27 Ky. Law Rep. 1173, 87 S. W. 1070 [1905]; City of Covington v. Matson, 17 Ky. Law Rep. 1323, 34 S. W. 897 [1896]; Louisiana Imp. Co. v. Baton Rouge Electric & Gas Co., 114 La. 534, 38 So. 444 [1905]; Barber Asphalt Co. v. Gogreve, 41 La. Ann. 251, 5 So. 848 [1889]; Connell v. Hill, 30 La. Ann. 251 [1878]; City of New Orleans v. Elliott, 10 La. Ann. 59 [1855]; O'Leary v. Sloo,

that one-third of the cost of the improvement shall be assessed upon "property abutting on each side of the street" within the taxing district and that the city should pay one-third of such cost, the legislature evidently intended to apportion the entire cost. Accordingly, the abutting owners on one side of the street are liable for one-third of the cost and not for one-sixth thereof. The construction contended for by the property owners, viz., that one-third of the cost was to be borne by the property on both sides of the street left no source of payment for the remaining one-third of the cost.³ If, however, the statute provides that not more than one-third of the cost can be assessed against "abutting property owners," the city cannot assess one-third of the cost upon the property abutting on each side of the street, but it can assess only one-third of the cost upon the property abutting on both sides of the street.⁴ Thus, if by statute not more than a third of the cost of street improvements, "not including sidewalks," is to be assessed against the abutting property, it is improper to assess against abutting property the entire cost of guttering.⁵ If the law fixes the proportion to be borne by the property owners and the public corporation, respectively, such provisions need not be incorporated in the contract for the public improvement;⁶ and a bid is not defective for omission to incorporate such provision.⁷ A party who complains of such an apportionment must show that the assessment levied against his property is in excess of the amount specified by law as the proper proportion to be borne by the property owners.⁸ It has been said, however, that under a statute authorizing an assessment to

7 La. Ann. 25 [1852]; *Alberger v. Mayor and City Council of Baltimore*, 64 Md. 1, 20 Atl. 986 [1885]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *In the Matter of the Petition of Merriam to Vacate an Assessment*, 84 N. Y. 596 [1881]; *Alvey v. City of Asheville*, — N. C. —, 59 S. E. 999 [1907]; *In the Matter of Dorrance Street*, 4 R. I. 230 [1856]; *Green v. Ward*, 82 Va. 324 [1886]; *Dancer v. Town of Man-nington*, 50 W. Va. 322, 40 S. E. 475 [1901]; *Owens v. City of Milwaukee*, 47 Wis. 161, 3 N. W. 3 [1879].

³ *Hilliard v. City of Asheville*, 118 N. C. 845, 24 S. E. 738 [1896].

⁴ *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906]; *Tournier v. Municipality No. One*, 5 La. Ann. 298 [1850]; *Connell v. Hill*, 30 La. Ann. 251 [1878].

⁵ *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906].

⁶ *Barber Asphalt Paving Company v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889].

⁷ *Beniteau v. City of Detroit*, 41 Mich. 116, 1 N. W. 899 [1879].

⁸ *In the Matter of the Petition of Merriam to Vacate an Assessment*, 84 N. Y. 596 [1881].

be set aside for legal irregularities, it is not a legal irregularity to assess the entire expense upon the property owners, although the petition for the work asked to have one-half of the expense paid by the city and the other half by the property owners.⁹ Where such statutes exist and are held to be valid, a larger proportion of the cost of the improvement than that which is specified by statute cannot be levied upon the property benefited.¹⁰ It may be provided by statute that the city is to pay a part of the cost of certain classes of improvements, while the property owners are to pay the entire cost of other classes of improvements.¹¹ Thus, it may be provided by statute that if a street is over a mile long the city shall pay at least one-half the cost thereof, while if it be less than a mile long the entire cost must be borne by the abutting property owner.¹² Under such a statute if a street as laid out is a perfect street and is less than a mile in length, the property owners must bear the entire burden, even though the street was originally intended to be longer than a mile and though other disconnected sections of the street as originally planned have been laid out and the entire length of such disconnected sections exceeds a mile.¹³ A statute imposing a part of the cost of an improvement upon the public corporation may, of course, be repealed by a subsequent statute imposing the entire expense upon the property owners.¹⁴ A general statute, however, which authorizes an assessment of not more than one-half of the cost of the improvement against the abutting owners has been held not to repeal the charter of a city which provides

⁹ Rich's Case, 12 Abb. Prac. (N. Y.) 118 [1861]; Rich's Case, 12 Abb. Prac. (N. Y.) 118 [1861].

¹⁰ Harton v. Town of Avondale, 147 Ala. 458, 41 So. 934 [1906]; Collier Estate v. Western Paving & Supply Company, 180 Mo. 362, 79 S. W. 947 [1904]; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896]; City of El Paso v. Mundy Brothers, 85 Tex. 316, 20 S. W. 140 [1892].

¹¹ Mayor, Aldermen and Commonalty of the City of New York v. Tiffany, 68 Hun. (N. Y.) 158, 22 N. Y. S. 604 [1893].

¹² Mayor, Aldermen and Common-

alty of the City of New York v. Tiffany, 68 Hun. (N. Y.) 158, 22 N. Y. S. 604 [1893].

¹³ Mayor, Aldermen and Commonalty of the City of New York v. Tiffany, 68 Hun. (N. Y.) 158, 22 N. Y. S. 604 [1893].

¹⁴ Durrett v. Kenton County, — (Ky.) —, 27 Ky. Law. Rep. 1173, 87 S. W. 1070 [1905]; Louisiana Imp. Co. v. Baton Rouge Electric & Gas Co., 114 La. 534, 38 So. 444 [1905]; In the Matter of the Petition of the New York Institution for Instruction of Deaf and Dumb to Vacate an Assessment, 121 N. Y. 234, 24 N. E. 378 [1890].

for assessing the entire expense against such owners.¹⁵ In some cases it has been held that the legislature cannot provide for charging a specified proportion of the cost of the improvement upon the owners of property benefited.¹⁶ The reason for this view is that such a statute does not purport to limit the amount of the assessment to the amount of the benefits, and that it is possible to comply strictly with such statute and yet to levy an assessment, the amount of which greatly exceeds the amount of the benefits. This is, of course, merely another form of the theory advanced by some courts that the legislature cannot provide for imposing the entire cost of the improvement upon the property benefited. The difference between the two views already given is caused by a divergence of judicial opinion as to the power of the legislature to determine the question of the existence of the amount of benefits conferred by the improvement for which the assessment is levied.¹⁷ The legislature may by statute authorize the city, acting through specified officers, to fix the relative share of expense to be borne by the city and the property owners respectively.¹⁸ Under a statute providing that the city is to assess all or any part of the cost of an improvement

¹⁵ *Copeland v. Mayor and Aldermen of Springfield*, 166 Mass. 498, 44 N. E. 605 [1896].

¹⁶ *City of Detroit v. Judge of Recorder's Court*, 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149 [1897]; *State, Agents, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; (reversing *State, Agents, Pros. v. Mayor and Common Council of City of Newark*, 35 N. J. L. (6 Vr.) 168 [1871]); *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880]. While this view has been advanced in the *District of Columbia* in *Jones v. District of Columbia*, 3 App. D. C. 26 [1894], the Supreme Court of the United States has held such method of apportionment to be valid in *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (reversing *District of Columbia v. Armes*, 8 App. D. C. 393

[1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 289 [1896]).

¹⁷ See § 666 *et seq.*

¹⁸ *City of Peoria v. Smith*, 232 Ill. 561, 83 N. E. 1061 [1908]; *People ex rel. Nortrup*, 232 Ill. 303, 83 N. E. 843 [1908]; *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824 [1900]; *Ryder Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898]; *Leitch v. La Grange*, 138 Ill. 291, 27 N. E. 917 [1892]; *Morse v. Charles*, — Mass. —, 83 N. E. 891 [1908]; *Brewer v. City of Springfield*, 97 Mass. 152 [1867]; *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]; *Seofield v. City of Lansing*, 17 Mich. 437 [1868]; *In the Matter of Opening Locust Avenue in Village of Port Chester*, 185 N. Y. 115, 77 N. E. 1012 [1906]; *In the Matter of Pike Street*, *Seattle*, 42 Wash. 551, 85 Pac. 45 [1906]; *State ex rel. Burbank v. City of Superior*, 81 Wis. 649, 51 N. W. 1014 [1892].

not less than half thereof upon such property as the council decides is especially benefited, the city need not and possibly cannot levy a general tax for its proportion of the improvement until the special assessments are paid in.¹⁹ A statute permitting the city to determine what proportion of the cost of the improvement is to be borne by the city may be permissive merely. In such case the city is not bound to bear any portion of the cost, but may levy the entire cost upon the property benefited by the improvement.²⁰ Such a statute, on the other hand, may be mandatory and may require the city to bear a portion of the improvement leaving it to the council merely to determine in what proportion the cost of the improvement is to be borne by the city and the property owners.²¹ A general ordinance fixing the proportion in which the cost of future improvements is to be borne may be incorporated by reference into subsequent special ordinances providing for special improvements.²² The fact that the city generally apportioned one-third of the cost to the city and two-thirds to the property owners; that it anticipated so doing in this case and that it actually did so, does not show an arbitrary assessment and failure to exercise judgment in making the apportionment.²³ It may be provided by statute that the question of apportioning the cost of the improvement between the city and the property owners is to be determined by commissioners chosen especially for the purpose of determining the question of the existence and amount of benefits.²⁴ Under a statute which provides that commissioners shall assess such part of the expenses of a street improvement upon the city as they may deem just,

¹⁹ *State ex rel. Burbank v. City of Superior*, 81 Wis. 649, 51 N. W. 1014 [1892].

²⁰ *Leitch v. Village of La Grange*, 138 Ill. 291, 27 N. E. 917 [1892]; *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905]; *In the Matter of the Application of Church*, 92 N. Y. 1 [1883]; *In the Matter of Lowden*, 89 N. Y. 548 [1882].

²¹ See § 666 *et seq.*

²² *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367 [1898].

²³ *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903].

²⁴ *City of Peoria v. Smith*, 232 Ill.

561, 83 N. E. 1061 [1908]; *People ex rel. v. Nortrup*, 232 Ill. 303, 83 N. E. 843 [1908]; *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1898]; *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653 [1898]; *City of Jacksonville v. Hamill*, 178 Ill. 235, 52 N. E. 949 [1899]; *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890]; *State, Board of Chosen Freeholders of the County of Hudson v. Inferior Court of Common Pleas of the County of Hudson*, 42 N. J. L. (13 Vr.) 608 [1880]; *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875].

the commissioners are not required to assess any part of the expense upon the city unless in their judgment they consider it just and fair so to do.²⁵ The fact that the commissioners leave a blank in their report where the amount of benefits received by the city is to be inserted shows conclusively that they found that no benefits were conferred upon the city.²⁶ The fact that the commissioners find that no part of the improvement should be borne by the city does not show that the improvement is not a public one for which a special assessment may be levied.²⁷ Such finding cannot be attacked collaterally. Hence, if such finding is made in a condemnation suit, it cannot subsequently be made the ground of resisting an assessment.²⁸ An objection that merely nominal benefits have been assessed against the city if not made in the trial court cannot be raised for the first time in a court of last resort.²⁹ The most just and fair method of apportioning benefits between the city on the one hand and the property owners on the other, is found in statutes which provide that the amount of benefits received by the property owners is to be determined as a matter of fact; that the property owners are to be assessed for the amount of such benefits as long as such assessment does not exceed the cost of such improvement and that if such assessments are not sufficient to pay the cost of the improvement the city is to pay the difference between the amounts of such assessments and the cost of such improvement.³⁰ The cost of a public improvement may be apportioned between the city and

²⁵ *People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse*, 63 N. Y. 291 [1875]; (reversing *People ex rel. Howlett v. Mayor, etc., of the City of Syracuse*, 2 Hun (N. Y.) 433 [1874]).

²⁶ *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890].

²⁷ *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653 [1898].

²⁸ *City of St. Louis v. Annex Realty Company*, 175 Mo. 63, 74 S. W. 961 [1903].

²⁹ *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900].

³⁰ *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053 [1894]; *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892]; *Goodwillie v. City of Lake View*, 137

Ill. 51, 27 N. E. 15 [1892]; *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86 [1890]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *State, Righter, Pros. v. Mayor and Common Council of the City of Newark*, 45 N. J. L. (16 Vr.) 104 [1883]; *State. Youngster, Pros. v. Mayor and Aldermen of Paterson*, 40 N. J. L. (11 Vr.) 244 [1878]; *Smith v. Mayor and Common Council of the City of Newark*, 32 N. J. Eq. (5 Stew.) 1 [1880]; *In re Beechwood Avenue, Appeal of O'Mara*, 194 Pa. St. 86, 45 Atl. 127 [1899].

the property owners on an entirely different basis from any of those which have thus far been discussed. If the city owns property which is benefited by the improvement it may be provided that such property is to be assessed in proportion to the benefits received thereby in the same way in which the property of private individuals is assessed. A city which owns public squares, parks and the like may be required to pay its proportion of an assessment for a public improvement based upon its ownership of such public squares in the same way as if it were a private corporation or an individual owning such private property.³¹ Such a statute is valid and operative under a constitutional provision forbidding a city to become indebted in any one year to an amount exceeding the income and revenue provided for such year without the assent of the voters thereof where there is no evidence as to the income and revenue of such city.³² A property owner cannot complain because the city has in fact paid a larger proportion of the cost than was specified in the resolution which was submitted to popular vote,³³ or that the resolution for the city's share of the improvement was not submitted to a popular vote,³⁴ or that the ordinance which provides that the city shall pay for the intersections exceeds the limit of taxation.³⁵ In apportioning the cost between the city and the property owners, the jury may consider the fact that the city will derive a revenue from the improvement.³⁶ Thus, in apportioning the cost of a sewer the fact that the city will derive a revenue by charging persons who wish to drain their lands directly into such sewer for such privilege may be considered in determining the share which the city will pay.³⁷ As long as the assessment on the property benefited does not exceed the amount of the benefits it is not necessary that the statute

³¹ *Bennett v. Seibert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071 [1894]; *City of Lawrence v. Killam*, 11 Kan. 499 [1873]; *Matter of Turfler*, 44 Barb. (N. Y.) 46 [1865]; *Turfler's Case*, 19 Abb. Pr. (N. Y.) 140 [1865]; *Dick v. City of Toledo*, 11 Ohio C. C. 349 [1896]; *Hemen v. City of Ballard*, 40 Wash. 81, 82 Pac. 277 [1905].

³² *Barber Asphalt Paving Company v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904].

³³ *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895]. See to the same effect *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870].

³⁴ *Townsend v. City of Manistee*, 88 Mich. 408, 50 N. W. 321 [1891].

³⁵ *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895].

³⁶ *Patton v. City of Springfield*, 99 Mass. 627 [1868].

³⁷ *Patton v. City of Springfield*, 99 Mass. 627 [1868].

should provide that the city must pay any part of the cost of the improvement.³⁸ Indeed, it is said that the public corporation, as such, is not benefited by public improvements. Statutes may provide for assessment of a part of the cost on abutting property and for making the rest of the cost a charge on the ward fund,³⁹ or on the remaining property in the district.⁴⁰ The apportionment between the city and the property owners may take the form of a provision requiring the city to pay certain parts of the improvement, such as the cost of street intersections and the like, and imposing the rest of the cost upon the property owners.⁴¹ This method of apportionment may be made by statute.⁴²

§ 664. Apportionment between different public corporations.

If the statute so provides, the cost of an improvement which benefits two or more public corporations may be apportioned between such corporations.¹ Thus, the cost of constructing highways,² bridges,³ parks,⁴ sewers,⁵ or systems of drainage,⁶ which

³⁸ *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; *In the Matter of Tapan*, 54 Barb. (N. Y.) 225 [1869].

³⁹ *Owens v. City of Milwaukee*, 47 Wis. 461, 3 N. W. 3 [1879].

⁴⁰ *Ford v. City of Toledo*, 64 O. S. 92, 59 N. E. 779 [1901].

⁴¹ *Callon v. The City of Jacksonville*, 147 Ill. 113, 35 N. E. 223 [1894]; *Kimble v. City of Peoria*, 140 Ill. 157, 29 N. E. 723 [1893]; *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. 602 [1890]; *Ottumwa Brick & Construction Co. v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899].

⁴² *Bacon v. Mayor and Aldermen of Savannah*, 91 Ga. 500, 17 S. E. 749 [1893]; *Blount v. City of Janesville*, 31 Wis. 648.

¹ *State v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]; *Pleasant Township v. Cook*, 160 Ind. 533, 67 N. E. 262 [1902]; *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 [1891]; *State, King, Pros. v. Durvea*, 45 N. J. L. (16 Vr.) 258 [1883];

State, King, Pros. v. Reed, 43 N. J. L. (14 Vr.) 186 [1881]; *State, Aprey, Pros. v. Cannon*, 33 N. J. L. (4 Vr.) 218 [1868]; *Town of Muskego v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890].

² *State v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]; *Pleasant Township v. Cook*, 160 Ind. 533, 67 N. E. 262 [1902]; *State, King, Pros. v. Durvea*, 45 N. J. L. (16 Vr.) 258 [1883]; *State, King, Pros. v. Reed*, 43 N. J. L. (14 Vr.) 186 [1881]; *State, Aprey, Pros. v. Cannon*, 33 N. J. L. (4 Vr.) 218 [1868].

³ *State v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896].

⁴ *De Las Casas, Petitioner*, 178 Mass. 213, 59 N. E. 664 [1901].

⁵ *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 [1891].

⁶ *Town of Muskego v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890].

benefit two or more public corporations may be apportioned between them. In making such apportionment, however, a large sum cannot be added to the assessment of one town on the basis of the density of population and superior development of such town.⁷ In the absence of a statute specifically authorizing it, a city cannot levy an assessment upon land which is for assessment purposes within the control of another public corporation.⁸ Thus, if by statute property within the limits of a public park is for assessment purposes within the control of a board of park commissioners, the city cannot levy an assessment thereon.⁹

§ 665. Benefits as theoretical limit of assessment and basis of apportionment.

It is well settled that, in theory, at least, local assessments based on the theory of benefits must be limited to the amount of the special benefit conferred by the improvement for which the assessment is levied, and must be apportioned upon the property assessed in substantial proportion to the amount of the benefits thus conferred.¹ The rule that the amount of the assess-

⁷ *Hundley and Rees v. Commissioners of Lincoln Park*, 67 Ill. 559 [1873].

⁸ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

⁹ *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, 38 N. E. 697 [1894].

¹ *Martin v. District of Columbia*, 205 U. S. 135, 27 S. 440 [1907]; (reversing 26 App. D. C. 140, 146 [1905]); *O'Brien v. Wheelock*, 184 U. S. 450, 46 L. 636, 22 S. 354 [1902]; (affirming *O'Brien v. Wheelock*, 95 Fed. 883, 37 C. C. A. 309 [1899]; which affirmed 78 Fed. 673); *Shoemaker v. United States*, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893]; (affirming *United States on petition of Commissioners v. Cooper*, 21 App. D. C. 491 [1893]); *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming *Reclamation Dist. No. 108 v. Hagar*, 4 Fed. 366 [1880]); *Horton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906]; *Driver v. Moore*, 81 Ark.

80, 98 S. W. 734 [1906]; *Ritter v. Drainage Dist. No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *People v. McCune*, 57 Cal. 153 [1880]; *Brady v. King*, 53 Cal. 44 [1878]; *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *City of Atlanta v. Hanlein*, 101 Ga. 697, 29 S. E. 14 [1897]; *Berdell v. City of Chicago*, 217 Ill. 429, 75 N. E. 386 [1905]; *Drainage Commissioners of Drainage District No. 2 v. Drainage Comm'rs of Union Drain. Dist. No. 3*, 211 Ill. 328, 71 N. E. 1007 [1904]; (affirming 113 Ill. App. 114 [1904]); *Myers v. City of Chicago*, 196 Ill. 591, 63 N. E. 1037 [1902]; *City of Chicago v. Adcock*, 168 Ill. 221, 48 N. E. 155 [1897]; *De Clercq v. Barber Asphalt Paving Company*, 167 Ill. 215, 47 N. E. 367 [1897]; *Greeley v. Town of Cicero*, 148 Ill. 632, 36 N. E. 603 [1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *Knepper v. City of Freeport*, 143 Ill. 99, 17 L. R. A. 774, 32 N. E. 372 [1893]; *Badger v.*

ment must be limited to the amount of the special benefit conferred by the improvement for which the assessment is levied and that the assessment must be apportioned upon the property

Inlet Drainage Dist., 141 Ill. 540, 31 N. E. 170 [1893]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Illinois Central Railroad Company v. Commissioners of East Lake Fork Special Drainage District*, 129 Ill. 417, 21 N. E. 925 [1890]; *Walter v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890]; *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86 [1890]; *Crawford v. The People ex rel. Rumsey*, 82 Ill. 557 [1876]; *Bibel v. People for the Use of the City of Bloomington*, 67 Ill. 172 [1873]; *Southeim v. City of Chicago*, 56 Ill. 429 [1870]; *City of Chicago v. Baer*, 41 Ill. 306 [1866]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1897]; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; *Law v. Madison, Smyrna and Graham Turnpike Company*, 30 Ind. 77 [1868]; *Charnock v. Fordoche & Grosse Tête Special Levee District Company*, 38 La. Ann. 323 [1886]; *Harwood v. Donovan*, 188 Mass. 487, 74 N. E. 914 [1905]; *Stark v. City of Boston*, 180 Mass. 293, 62 N. E. 375 [1902]; *Mota v. City of Detroit*, 18 Mich. 494 [1869]; *State ex rel. City of St. Paul v. District Court of Ramsey County*, 75 Minn. 292, 77 N. W. 968 [1899]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. 451 [1879]; *Daily v. Swope*, 47 Miss. 367 [1872]; *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295 [1898]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *Farrar v. City of St. Louis*, 80 Mo. 379 [1883]; *City of St. Louis v. Speck*, 67 Mo. 403 [1878]; *Smith v. City of Omaha*, 49 Neb. 883, 69 N. W. 402 [1896]; *Cain v. City of Omaha*, 42 Neb. 120, 60

N. W. 368 [1894]; *Cossitt Land Co. v. Neuscheler*, — N. J. L. —, 60 Atl. 1128 [1905]; *State, Morris and Essex Railroad Company, Pros. v. Jersey City*, 36 N. J. L. (7 Vr.) 56 [1872]; *State, Hampton, Pros. v. Mayor and Aldermen of the City of Paterson*, 36 N. J. L. (7 Vr.) 159 [1873]; *State, Britton, Pros. v. Blake*, 35 N. J. L. (6 Vr.) 208 [1871]; *Bogart v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Green) 568 [1876]; (*reversing, Bogart v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Green) 426 [1874]); *Provident Institution for Savings v. Allen*, 37 N. J. E. (10 Stew.) 36 [1883]; *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 360, 55 S. E. 800 [1906]; *Harper v. Commissioners of New Hanover County*, 133 N. C. 106, 45 S. E. 526 [1903]; *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; *Commissioners of Greene County v. Commissioners of Lenoir County*, 92 N. C. 180 [1885]; *Sessions v. Crunkilton*, 20 O. S. 349 [1870]; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903]; *Park Avenue Sewers, Appeal of Parker*, 169 Pa. St. 433, 32 Atl. 574 [1895]; *City of Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102 [1892]; *Vacation of Howard St., Philadelphia*, 142 Pa. St. 601, 21 Atl. 974 [1891]; *Cleveland v. Tripp*, 13 R. I. 50 [1880]; *Kettle v. City of Dallas*, 35 Tex. Civ. Div. 632, 80 S. W. 874 [1904]; *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332 [1896]; *State ex rel. Moore v. Mayor and Common Council of the City of Ashland*, 88 Wis. 599, 60 N. W. 1001 [1894]; *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35 [1879].

assessed in substantial proportion to the amount of such benefits so conferred is placed, as we have seen, upon distinct though not inconsistent theories. One of the most reasonable theories, and one often sanctioned and adopted by the courts is, that an assessment must be limited and apportioned in accordance with the benefits conferred, not by any specific constitutional provisions, but by its very nature,² that, irrespective of any specific constitutional provisions, an assessment must be so limited in order to be a tax,³ and that an assessment not so limited is not a legitimate exercise of the power of taxation, but is, on the other hand, a case of confiscation and spoliation.⁴ In various forms this theory has been repeated in many judicial decisions.⁵

² Washington Avenue, 69 Pa. St. (19 P. F. Smith) 352 [1871]. In this case, however, the court after laying down this general principle discusses as applicable to such assessments the constitutional provisions protecting the right of acquiring and possessing property; forbidding the deprivation of property except by the judgment of one's peers or the law of the land; and giving to every person injured a remedy by due course of law. The court said of an assessment: "It must be public in its purpose and reasonably just and equal in its distribution and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation, extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights." Washington Avenue, 69 Pa. St. (19 P. F. Smith) 352, 363 [1871].

"The constitutionality of assessments for street improvement can be sustained only upon the ground that the property assessed is benefited by the improvement. This is the doctrine of all the authorities." Allegheny City v. West Penna. R. Co., 138 Pa. St. 375, 382, 21 Atl. 763 [1890].

³ Coster v. Tide Water Company, 18 N. J. Eq. (3 C. E. Green) 54 [1866]; (affirmed as Tide Water Company v. Coster, 18 N. J. Eq. (3

C. E. Green) 518, 90 Am. Dec. 634 [1866]).

⁴ Preston v. Rudd, 84 Ky. 150 [1886]; Broadway Baptist Church v. McAtee, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; City of Detroit v. Judge of Recorder's Court, 112 Mich. 588, 71 N. W. 149; *sub nomine*, City of Detroit v. Chapin, 42 L. R. A. 638 [1897]; Motz v. City of Detroit, 18 Mich. 494 [1869]. "We are dealing with the question of special, local taxation, of the right of municipal authorities to levy a tax upon A., which it does not impose upon B. for the reason that it has done something by which the property of A. has been specially benefited to the amount of the tax. In the absence of any such benefit, in a case where we can declare as a matter of law no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a tax in any proper sense of the term; it would be in the nature of a forced loan and would practically amount to confiscation." Allegheny City v. West Penna. Railroad Co., 138 Pa. St. 375, 383, 21 Atl. 763 [1890].

⁵ Preston v. Rudd, 84 Ky. 150 [1886]; Broadway Baptist Church, v. McAtee, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; City of Detroit v. Judge of Recorder's Court, 112 Mich. 588, 71 N. W. 149; *sub nomine*, City of Detroit v. Chapin, 42

In many cases, specific constitutional provisions are invoked to overthrow assessments which exceed the benefits conferred or which are not apportioned in accordance therewith. The rule that such assessments are invalid is referred in various cases to the constitutional provision forbidding the taking of property without due compensation,⁶ or to the constitutional provision forbidding the taking of property without due process of law;⁷ or to the constitutional provision requiring uniformity and equality in taxation.⁸ The rule that an assessment must rest upon some reasonable basis of uniformity prevents double assessments upon a given tract of realty for the same benefits.⁹ Thus, if bene-

L. R. A. 638 [1897]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *Rosell, Pros. v. Mayor and Council of Neptune City*, 68 N. J. L. (39 Vr.) 509, 53 Atl. 199 [1902]; *State, Frevert, Pros. v. Mayor and Council of the City of Bayonne*, 63 N. J. L. (34 Vr.) 202, 42 Atl. 773 [1899]; *Vreeland v. Mayor, etc., of Bayonne*, 58 N. J. L. (29 Vr.) 126, 32 Atl. 68 [1895]; *State, Reynolds, Pros. v. Mayor and Aldermen of the City of Paterson*, 48 N. J. L. (19 Vr.) 435, 5 Atl. 896 [1886]; *State, New Brunswick Rubber Co., Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick*, 38 N. J. L. (9 Vr.) 190, 20 Am. Rep. 380 [1876]; *State, Bogart, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 57 [1875]; *State, Agens, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; (reversing, *State, Agens, Pros. v. Mayor and Common Council of City of Newark*, 35 N. J. L. (6 Vr.) 168 [1871]); *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *State, New Jersey Railroad and Transportation Company, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 330 [1875]; *State, Delaware, Lackawanna and Western Railroad Company, Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 137 [1874]; *State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City*, 37 N. J. L.

(8 Vr.) 128 [1874]; *State, Hoboken Land and Improvement Company, Pros. v. Mayor, etc., of Hoboken*, 36 N. J. L. (7 Vr.) 291 [1873]; *State, Britton, Pros. v. Blake*, 35 N. J. L. (6 Vr.) 208 [1871]; *Bogert v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Green) 568 [1876]; (reversing, *Bogert v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Green) 426 [1874]); *Tide Water Company v. Coster*, 18 N. J. Eq. (3 C. E. Green) 518, 90 Am. Dec. 634 [1866]; (affirming, *Coster v. Tide Water Company*, 18 N. J. Eq. (3 C. E. Green) 54 [1866]); *Allegheny City v. West Penna. Railroad Co.*, 138 Pa. St. 375, 21 Atl. 763 [1890]; *Ferson's Appeal*, 96 Pa. St. (15 Norris) 140 [1880]; *City of Philadelphia to Use of Johnson v. Rule*, 93 Pa. St. (12 Norris) 15 [1880]; *Craig v. City of Philadelphia*, 89 Pa. St. (8 Norris) 265 [1879]; *Kaiser v. Weise*, 85 Pa. St. (4 Norris) 366 [1877]; *Seely v. City of Pittsburgh*, 82 Pa. St. (1 Norris) 360, 22 Am. Rep. 760 [1876].

⁶ *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368 [1894]. See § 109 *et seq.*

⁷ See § 114 *et seq.*

⁸ See § 146 *et seq.*

⁹ *Abascal v. Bouny*, 37 La. Ann. 538 [1885]; *State of Minnesota ex rel. Merchant v. District Court for St. Louis County*, 66 Minn. 161, 68 N. W. 860 [1896].

fits to the remaining property have once been deducted from the damages for property taken for a public use, such benefits cannot subsequently be assessed against that part of the same property that is not taken.¹⁰ The rule that assessments must rest upon some reasonable basis of uniformity has been in a few cases extended so as to require substantial uniformity in the method of levying¹¹ or collecting.¹² Thus, a statute which allowed the council to require the improvement of one street, a great public highway, at the expense of the abutting property owners, without any petition from such owners, if the council by a unanimous vote, should order such improvement, while other street improvements could be made only on petition by the property owners was held unconstitutional.¹³ So a statute which, as amended, allowed assessments to be collected as other taxes are collected, or at the option of the holders of the assessment certificate in a civil action against the owner of the lot, was held to be unconstitutional as allowing some assessments to be collected in one way and some in another.¹⁴ There is no objection, however, to a statute which provides one method of repair for part of the streets of a given city and another method of repair for the rest of such streets, and authorizes a levy of an assessment according to frontage for each method of improvement.¹⁵ In some states specific constitutional provisions require in so many words that assessments be restricted to the amount of benefits and be apportioned to such benefits. The constitution of Alabama now in force provides: "No city, town or other municipality shall make any assessment for the costs of sidewalk or street paving or for the cost of the construction of any sewers against property in excess of the increased value of such property by reason of the special benefits derived from such improvements."¹⁶ Under this section assessments cannot exceed the amount of benefits con-

¹⁰ *State of Minnesota ex rel. Merchant v. District Court for St. Louis County*, 66 Minn. 161, 68 N. W. 860 [1896]. So a tract of land included in one levee district cannot while a part of that district and assessed for such levee be made a part of another levee district. *Abascal v. Bouny*, 37 La. Ann. 538 [1885].

¹¹ *Howell v. Bristol*, 71 Ky. (8 Bush.) 493 [1871].

¹² *M'Comb v. Bell*, 2 Minn. 295 [1858].

¹³ *Howell v. Bristol*, 71 Ky. (8 Bush.) 493 [1871].

¹⁴ *M'Comb v. Bell*, 2 Minn. 295 [1858].

¹⁵ *Oakland Paving Co. v. Rier*, 52 Cal. 270 [1877].

¹⁶ § 223, Constitution of Alabama [1901].

ferred.¹⁷ The effect of such provision upon the method of apportionment and the validity of specific statutes as affected thereby is discussed elsewhere.¹⁸ Under this provision the legislature may adopt any reasonable method of apportionment of the expense of the improvement for which the assessment is levied, as long as the assessment is fairly apportioned and the amount levied upon any given tract does not actually exceed the amount fixed by the constitution.¹⁹ Thus, as long as the assessment does not exceed the constitutional limitation, the legislature may authorize the assessment to be in the amount of the "special benefits accruing to said property or property owner by reason of said paving or improving and in no case to exceed four dollars per front foot."²⁰ So the legislature may authorize an assessment according to frontage,²¹ or may charge each lot with the cost of the work done in front thereof.²² This last rule, it may be observed, is probably safe only where such cost of work done in front of each lot is fairly uniform or is proportionate to the special benefits received by the property assessed.

§ 666. Power of legislature to determine existence and amount of benefits.

The determination of the exact amount of benefits existing in point of fact is at best a mere approximation.¹ Accordingly, the legislature has attempted in many cases to lay down in advance a fixed rule prescribing the amount and often the apportionment of the benefit conferred by the improvement. This method of determining the existence, amount and apportionment of benefits has many advantages. The rule thus laid down is a general one applicable to all improvements of the class with which it deals, and the benefits thus fixed are the same for all property similarly situated with regard to the improvement. An attempt to determine benefits separately for each separate tract

¹⁷ City Council of Montgomery v. Moore, 140 Ala. 638, 37 So. 291 [1903]; Inge v. Board of Public Works of Mobile, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902].

¹⁸ See § 677, §§ 690-694.

¹⁹ Harton v. Town of Avondale, 147 Ala. 458, 41 So. 934 [1906]; Inge v. Board of Public Works of Mobile,

135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902].

²⁰ Inge v. Board of Public Works of Mobile, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902].

²¹ Harton v. Town of Avondale, 147 Ala. 458, 41 So. 934 [1906].

²² Harton v. Town of Avondale, 147 Ala. 458, 41 So. 934 [1906].

¹ See § 689.

of land would probably on account of the varying conditions of the evidence and the varying attitude of mind of the judge or jury which is to determine such question lead to as many different results as there were different tracts of land involved in separate proceedings. The adoption of a legislative rule determining the amount and apportionment of benefits brings order out of what might in the absence of some fixed rule come very near being chaos. On the other hand the disadvantages of such legislative determination are marked. Since the rule thus laid down is to be general in its terms it is necessarily an arbitrary one. No real consideration of the actual benefits in the particular case can exist where the legislature has attempted to fix in advance a measure of benefits for all cases. If such rule is applied, the property owner is all too often the recipient of constructive benefits which exist merely in the contemplation of the law, but for which he is obliged to make compensation in money, which he must pay, not constructively, but actually. On account of these different considerations we find a marked variance in judicial opinion on the question of the power of the legislature to prescribe in advance by a general rule the amount and apportionment of benefits. In some cases it is held that questions of this sort are for the determination of the legislature and that a general rule laid down in advance fixing the amount and apportioning the benefits is valid and must be enforced.² The amount

² *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 45 L. 1115, 21 S. 860 [1901]; (affirming, *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]); *Webster v. Fargo*, 181 U. S. 394, 45 L. 912, 21 S. 623, 645 [1901]; (affirming *Webster v. City of Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]); *Wight v. Davidson*, 181 U. S. 371, 46 L. 900, 21 S. 616 [1901]; (reversing, *Davidson v. Wight*, 16 D. C. App. 371 [1900]); *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (affirming *Barber Asphalt Paving Company v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18

S. 521 [1898]; *Walston v. Nevin*, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (affirming, *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]); *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. 1098 [1878]; *Fay v. City of Springfield*, 94 Fed. 409 [1899]; *Loeb v. Trustees of Columbia Township, Hamilton County*, 91 Fed. 37 [1899]; *City Council of Montgomery v. Moore*, 140 Ala. 638, 37 So. 291 [1903]; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309 [1901]; *Hadlev v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900]; *Treanor v. Houton*, 103 Cal. 53, 36 Pac. 1081 [1894]; *In the Matter of the Bonds of the Madera Irrigation District*.

of the benefits thus fixed by the legislature is said to be a "statu-

92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884]; *Emery v. San Francisco Gas Company*, 28 Cal. 346 [1865]; *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859]; *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122 [1904]; 80 Pac. 467 [1905]; *Park Ecclesiastical Society v. City of Hartford*, 47 Conn. 89 [1879]; *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *English v. Mayor and Council of Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158 [1896]; *District of Columbia v. Burgdorf*, 6 App. D. C. 465 [1895]; *Mayor and Aldermen of Savannah v. Weed*, 96 Ga. 670, 23 S. E. 900 [1895]; *Hayden v. City of Atlanta*, 70 Ga. 817 [1883]; *Wright v. City of Chicago*, 46 Ill. 44 [1867]; *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1896]; *Board of Commissioners of Montgomery County v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887]; *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281 [1895]; *Ft. Dodge Electric Light and Power Company v. City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7 [1902]; *Wolf v. City of Keokuk*, 48 Ia. 129 [1878]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *Blair v. City of Atchison*, 40 Kan. 353, 19 Pac. 815 [1888]; *Burnes v. Mayor and City Council of Atchison*, 2 Kan. (1st. Ed.) 545, 2 Kan. (2nd. Ed.) 448 [1864]; *City of Louisville v. American Standard Asphalt Co.*, — Ky. —, 102 S. W. 806 [1907]; *R. B. Park & Co. v. Cane*. — Ky. —, 24 Ky. Law Rep. 2294, 73 S. W. 1121 [1903]; *Wagner v. Gast*, 24 Ky. L. Rep. 1401, 71 S. W. 533 [1903]; *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901]; *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899]; *City of Covington v. Matson*, 34 S. W. 897, 17 Ky. L. Rep. 1323; *Fox v. Middlesborough Town Company*, 96 Ky. 262, 28 S. W. 776 [1894]; *Boone v. Nevins (Ky.)*, 23 S. W. 512, 15 Ky. L. Rep. 547 [1893]; *Beck v. Obst*, 75 Ky. (12 Bush.) 268 [1876]; *Broadway Baptist Church v. McAtee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; *S. P. Moody & Co. v. Sportono*, 112 La. 1008, 36 So. 836 [1904]; *Kelly v. Chadwick*, 104 La. 719, 29 So. 295 [1903]; (affirmed *Chadwick v. Kelly*, 187 U. S. 540, 47 L. 293, 23 S. 175 [1904]); *Barber Asphalt Paving Company v. Watt*, 51 La. Ann. 1345, 26 So. 70 [1899]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *Smith v. Mayor and Aldermen of Worcester*, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; *Trustees of Phillip's Academy v. Inhabitants of Andover*, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841 [1900]; *Mayor and City Council of Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165 [1901]; *Alberger v. Mayor and City Council of Baltimore*, 64 Md. 1, 20 Atl. 988 [1885]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *City of Detroit v. Judge of Recorder's Court*, 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149 [1897]; *Sheley v. City of Detroit*, 45 Mich. 431, 8 N. W. 52 [1881]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *State of Minnesota ex rel. Powell v. District Court of Ramsey County*, 47 Minn. 406, 50 N. W. 476 [1891]; *State of Minnesota ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97 [1888]; *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885]; *Wilzinski v. City of Greenville*, 85 Miss. 393, 37 So. 807 [1905];

tory equivalent for benefits conferred.”³ To whatever constitutional restriction or upon whatever theory it may be explained, the great weight of authority is that the legislature has no power to authorize assessments in substantial excess of the special benefits conferred upon the realty assessed by the improvement for which the assessment is levied. If the assessment is in substantial excess of the benefits conferred, it is invalid as a violation of the constitution.⁴ If not in substantial excess of the benefits so

Vasser v. George, 47 Miss. 713 [1873]; Daily v. Swope, 47 Miss. 367 [1872]; Ross v. Gates, 183 Mo. 338, 81 S. W. 1107 [1904]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; Collier Estate v. Western Paving and Supply Company, 180 Mo. 362, 79 S. W. 947 [1904]; City of St. Charles ex rel. Budd v. Deemar, 174 Mo. 122, 73 S. W. 469 [1902]; Herman v. Gilliam, 171 Mo. 258, 71 S. W. 163 [1902]; Prior v. Buehler and Cooney Construction Company, 170 Mo. 439, 71 S. W. 205 [1902]; Adams v. Green, 74 Mo. App. 125 [1898]; Eyerman v. Hardy, 8 Mo. App. 311 [1880]; Seibert v. Tiffany, 8 Mo. App. 33 [1879]; McMillan v. City of Butte, 30 Mont. 220, 76 Pac. 203 [1904]; Hurford v. City of Omaha, 4 Neb. 336 [1876]; People of the State of New York ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902]; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777 [1885]; People of the State of New York ex rel. Troy and Lansingburgh Railroad Company v. Coffey, 66 Hun (N. Y.) 160, 21 N. Y. Supp. 34 [1892]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874]; Webster v. City of Fargo, 9 N. E. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; Roberts v. First National Bank of Fargo, 8 N. D. 504, 79 N. W. 1049 [1899]; Northern Indiana Railroad Company v. Connelly, 10 O. S. 160 [1859]; Conner v. City of Cincinnati, 11 Ohio

C. C. 336 [1896]; (affirmed 55 O. S. 82); Wilson v. City of Salem, 24 Or. 504, 34 Pac. 9, 691 [1893]; Masters v. City of Portland, 24 Or. 161, 33 Pac. 540 [1893]; King v. City of Portland, 2 Or. 146 [1865]; Harrisburg v. McPherran, 200 Pa. St. 343, 49 Atl. 988 [1901]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893]; Beaumont v. Wilkes Barre City, 142 Pa. St. 198, 21 Atl. 888 [1891]; Beltzhoover Borough v. Maple, 130 Pa. St. 335, (*sub nomine*, Maple v. Borough of Beltzhoover 18 Atl. 650 [1889]); Wray v. Mayor of Pittsburg for Use, etc., 46 Pa. St. (10 Wright) 365 [1863]; Magee v. Commonwealth, for the Use of the City of Pittsburgh, 46 Pa. St. (10 Wright) 358 [1863]; Schenley v. Commonwealth for Use of City of Allegheny, 36 Pa. St. (12 Casey) 64 [1859]; Spring Garden v. Wistar, 18 Pa. St. (6 Harr.) 195 [1852]; In the Matter of Dorrance Street, 4 R. I. 230 [1856]; Norfolk City v. Ellis, 67 Va. (26 Grattan) 224 [1875]; City of Seattle v. Yesler, 1 Wash. Terr. 577 [1878]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892].

³Northern Indiana Railroad Company v. Connelly, 10 O. S. 160, 165 [1859].

⁴O'Brien v. Wheelock, 184 U. S. 450, 46 L. 636, 22 S. 354 [1902]; (affirming, O'Brien v. Wheelock, 95 Fed. 883, 37 C. C. A. 309 [1899]; which affirmed 78 Fed. 673); Norwood v. Baker, 172 U. S. 269, 43 L. 443, 19 S. 187 [1898]; Bidwell v. Huff, 103 Fed. 362 [1900]; Cribbs v.

conferred and if apportioned substantially according to such benefits, such assessment is not in violation of constitutional provi-

Benedict, 64 Ark. 555, 44 S. W. 707 [1897]; City of Atlanta v. Hanlein, 101 Ga. 697, 29 S. E. 14 [1897]; City of Atlanta v. Hamlein, 96 Ga. 381, 23 S. E. 408 [1895]; Berdel v. City of Chicago, 217 Ill. 429, 75 N. E. 386 [1905]; City of Chicago v. Adcock, 168 Ill. 221, 48 N. E. 155 [1897]; Chicago and Alton Railroad Company v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; Greeley v. Town of Cicero, 148 Ill. 632, 36 N. E. 603 [1894]; Crawford v. People ex rel. Rumsey, 82 Ill. 557 [1876]; Bibel v. The People, for Use of the City of Bloomington, 67 Ill. 172 [1873]; Southeim v. City of Chicago, 56 Ill. 429 [1870]; St. John v. City of East St. Louis, 50 Ill. 92 [1869]; Wright v. City of Chicago, 46 Ill. 44 [1867]; City of Chicago v. Baer, 41 Ill. 306 [1866]; City of Chicago v. Larned, 34 Ill. 203 [1864]; Broadway Baptist Church v. McAtee, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; Abascal v. Bouny, 37 La. Ann. 538 [1885]; Dexter v. City of Boston, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379 [1900]; Weed v. Mayor and Aldermen of Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898]; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535 [1876]; Thornton v. City of Clinton, 148 Mo. 648, 50 S. W. 295 [1898]; McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440 [1873]; Smith v. City of Omaha, 49 Neb. 883, 69 N. W. 402 [1896]; Cain v. City of Omaha, 42 Neb. 120, 60 N. W. 368 [1894]; State, Culver, Pros. v. Mayor and Aldermen of Jersey City, 45 N. J. L. (16 Vr.) 256 [1883]; State, Kean, Pros. v. Driggs Drainage Company, 45 N. J. L. (16 Vr.) 91 [1883]; State, Vreeland, Pros. v. Mayor and Aldermen of Jersey City, 43 N. J. L. (14 Vr.) 135 [1881]; (affirmed as Mayor and Aldermen of Jersey City v. State, Vreeland, Pros.,

43 N. J. L. (14 Vr.) 638 [1881]; State, United New Jersey Railroad and Canal Co. v. Mayor and Aldermen of Jersey City, 41 N. J. L. (12 Vr.) 471; State, M'Closkey, Pros. v. Chamberlin, 37 N. J. L. (8 Vr.) 388 [1875]; State, Delaware, Lackawanna & Western Railroad Company, Pros. v. Village of Passaic, 37 N. J. L. (8 Vr.) 137 [1874]; State v. Hudson County Avenue Commissioners, 37 N. J. L. (8 Vr.) 12 [1874]; State, Hoboken Land and Improvement Company, Pros. v. Mayor, etc., of Hoboken, 36 N. J. L. (7 Vr.) 291 [1873]; State, Hampton, Pros. v. Mayor and Aldermen of the City of Paterson, 36 N. J. L. (7 Vr.) 159 [1873]; State, Morris and Essex Railroad Company, Pros. v. Jersey City, 36 N. J. L. (7 Vr.) 56 [1872]; Bogert v. City of Elizabeth, 27 N. J. Eq. (12 C. E. Green) 568 [1876]; (reversing, Bogert v. City of Elizabeth, 25 N. J. Eq. (10 C. E. Green) 426 [1874]); Provident Institution for Savings v. Allen, 37 N. J. Eq. (10 Stew.) 36 [1883]; City of Asheville v. Wachovia Loan & Trust Co., 143 N. C. 360, 55 S. E. 800 [1906]; Harper v. Commissioners of New Hanover County, 133 N. C. 106, 45 S. E. 526 [1903]; Bowler v. Biddinger Free Turnpike Co., (Ohio) 6 W. L. B. 404 [1881]; King v. Portland, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; Park Avenue Sewers, Appeal of Parker, 169 Pa. St. 433, 32 Atl. 574 [1895]; City of Erie v. Russell, 148 Pa. St. 384, 23 Atl. 1102 [1892]; Vacation of Howard Streets, Philadelphia, 142 Pa. St. 601, 21 Atl. 974 [1891]; Ferson's Appeal, 96 Pa. St. (15 Norris) 140 [1880]; City of Philadelphia to Use of Johnson v. Rule, 93 Pa. St. (12 Norris) 15 [1880]; Craig v. City of Philadelphia, 89 Pa. St. (8 Norris) 265 [1879]; Kaiser v. Weise, 85 Pa. St. (4 Norris) 366 [1877]; Seely v.

sions, as far as its amount and apportionment are concerned.⁵ In some jurisdictions, however, we find a divergence, in theory

City of Pittsburg, 82 Pa. St. (1 Norris) 360, 22 Am. Rep. 760 [1876]; Cleveland v. Tripp, 13 R. I. 50 [1880]; Barnes v. Dyer, 56 Vt. 469 [1884]; Allen v. Drew, 44 Vt. 174 [1872]; Howell v. City of Tacoma, 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447 [1892]; State ex rel. Moore v. Mayor and Common Council of the City of Ashland, 88 Wis. 599, 60 N. W. 1001 [1894]; Watkins v. Zwietusch, 47 Wis. 513, 3 N. W. 35 [1879].

⁵ Martin v. District of Columbia, 205 U. S. 135, 27 S. 440 [1907]; (reversing, 26 App. D. C. 140, 146 [1905]); Shoemaker v. United States, 147 U. S. 282, 37 L. 170, 13 S. 361 [1893]; (affirming United States on Petition of Commissioners v. Cooper, 21 D. C. 491 [1893]); Walston v. Nevin, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (affirming, Nevin v. Roach, 86 Ky. 492, 5 S. W. 546 [1887]); Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 549, 4 S. 663 [1884]; (affirming, Reclamation District No. 108 v. Hagar, 4 Fed. 366 [1880]); Harton v. Town of Avondale, 147 Ala. 458, 41 So. 934 [1906]; Driver v. Moore, 81 Ark. 80, 98 S. W. 734 [1906]; Ritter v. Drainage Dist. No. 1, Poinsett County, 78 Ark. 580, 94 S. W. 711 [1906]; City of Denver v. Campbell, 33 Colo. 162, 80 Pac. 142 [1905]; City of Denver v. Dumars, 33 Colo. 94, 80 Pac. 114 [1904]; City of Denver v. Knowles, 17 Colo. 204, 17 L. F. A. 135, 30 Pac. 1041 [1892]; Bassett v. City of New Haven, 76 Conn. 70, 55 Atl. 579 [1903]; Drainage Commissioners of Drainage District No. 2 v. Drainage Commissioners of Union Drain Dist. No. 3, 211 Ill. 328, 71 N. E. 1007; (affirming, 113 Ill. App. 114); Myers v. City of Chicago, 196 Ill. 591, 63 N. E. 1037 [1902]; Liehtner v. City of Peoria, 150 Ill. 80, 37 N. E. 69

[1894]; Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; Kuehner v. City of Freeport, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893]; Badger v. Inlet Drainage District, 141 Ill. 540, 31 N. E. 170 [1893]; Goodwillie v. City of Lake View, 137 Ill. 51, 27 N. E. 15 [1892]; Illinois Central Railroad Company v. Commissioners of East Lake Fork Special Drainage District, 129 Ill. 417, 21 N. E. 925 [1890]; Walters v. Town of Lake, 129 Ill. 23, 21 N. E. 556 [1890]; Wilbur v. City of Springfield, 123 Ill. 395, 14 N. E. 871 [1889]; Hundley and Rees v. Commissioners of Lincoln Park, 67 Ill. 559 [1873]; Wray v. Fry, 158 Ind. 92, 62 N. E. 1004 [1901]; Board of Commissioners of County of Monroe v. Harrell, 147 Ind. 500, 46 N. E. 124 [1896]; Quill v. City of Indianapolis, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; Law v. Madison, Smyrna and Graham Turnpike Company, 30 Ind. 77 [1868]; Charnock v. Fordoche & Grosse Tête Special Levee District Company, 38 La. Ann. 323 [1886]; City of New Orleans v. Elliott, 10 La. Ann. 59 [1855]; Mayor and City Council of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43 [1894]; Harwood v. Donovan, 188 Mass. 487, 74 N. E. 914 [1905]; Stark v. City of Boston, 180 Mass. 293, 62 N. E. 375 [1902]; Hall v. Street Commissioners of Boston, 177 Mass. 434, 59 N. E. 68 [1901]; Lincoln v. Board of Street Commissioners of the City of Boston, 176 Mass. 210, 57 N. E. 356 [1900]; Brady v. Hayward, 114 Mich. 326, 72 N. W. 233 [1897]; Motz v. City of Detroit, 18 Mich. 494 [1869]; State v. District Court of Ramsey County, 98 Minn. 63, 107 N. W. 726 [1906]; State ex rel. City of St. Paul v. District Court of Ramsey County, 75 Minn. 292, 77 N. W. 968 [1899];

at least, from the views already stated as those entertained by the weight of authority. In California it has been said that in the absence of constitutional restrictions, the apportionment of special assessments is within the discretion of the legislature, may be upon any basis which the legislature may select, and does not depend upon the fact of any special local benefit to the taxpayer.⁶ In Iowa the courts have taken an extreme position on the question of the relation between the amount of the assess-

State of Minnesota ex rel. Duluth v. District Court, 61 Minn. 542, 64 N. W. 190 [1895]; State of Minnesota ex rel. Merrick v. District Court of Hennepin, 33 Minn. 235, 22 N. W. 625 [1885]; Daily v. Swope, 47 Miss. 367 [1872]; Mound City Land and Stock Co. v. Miller, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898]; Farrar v. City of St. Louis, 80 Mo. 379 [1883]; City of St. Louis v. Speck, 67 Mo. 403 [1878]; DeWitt v. City of Elizabeth, 56 N. J. L. (27 Vr.) 119, 27 Atl. 801 [1893]; State, Raymond, Pros. v. Rutherford, 55 N. J. L. (26 Vr.) 441, 27 Atl. 172 [1893]; State, Aldridge, Pros. v. Essex Public Road Board, 48 N. J. L. (19 Vr.) 366, 5 Atl. 784 [1886]; (reversing, State, Aldridge, Pros. v. Essex Public Road Board, 46 N. J. L. (17 Vr.) 126 [1884]); State, Speer, Pros. v. Essex Public Road Board, 47 N. J. L. (18 Vr.) 101; State, Wetmore, Pros. v. City of Elizabeth, 41 N. J. L. (12 Vr.) 152 [1879]; State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Paterson Avenue and Secaucus Road Commissioners, 41 N. J. L. (12 Vr.) 83 [1879]; State, Watrous, Pros. v. City of Elizabeth, 40 N. J. L. (11 Vr.) 278 [1878]; State, Youngster, Pros. v. Mayor and Aldermen of Paterson, 40 N. J. L. (11 Vr.) 244 [1878]; State, Simmons, Pros. v. City of Passaic, 38 N. J. L. (9 Vr.) 60 [1875]; Village of Passaic v. State, Delaware, Lackawanna and Western Railroad Co., 37 N. J.

L. (8 Vr.) 538 [1875]; Smith v. Mayor and Common Council of the City of Newark, 32 N. J. Eq. (5 Stew.) 1 [1880]; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; Commissioners of Greene County v. Commissioners of Lenoir County, 92 N. C. 180 [1885]; Rolph v. City of Fargo, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898]; Sessions v. Crunkilton, 20 O. S. 349 [1870]; Northern Indiana Railroad Company v. Connelly, 10 O. S. 160 [1859]; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903]; Masters v. City of Portland, 24 Or. 161, 33 Pac. 540 [1893]; Harrisburg v. McPherran, 200 Pa. St. 343, 49 Atl. 988 [1901]; Vacation of Howard Street, Philadelphia, 142 Pa. St. 601, 21 Atl. 974 [1891]; Magee v. Commonwealth for the Use of the City of Pittsburgh, 46 Pa. St. 358 [1863]; Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447 [1898]; Cleveland v. Tripp, 13 R. I. 50 [1880]; Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904]; Violet v. City Council of Alexandria, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; Alexander v. City of Tacoma, 35 Wash. 366, 77 Pac. 686 [1904]; Lewis v. City of Seattle, 28 Wash. 639, 69 Pac. 393 [1902]; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332 [1896].

⁶ In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]].

ment and the amount of special benefits conferred by the improvement for which the assessment is levied. The Supreme Court of Iowa has held that the right of special assessment does not rest upon any theory of special benefits, but on the theory that such method of paying for public improvements does justice in the long run, and in the long run only.⁷ Accordingly, the Iowa courts have said repeatedly that assessments for public improvements should be sustained, regardless of the question of whether such improvement does or does not confer any benefit upon the property assessed.⁸ The Supreme Court of the United States has been urged to declare the Iowa system of assessment unconstitutional, as being a violation of that clause of the Fourteenth Amendment of the Constitution of the United States which forbids a taking of property without due process of law.⁹ The case, however, in which such request was made was one which came on error from a judgment of the Supreme Court of Iowa.¹⁰ The only question involving such provision of the Fourteenth Amendment, which was presented to the Supreme Court of Iowa for its decision, was whether a personal judgment for a street assessment against a non-resident of whose person the Iowa courts had not acquired jurisdiction was due process of law.¹¹ Accordingly, under the practice of the Supreme Court of the United States, this was the only question considered in reviewing the judgment of the State Supreme Court. The question of the

⁷ *Warren v. Henly*, 31 Ia. 31 [1870]. For a fuller statement of this theory and a discussion of it see § 12, § 651 *et seq.*

⁸ *Minneapolis and St. Louis Railroad Co. v. Lindquist*, 119 Ia. 144, 93 N. W. 103 [1903]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Chicago, Milwaukee & St. Paul Railway Company v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900]; *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897]; *Gatch v. City of Des Moines*, 63 Ia. 718, "The expense of the improvement of streets by grading, paving, macadamizing and laying sidewalks, has been too long imposed upon the abutting property in this state without regard to benefits to be now called in question." *Gatch v. The*

City of Des Moines, 63 Ia. 718, 720; (citing, *Warren v. Henly*, 31 Ia. 31 [1870]).

⁹ *Dewey v. Des Moines*, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899].

¹⁰ *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897].

¹¹ "The only one of the assignments of error made in the State Supreme Court which has any reference to any Federal question is the one set forth in the statement of facts, and it will be seen that such assignment relates solely to the validity of the provision for personal liability imposed upon plaintiff in error by the judgment of the district court. None of the other assignments of error involves any Federal question." *Dewey v. Des Moines*, 173 U. S. 193, 196, 197, 43 L. 665, 19 S. 379 [1899].

validity of the Iowa system of assessments as affected by the Fourteenth Amendment to the Constitution of the United States, forbidding a taking of property other than by due process of law, is therefore still undecided. It may be added that recent Iowa statutes expressly forbid assessments in excess of benefits, and require assessments to be apportioned according to the benefits conferred upon the property assessed.¹² In Colorado local assessments could, under the original view of the courts, be levied only where the statute or ordinance requiring the construction of the local improvement could be upheld as a police regulation, and where the assessment was not, accordingly, based on any theory of benefits.¹³ If it could not be supported as a police regulation, but only as an exercise of the taxing power, local assessments could not be levied for such purpose.¹⁴ This holding was based on the theory that an assessment was, in every sense of the word, a tax and that the constitutional provision requiring uniformity of taxation¹⁵ prevented an assessment from being apportioned according to any theory of benefits. While this view was entertained by the courts, it was held that if the city graded a sidewalk it could then require the owners of lots abutting on the street in question to furnish the necessary materials and lay the sidewalk.¹⁶ So it was held that the construction of sewers could be required under the police power, and local assessments levied therefor.¹⁷ The construction of a street, however, was not such an improvement as, under the doctrines of the police power, could be compelled at the expense of the owners of property benefited thereby;¹⁸ and under this distinction curb stones and gutters were held to be a part of the street, not of the sidewalk. The construction of curb stones and gutters could not, therefore, be compelled under the doctrine of police power; and under the power of taxation it was held that a local assessment for such improvements levied on abutting

¹² *Stutsman v. City of Burlington*, Iowa, 127 Ia. 563, 103 N. W. 800 [1905]. Drainage Act, Acts 30th General Assembly, p. 61, c. 68. *Sisson v. Board of Supervisors of Buena Vista County*, 128 Ia. 442, 70 L. R. A. 440, 104 N. W. 454 [1905].

¹³ *Palmer v. Way*, 6 Colo. 106 [1881].

¹⁴ *Palmer v. Way*, 6 Colo. 106 [1881].

¹⁵ Article X., § 3.

¹⁶ *Palmer v. Way*, 6 Colo. 106 [1881].

¹⁷ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887].

¹⁸ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889].

property violated that provision of the constitution of Colorado,¹⁹ which required uniformity in taxation, and was therefore invalid.²⁰ In reply to questions submitted to the Supreme Court by the legislature of Colorado and after hearing *ex parte* arguments only, the Supreme Court declined to overrule its prior decisions on the question of the lack of power in the legislature to provide for levying assessments on abutting lot owners for the expense of grading and paving public streets.²¹ In a subsequent case between adversary parties, however, the court overruled its former decisions and held that local assessments could be levied on abutting property owners for grading and paving public streets.²² Property owners may be estopped from setting up the fact that the assessments exceed the benefits.²³ Thus, property owners who have signed a petition for an improvement in which they have agreed to pay the assessment levied therefor are estopped from setting up the fact that the assessment necessary to pay the amount of such improvement exceeds the benefits.²⁴ If the fact that the benefit from the improvement is less than the assessment is due to the action of the property owners in insisting upon a particular kind of improvement which proved to be of but little benefit, they cannot attack the assessment therefor on the ground that it exceeds the benefits conferred by such improvement.²⁵

§ 667. Legislative determination held ineffective.

In other cases a rule has been laid down which goes to the opposite extreme. It has been held in some states that assessments must be substantially limited in amount and apportioned according to the benefits which exist in point of fact. In such jurisdictions the legislative determination as to the amount and apportionment of benefits is regarded as of no validity, on the theory that the owners of the property assessed are entitled to the determination of the officials authorized to levy and appor-

¹⁹ Article X., § 3.

²⁰ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1889].

²¹ *In re House Resolutions Concerning Street Improvements*, 15 Colo. 598, 26 Pac. 323 [1890].

²² *City of Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892]; (*overruling Palmer v. Way*, 6 Colo. 106 [1881]).

²³ *Henning v. Stengel*, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64 [1902]; *Thornton v. Cincinnati*, 26 Ohio C. C. 33 [1904].

²⁴ *Thornton v. Cincinnati*, 26 Ohio C. C. 33 [1904].

²⁵ *Henning v. Stengel*, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64 [1902].

tion such assessment upon the question and the existence of the amount of benefits. Accordingly, in such jurisdictions the legislative determination of the existence and amount of benefits is invalid.¹ Even in jurisdictions in which this rule is laid down some cases are to be found in which much greater weight is given to the legislative determination than would be indicated by the general rule already given.²

§ 668. Legislative determination held final if no injustice results therefrom.

Even in some jurisdictions in which the conclusive effect of legislative determination as to the existence and amount of benefits has been expressed in very sweeping terms we find the qualification, nevertheless, recognized, that if actual and extreme injustice follows from the application of the legislative rule in particular cases the determination of the legislature cannot be regarded as valid with reference to such cases.¹ At the same time great weight must be given to the determination of the legislature. What degree of injustice must exist in order to justify the courts in declining to recognize the validity of the

¹ *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Harwood v. Street Commissioners of City of Boston*, 183 Mass. 348, 67 N. E. 362 [1903]; *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124 [1901]; *Poillon v. Borough of Rutherford*, 65 N. J. L. (36 Vr.) 538, 47 Atl. 439 [1900]; *Frevort v. City of Bayonne*, 63 N. J. L. (34 Vr.) 202, 42 Atl. 773 [1899]; *Coward v. North Plainfield*, 63 N. J. L. (34 Vr.) 61, 42 Atl. 805 [1899]; *State, Reynolds, Pros. v. Mayor and Aldermen of City of Paterson*, 48 N. J. L. (19 Vr.) 435, 5 Atl. 896 [1886]; *State, Kean, Pros. v. Driggs Drainage Co.*, 45 N. J. L. (16 Vr.) 91 [1883]; *State, Watrous, Pros. v. City of Elizabeth*, 40 N. J. L. (11 Vr.) 278 [1878]; *State, Hutton, Pros. v. Inhabitants of Township of West Orange*, 39 N. J. L. (10 Vr.) 453 [1877]; *State, Agens, Pros. v. Mayor and Common Council of City of Newark*, 37 N. J. L. (8 Vr.) 415; 18 Am. Rep. 729 [1874]; *State, McCloskey, Pros. v. Chamberlin*, 37 N.

J. L. (8 Vr.) 388 [1875]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *State, Delaware, Lackawanna & Western R. R. Co., Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 137 [1874]; *State, Morris & Essex R. R. Co. Pros. v. Jersey City*, 36 N. J. L. (7 Vr.) 56 [1872]; *Bogert v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Green) 568 [1876]; (reversing *Bogert v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Green) 426 [1874]).

² *Snow v. City of Fitchburg*, 136 Mass. 83 [1883]; *State, Britton, Pros. v. Blake*, 35 N. J. L. (6 Vr.) 208 [1871]; *State, Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr.) 227 [1870]; *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899].

¹ *City of Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408 [1895]; *City of Detroit v. Daly*, 68 Mich. 503 37 N. W. 11 [1888].

legislative determination is a question which it is difficult to solve by an abstract statement. It has been said that the legislative determination is final unless it is conclusively shown to be wrong,² or unless it can be clearly shown that private rights are flagrantly invaded,³ or unless the application of the legislative rule produces a gross inequality,⁴ or it is clear that the legislative determination will probably result in disproportional or unequal taxation,⁵ or will impose an assessment unsupported by any possible benefit or out of all proportion to the possible benefits,⁶ or unless it is so clearly unequitable as to violate some constitutional principle.⁷ The legislative determination of the fact of benefit is said to be conclusive unless the court can see plainly that there is no benefit and that such absence of benefit does not admit of dispute as a matter of fact.⁸ Accordingly, a rule intermediate between the two extreme rules already given and recognized by some courts seems to be that the legislative determination is to be regarded as final and conclusive except as to the cases where actual injustice is shown to exist and where assessments are levied greatly in excess of or out of proportion to the actual benefits.⁹

§ 669. Legislative determination made subject to review.

If the legislature has laid down a rule for determining the amount and apportionment of benefits, but has provided for a hearing at some stage of the assessment proceedings, at which hearing the assessments are to be reduced to the amount of benefits if they are found to exceed them, the legislative determination as thus limited and qualified is to be regarded as valid.¹

² *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. Law Rep. 128 [1901].

³ *Allen v. Drew*, 44 Vt. 174 [1872].

⁴ *State of Minnesota ex rel. Merriek v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

⁵ *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903].

⁶ *Minor v. Daspit, Sheriff*, 43 La. Ann. 337, 9 So. 49 [1891].

⁷ *City of Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892].

⁸ *Duncan v. Ramish*, 142 Cal. 686,

76 Pac. 661 [1904]; *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900].

⁹ *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906]; *Schroder v. Overman*, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; *King v. Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]; *King v. Portland*, 2 Or. 146 [1865].

¹ *Schaefer v. Werling*, 188 U. S. 516, 23 S. 449 [1903]; (affirming *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149 [1901]); *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming, *Goodrich v.*

§ 670. Determination by public corporation of existence and amount of benefits.

The legislature may and frequently does confer upon a city or other public corporation power to determine the existence and amount of benefits or the method of apportionment of the assessment which such public corporation is authorized to levy. If the legislature gives to the public corporation the choice between two or more methods of apportioning an assessment and each of these methods falls within the power of the legislature to determine the existence and apportionment of benefits,¹ the determination by the city to make use of one of these methods is final and conclusive.² The legislature may leave it to the public corporation which is to levy the assessment or to certain designated officials thereof to determine what method of apportionment it will employ. Any fair and legal method of apportionment selected by such public corporation is valid under such circumstances.³ It has been said that the public corporation is restrained only by the constitution and laws of the state and by the doctrine of the common law which requires municipal ordinances to be reasonable.⁴ Where the legislature provides that the question of the existence, amount and apportionment of benefits shall be deter-

City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]; *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *Pittsburgh, C. C. & St. L. Ry. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906]; *Deane v. Indiana Macadam and Construction Company*, 161 Ind. 371, 68 N. E. 686 [1903]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Marion Bond Co. v. Johnson*, 29 Ind. App. 294, 64 N. E. 626 [1902]; *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900].

¹ See §§ 660-669.

² *Falch v. The People ex rel. Johnson*, 99 Ill. 137 [1881]; *Kelly v. The City of Cleveland*, 34 O. S. 468 [1878]; *Conner v. City of Cincinnati*, 11 Ohio C. C. 336 [1896]; (affirmed 55 O. S. 82 [1896]); *Scranton City*

v. Bush, 160 Pa. St. 499, 28 Atl. 926 [1894].

³ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. Ct. 56 [1896]; (reversing *Bradley v. Fallbrook Irrigation District*, 68 Fed. 948 [1895]); *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971 [1900]; *Davis v. Gains*, 48 Ark. 370, 3 S. W. 184; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687 [1896]; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471 [1887]; *Norton v. Fisher*, 33 Ind. App. 132, 71 N. E. 51 [1903]; *Douglass v. Craig*, 4 Kan. App. 99, 46 Pac. 197 [1896]; *Howe v. City of Cambridge*, 114 Mass. 388 [1874]; *Grand Rapids School Furniture Co. v. City of Grand Rapids*, 92 Mich. 564, 52 N. W. 1028 [1892]; *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889].

⁴ *The Borough of Greensburg v. Young*, 53 Pa. St. (3 P. F. Smith) 280 [1886].

mined by the public corporation, which is to levy the assessment or by some designated public official or set of officials, it is said in many cases that the determination of said public corporation or public officials upon the question of the existence, amount and apportionment of benefits is final and conclusive.⁵ A statute giv-

⁵ *Hibben v. Smith*, 191 U. S. 310, 24 S. 88 [1903]; (affirming, *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]); *Schaefer v. Werling*, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming, *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149); *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]); *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming, *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *King v. Portland City*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming, *King v. City of Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing, *Bradley v. Fallbrook Irrigation District*, 68 Fed. 948 [1895]); *Illinois Central Railroad v. Decatur*, 147 U. S. 190, 37 L. 132, 13 S. 293 [1893]; *Minnesota & M. Land & Improvement Co. v. City of Billings*, 111 Fed. Rep. 972, 50 C. C. A. 70 [1901]; *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904]; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920 [1899]; *Reclamation Dist. No. 537, of Yolo County, v. Burger*, 122 Cal. 442, 55 Pac. 156 [1898]; *Piper's Appeal in the matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Wolff v. City of Denver*, 20 Colo. App. 135, 77 Pac. 364 [1904]; *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *Cone v. City of Hartford*, 28 Conn. 363 [1859]; *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906]; *City of*

Peru v. Bartels, 214 Ill. 515, 73 N. E. 755 [1905]; *Myers v. City of Chicago*, 196 Ill. 591, 63 N. E. 1031 [1902]; *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; *Graham v. City of Chicago*, 187 Ill. 411, 58 N. E. 393 [1900]; *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824 [1900]; *Birket v. City of Peoria*, 185 Ill. 369, 57 N. E. 30 [1900]; *Farrel v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E. 325 [1899]; *Cramer v. City of Charleston*, 176 Ill. 507, 52 N. E. 73 [1898]; *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898]; *Bass v. South Park Comrs.*, 171 Ill. 370, 49 N. E. 549 [1898]; *Chicago & Northwestern Railway Co. v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105 [1896]; *Ware v. City of Jerseyville*, 158 Ill. 234, 41 N. E. 736 [1895]; *Chicago, Rock Island & Pacific R. Co. v. City of Moline*, 158 Ill. 64, 41 N. E. 877 [1895]; *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]; (distinguishing *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]); *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. 354 [1895]; *The Chicago and Alton R. R. Co. v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *Holt v. East St. Louis*, 150 Ill. 530, 37 N. E. 927 [1894]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *Fuehner v. City of Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893]; *City of Bloomington v. Latham et al.*, 142 Ill. 462, 18 L. R.

ing to the finding of a city council on confirmation of an assessment the validity and force of a judgment is valid.⁶ The rule that the action of the public corporation or designated officer is final and conclusive is probably too broad for the actual con-

A. 487, 32 N. E. 506 [1893]; Leitch v. Village of LaGrange, 138 Ill. 291, 27 N. E. 917 [1892]; Burhans v. Village of Norwood Park, 138 Ill. 147, 27 N. E. 1088 [1892]; County of Adams v. City of Quincy, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; Green v. City of Springfield, 130 Ill. 515, 22 N. E. 602 [1890]; Wilbur v. City of Springfield, 123 Ill. 395, 14 N. E. 871 [1889]; Morrell v. Union Drainage District No. 1, 118 Ill. 139, 8 N. E. 675 [1887]; City of Sterling v. Galt, 117 Ill. 11, 7 N. E. 471 [1887]; Watson v. City of Chicago, 115 Ill. 78, 3 N. E. 430 [1886]; City of Galesburg v. Searles, 114 Ill. 217, 29 N. E. 686 [1886]; Enos v. City of Springfield, 113 Ill. 65 [1886]; Falch v. The People ex rel. Johnson, 99 Ill. 137 [1881]; White v. The People ex rel. City of Bloomington, 94 Ill. 604 [1880]; Crawford v. The People ex rel. Rumsey, 83 Ill. 557 [1876]; Pittsburg, C. C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Deane v. Indiana Macadam and Construction Co., 161 Ind. 371, 68 N. E. 686 [1903]; Shank v. Smith, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. Rep. 932 [1901]; Adams v. City of Shelbyville, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; Marion Bond Co. v. Johnson, 29 Ind. App. 294, 64 N. E. 626 [1902]; Chambliss v. Johnson, 77 Ia. 611, 42 N. W. 427 [1889]; Preston v. Rudd, 84 Ky. 150 [1886]; Mayor and City Council of Baltimore v. Hughes, Admr., 1 Gill & Johnson (Md.) 480, 19 Am. Dec. 243 [1829]; Power v. City of Detroit, 139 Mich. 30, 102 N. W. 288 [1905]; Rogers v. City of St. Paul, 22 Minn. 494 [1876]; Voigt v. City of Detroit, 123 Mich. 547, 82 N. W. 253 [1900]; Barber Asphalt Paving Company v. French, 158 Mo.

534, 54 L. R. A. 492, 58 S. W. 934 [1900]; Kansas City Grading Co. v. Holden, 107 Mo. 305, 17 S. W. 798 [1891]; City of Kansas to the use of Adkins v. Richards, 34 Mo. App. 521 [1889]; Seibert v. Tiffany, 8 Mo. App. 33 [1879]; Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734 [1903]; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66 [1906]; Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (affirmed as Paulsen v. Portland, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]); City of Allentown v. Hower, 93 Pa. St. (12 Norris) 332 [1880]; Wray v. The Mayor of Pittsburgh for use, etc., 46 Pa. St. 365 [1863]; Adams v. Fisher, 75 Tex. 657, 6 S. W. 772 [1890]; (overruled in Hutchinson v. Storrie, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]); Allen v. Drew, 44 Vt. 174 [1872]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892]; Teegarden v. City of Racine, 56 Wis. 545, 14 N. W. 614 [1883].

⁶ Alexander v. City of Tacoma, 35 Wash. 366, 77 Pac. 686 [1904]; Lewis v. Seattle, 28 Wash. 639, 69 Pac. 393 [1902]; Tacoma Bituminous Paving Co. v. Sternberg, 26 Wash. 84, 66 Pac. 121 [1901]; Potter v. City of Whatcom, 25 Wash. 207, 65 Pac. 197 [1901]; McNamee v. City of Tacoma, 24 Wash. 591, 64 Pac. 791 [1901]; Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900]; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898]; New Whatcom v. Bellingham Bay Improvement Company, 18 Wash. 181, 51 Pac. 360 [1897]; City of New Whatcom v. Bellingham Bay Improvement Co., 16 Wash. 131, 47 Pac. 236 [1896]. See § 927 *et seq.*

dition of the law in most jurisdictions, since it seems to be generally held that while the determination of the public corporation or public officials is *prima facie* valid and conclusive, its doctrine may be attacked if fraud or mistake can be clearly shown,⁷ or if fraud or oppression shall be shown to exist.⁸ Since public corporations have no power to levy local assessments except as authorized by statute, it follows that if the legislature has provided a method of apportionment, the public corporation which attempts to levy an assessment under such statute must comply in at least a substantial manner with the method of apportionment thus fixed by statute.⁹ The absence of an express provision as to the method of apportionment must be presumed to show that the legislature intends to leave the method of apportionment to the sound discretion of the public corporation. It cannot be presumed that the legislature intended to enact a nullity by providing by statute for the levying of an assessment and omitting therein all provision as to the method of apportionment. If the statute authorizes a city or other public corporation to levy a local assessment but does not prescribe the method in which such assessment is to be apportioned, the city may apportion the assessment in any manner which would be fair and legal if authorized by statute.¹⁰ Under such circumstances an appor-

⁷ State of Minnesota, Cunningham, v. Board of Public Works of City of St. Paul, 27 Minn. 442, 8 N. W. 161 [1881]; Rogers v. City of St. Paul, 22 Minn. 494 [1876]. Such determination is said to be "conclusive except in case of fraud or demonstrable mistake." State ex rel. Lewis v. District Court of Ramsey County, 33 Minn. 164, 22 N. W. 295 [1885]; (citing State of Minnesota ex rel. Cunningham v. District Court of Ramsey County, 29 Minn. 62, 11 N. W. 133 [1882]; State of Minnesota ex rel. Cunningham v. Board of Public Works of City of St. Paul, 27 Minn. 442, 8 N. W. 161 [1881]; Carpenter v. City of St. Paul, 23 Minn. 232 [1876]; Rogers v. City of St. Paul, 22 Minn. 494 [1876]).

⁸ City of Toledo v. Ford, 20 Ohio C. C. 290 [1900].

⁹ People of the State of California v. Lynch, 51 Cal. 15, 21 Am. Rep. 677

[1875]; Bibel v. The People for use of the City of Bloomington, 67 Ill. 172 [1873]; Lill v. City of Chicago, 29 Ill. 31 [1862]; Overshiner v. Jones, 66 Ind. 452 [1879]; Fitzgerald v. City of Sioux City, 125 Iowa 396, 101 N. W. 268 [1904]; State, Speer, Pros. v. City of Passaic, 38 N. J. L. (9 Vr.) 168 [1875]; State, Little, Pros. v. Mayor and Common Council of Newark, 36 N. J. L. (7 Vr.) 170 [1873]; State, Zabriskie, Pros. v. Mayor and Common Council of Hudson City, 29 N. J. L. (5 Dutch.) 115 [1860]; State, Malone, Pros. v. Mayor, etc., of Jersey City, 28 N. J. L. (4 Dutch.) 500 [1860]; Blanchard v. City of Barre, 77 Vt. 420, 60 Atl. 970 [1905].

¹⁰ Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 781 [1885]; Douglass v. Craig, 4 Kan. App. 99, 46 Pac. 197 [1896].

tionment according to the value of the land without regard to the value of the improvements thereon was held to be proper.¹¹ A general ordinance which provides the method of apportioning an assessment or special tax may be adopted by reference into subsequent ordinances which provide for specific improvements.¹² If by statute it is provided that the property owner may have a hearing at confirmation upon the question whether his property is assessed for more than its proportionate share of the cost of improvement and whether the assessment against his property exceeds the benefits the property owner is restricted to a hearing upon these two questions and cannot have a hearing upon the question whether the assessments against other property are greater or less proportionately than the assessment against his property.¹³ The justice or injustice of other assessments is a question between the public corporation levying the assessment and the other property owners as long as the assessment of the property owner complaining is not thereby affected. If the entire cost is assessed upon the property owners and improper items are included, the assessment is invalid, even though an amount exceeding the cost of the improper items was assessed against the city as the owner of property benefited by the improvement.¹⁴

§ 671. Power of public boards to determine existence and amount of benefits.

Power to determine the question of the existence, amount and apportionment of benefits may be conferred upon the board of public works or some similar body. Under some statutes their action is ordinarily final,¹ unless fraud is shown to

¹¹ *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885].

¹² *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367 [1898].

¹³ *Clark v. City of Chicago*, 166 Ill. 84, 46 N. E. 730 [1897]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876]; *Southeim v. City of Chicago*, 56 Ill. 429 [1870].

¹⁴ *In the Matter of Livingston*, 121 N. Y. 94, 24 N. E. 290 [1890].

¹ *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905]; *State ex rel. Wheeler v. District Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900]; *State of Minnesota ex rel. Cunningham v. District Court of Ramsey County*, 29 Minn. 62, 11 N. W. 133 [1882]; *In the Matter of the Application of Church*, 92 N. Y. 1 [1883]. Such board cannot reverse its own determination after it is announced; *Richards v. Low*, 77 N. Y. S. 1102, 38 Misc. Rep. 500 [1902].

exist,² or unless the proceedings show on their face a failure to comply with the terms of the statute under which such power exists,³ or a clear mistake.⁴

§ 672. Determination by commissioners of existence and amount of benefits.

It is frequently provided by statute that commissioners chosen for that purpose shall determine the question of the existence, amount and apportionment of benefits as questions of fact. Under such statutes the determination of such commissioners upon questions of fact is often said to be final and conclusive,¹ or conclusive in the absence of fraud.² In other jurisdictions the determination of the commissioners upon this question is *prima facie* valid, though not conclusively so.³ Their determination is said to be final and conclusive in the absence of fraud or of abuse of the discretion conferred upon them.⁴ If the report of the

² State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183.

³ State v. District Court of Ramsey County, 95 Minn. 503, 104 N. Y. 553 [1905]; State of Minnesota ex rel. Cunningham v. District Court of Ramsey County, 29 Minn. 62, 11 N. W. 133 [1882].

⁴ State ex rel. Wheeler v. District Court of Ramsey County, 80 Minn. 293, 83 N. W. 183 [1900].

¹ Commissioners of Sewers v. Newburg, 3 Keb. 827 (29 Car. II.); Bauman v. Ross, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (reversing District of Columbia v. Armes, 8 App. D. C. 393 [1896]; Bauman v. Ross, 9 App. D. C. 260 [1896]; Abbott v. Ross, 9 App. D. C. 289 [1896]); City of Jacksonville v. Hamill, 178 Ill. 235, 52 N. E. 949 [1899]; Galt v. City of Chicago, 174 Ill. 605, 51 N. E. 653 [1898]; Latham v. Village of Wilmette, 168 Ill. 153, 48 N. E. 311 [1897]; Billings v. City of Chicago, 167 Ill. 337, 47 N. E. 731 [1897]; Jones v. Town of Lake View, 151 Ill. 663, 38 N. E. 688 [1894]; Walters v. Town of Lake, 129 Ill. 23, 21 N. E. 556 [1890]; Board of Commissioners of

Monroe County v. Harrell, 147 Ind. 500, 46 N. E. 124 [1896]; Warren v. City of Grand Haven, 30 Mich. 24 [1874]; *In re Munn*, 165 N. Y. 149, 58 N. E. 881 [1900]; Voght v. City of Buffalo, 133 N. Y. 483, 31 N. E. 340 [1892]; Hoffeld v. City of Buffalo, 130 N. Y. 387, 29 N. E. 747 [1892]; *In the Matter of Anderson*, 39 Howard 184 [1870]; Lynn v. City of Brooklyn, 28 Barb. 609 [1858]; Meserole v. Mayor and Common Council of Brooklyn, 8 Paige's Chan. 198 [1840]; Lewis v. Laylin, 46 O. S. 663, 23 N. E. 288 [1899]; Meissner v. City of Toledo, 31 O. S. 387 [1877]; Commonwealth for use, etc. v. Woods, 44 Pa. St. (8 Wright) 113 [1862].

² Betts v. City of Naperville, 214 Ill. 380, 73 N. E. 752 [1905].

³ Driver v. Moore, 81 Ark. 80, 98 S. W. 734 [1906]; Overstreet v. Levee District No. 1 of Conway County, 80 Ark. 462, 97 S. W. 676 [1906]; Ricketts v. Spraker, 77 Ind. 371 [1881].

⁴ Jenks v. City of Chicago, 48 Ill. 296 [1868]; Blanchet v. Municipality No. 2, 13 La. 322 [1839]; *In re City of Seattle*, — Wash. —, 91 Pac. 548 [1907]; *In re Westlake*

proceedings of the commissioners shows that their result was reached by the application of an incorrect rule as to the determination and amount of benefits, their proceedings are ordinarily subject to review for such reason.⁵ Under statutes which provide for an appeal from the action of the commissioners in determining and apportioning assessments, the action of the commissioners is ordinarily regarded as *prima facie* valid, but not conclusive.⁶ The determination of the commissioners as to what property is benefited may be made, by statute, final after confirmation, while an appeal may be taken as to the apportionment.⁷

§ 673. Determination by court of existence and amount of benefits.

Under some assessment statutes the question of the existence, amount and apportionment of benefits is to be submitted in the first instance to a court as one of the necessary steps in levying the assessment. Under such statutes the determination of the court upon these questions is ordinarily final and conclusive.¹

§ 674. *Prima facie* validity of apportionment.

Under many statutes the burden of proof as to the invalidity of an assessment is upon the party attacking the same if the

Avenue, 40 Wash. 144, 82 Pac. 279 [1905].

⁵ Berdel v. City of Chicago, 217 Ill. 429, 75 N. E. 386 [1905]; State, Coward, Pros. v. Mayor, etc., of North Plainfield, 63 N. J. L. (34 Vr.) 61, 42 Atl. 805 [1899]; State, Van Horne, Pros. v. Town of Bergen, 30 N. J. L. (1 Vr.) 307 [1863]; State, Culver, Pros. v. Town of Bergen in the County of Hudson, 29 N. J. L. (5 Dutch.) 266 [1861]; Elwood v. City of Rochester, 43 Hun, 102 [1887]; Morewood Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893]. The fact that the assessment is excessive does not show that the principle is erroneous. County of Monroe v. City of Rochester, 154 N. Y. 570, 49 N. E. 139 [1898].

⁶ Wathen v. Allison Ditch District

No. 2, 213 Ill. 138, 72 N. E. 781 [1904]; Topliff v. City of Chicago, 196 Ill. 215, 63 N. E. 692 [1902]; Pike v. City of Chicago, 155 Ill. 656, 40 N. E. 567 [1895]; Green v. City of Springfield, 130 Ill. 515, 32 N. E. 602 [1890]; *In re* Opening of East 176th Street, 83 N. Y. S. 433, 85 App. Div. 347 [1903]; *In the Matter of* Opening Grant Avenue, 175 N. Y. 509, 67 N. E. 1083 [1903]; (affirming 78 N. Y. S. 737, 76 App. Div. 87); *In re* Westlake Avenue, 40 Wash. 144, 82 Pac. 279 [1905].

⁷ Dickson v. City of Racine, 61 Wis. 545, 21 N. W. 620 [1884].

¹ Barber Asphalt Paving Company v. Edgerton, 125 Ind. 455, 25 N. E. 436 [1890]; Heick v. Voight, 110 Ind. 279, 11 N. E. 306 [1886]; State ex rel. Stotts v. Wall, 153 Mo. 216, 54 S. W. 465 [1899].

proceedings appear on their face to be regular.¹ There is at least a presumption in favor of the determination by the city as to the amount and apportionment of benefits if the proceedings show that the city has complied with the statutes whereby power is conferred upon it.² Such presumption seems to be conclusive if the power of the city has been honestly exercised in making such determination,³ if fraud is not shown to exist,⁴ and if the injustice of the assessment in question is not clearly shown.⁵ If an apportionment is made by the properly authorized officials and the proceedings upon their face purport a compliance with the statute controlling, the apportionment will be presumed to be a proper and valid one.⁶ It is not necessary that the method in which the assessment is calculated should appear affirmatively.⁷ In some cases the determination of the city upon the question of the amount and apportionment of benefits has been attacked successfully.⁸ These cases, however, can nearly all be explained upon the theory that the injustice of the assessment in the par-

¹ *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899 [1889]; *Dann v. Woodruff*, 51 Conn. 203 [1883]; *In the Matter of Merriam*, 84 N. Y. 596 [1881].

² *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687 [1896]; *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899 [1889]; *City of Louisville v. Bitzer*, 115 Ky. 359, 61 L. R. A. 434, 73 S. W. 1115, 24 Ky. Law Rep. 2263 [1903]; *State ex rel. Kech v. District Court of Ramsey County*, 98 Minn. 63, 107 N. W. 726 [1906]; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1895]; *Turnquist v. Cass County Drainage Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902]; *Taylor v. Wapakoneta*, 26 Ohio Cir. Ct. R. 285 [1904]; *Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (*Affirmed as Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]).

³ *Oregon & California R. R. Co. v. City of Portland*, 25 Or. 229, 22 L. R. A. 713, 35 Pac. 452 [1894].

⁴ *Davies v. City of Saginaw*, 87 Mich. 439, 49 N. W. 667 [1891]; *Turnquist v. Cass County Drainage*

Commissioners, 11 N. D. 514, 92 N. W. 852 [1902].

⁵ *City of Pueblo v. Robinson*, 12 Colo. 593, 21 Pac. 899 [1889]; *People, etc., ex rel. Butts v. Common Council of City of Rochester*, 5 Lansing (N. Y.) 142 [1871]; *Paulson v. City of Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (*affirmed as Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]).

⁶ *DeKoven et al. v. City of Lake View*, 129 Ill. 399, 21 N. E. 813 [1890]; 155 Ill. 545, 40 N. E. 485 [1895]; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1005 [1901]; *Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 42 N. E. 1009 [1895]; *Bowen v. Hester*, 143 Ind. 511, 41 N. E. 330 [1895]; *Morrow v. Geeting*, 15 Ind. App. 358, 41 N. E. 848, 44 N. E. 59 [1896]; *State, Britton, Pros. v. Blake*, 35 N. J. L. (6 Vr.) 208 [1871]; *City of Toledo for use v. Beaumont*, 3 Ohio N. P. 287 [1895].

⁷ *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687 [1896].

⁸ *Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904]; *Greeley v. The People of the State of Illinois*, 60

ticular case was so clearly shown that even a strong *prima facie* presumption in favor of the validity of the action of the city could not sustain such assessment. It has been said that the determination of the city is not conclusive as to the amount of benefits, but that it is conclusive as to the apportionment between the tracts assessed.⁹ The legislature may, of course, provide for an appeal from the action of the city. Upon such appeal the determination of the city, though *prima facie* valid, is not, of course, conclusive.¹⁰

§ 675. Power of court to review existence and amount of benefits.

It may be provided by statute that the action of the body levying and apportioning the assessment may be reviewed by some specified court or courts.¹ The statute which confers this power of review may also provide that the action of the trial court shall be final and conclusive on the question of the amount of benefits and that neither appeal nor error shall lie therefrom.² Even under such a statute appeal or error will lie if the trial court refuses to inquire into the apportionment of the assessment.³ Under such a statute it has been said that a preliminary

Ill. 19 [1871]; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876]; *City of Asheville v. Wachovia Loan & Trust Company*, 143 N. C. 360, 55 S. E. 800 [1906]; *Walsh v. Sims*, 65 Ohio St. 211, 62 N. E. 120 [1901]; *Friedrich v. City of Milwaukee*, 118 Wis. 254, 95 N. W. 126 [1903]; *State ex rel. Moore v. Mayor and Common Council of Ashland*, 88 Wis. 599, 60 N. W. 1001 [1894].

⁹ *Taylor v. Wapakoneta*, 26 Ohio Cir. Ct. R. 285 [1904].

¹⁰ *Dickson v. City of Racine*, 61 Wis. 545, 21 N. W. 620 [1884]; *Tee-garden v. Racine*, 56 Wis. 545, 14 N. W. 614 [1883].

¹ *Berdel v. City of Chicago*, 217 Ill. 429, 75 N. E. 386 [1905]; *Wathen v. Allison Ditch Dist. No. 2*, 213 Ill. 138, 72 N. E. 781 [1904]; *Graham v. City of Chicago*, 187 Ill. 411, 58 N. E. 393 [1900]; *Middaugh v. City of Chicago*, 187 Ill. 230, 58 N. E. 459 [1900]; *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824

[1900]; *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900]; *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86 [1890]; *Barber Asphalt Paving Co. v. Gaar*, 115 Ky. 334, 73 S. W. 1106, 24 Ky. Law Rep. 2227 [1903]; *Opening of Park Avenue*, Appeal of Luce Bros., 83 Pa. St. (2 Norris) 175 [1876]; *In the Matter of Pike Street Seattle*, 42 Wash. 551, 85 Pac. 45 [1906].

² *Berdel v. City of Chicago*, 217 Ill. 429, 75 N. E. 386 [1905]; *Graham v. City of Chicago*, 187 Ill. 411, 58 N. E. 393 [1900]; *Middaugh v. City of Chicago*, 187 Ill. 230, 58 N. E. 459 [1900]; *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824 [1900]; *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900]; *Haegle v. Mallinckrodt*, 3 Mo. App. 329 [1877].

³ *Mercy Hospital v. City of Chicago*, 187 Ill. 400, 58 N. E. 353 [1900].

inquiry into the benefits is not necessary, since the owner of the property assessed may have the question of the existence and amount of such benefits reviewed by the court.⁴ If by statute the action of the body which levies and apportions the assessment is not made final and the assessment is clearly erroneous, the owner of the property assessed may obtain relief against such assessment from the courts.⁵ This is true especially where the proceedings show that the assessing body applied an erroneous principle,⁶ or abused their discretion.⁷ It is frequently provided that the courts have power to review the application of erroneous principles made by the assessing body, but not to review questions of fact passed upon by them.⁸ Matters as to which the action of the assessing body is made a finality cannot ordinarily be reviewed by the courts.⁹ While the tax bill need not show

⁴ *Graham v. City of Chicago*, 187 Ill. 411, 58 N. E. 393 [1900]; *Mid-daugh v. City of Chicago*, 187 Ill. 230, 58 N. E. 459 [1900].

⁵ *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86 [1890]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *City of St. Joseph v. Crowther*, 142 Mo. 155, 43 S. W. 786 [1897]; *Walsh v. Sims*, 65 Ohio St. 211, 62 N. E. 120 [1901]; *Opening of Park Avenue*, *Appeal of Luce Bros.*, 83 Pa. St. 175 [1876].

⁶ *Berdel v. City of Chicago*, 217 Ill. 429, 75 N. E. 386 [1905]; *State, Coward, Pros. v. Mayor, etc., of North Plainfield*, 63 N. J. L. (34 Vr.) 61, 42 Atl. 805 [1899]; *State, Van Horne, Pros. v. Town of Berger*, 30 N. J. L. (1 Vr.) 307 [1863].

⁷ *Blanchet v. Municipality No. 2*, 13 La. 322 [1839]; *In the Matter of Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905].

⁸ *In the Matter of Munn*, 165 N. Y. 149, 58 N. E. 881 [1900]; *Voght v. City of Buffalo*, 133 N. Y. 483, 31 N. E. 340 [1892]; *Hoffeld v. City of Buffalo*, 130 N. Y. 387, 29 N. E. 747 [1892]; *O'Reilly v. Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889]; *Lynn v. City of Brooklyn*, 28 Barb. 609 [1858]; *Elwood v. City of Rochester*, 43 Hun 102 [1887].

⁹ *City of Jacksonville v. Hamill*, 178 Ill. 235, 52 N. E. 949 [1899]; *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653 [1898]; *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Dickson v. Racine*, 61 Wis. 545, 21 N. W. 620 [1884]. "The claim set up on the part of the lot owner that there can be no due process of law under which an assessment can be made which does not provide for a review of such assessment and hearing by a court is not tenable. Assuming the necessity of a hearing before an assessment can be made conclusive, the law may provide for that hearing by the body which levies the assessment, and after such hearing may make the decision of that body conclusive. Although in imposing such an assessment, the common council or board of trustees may be acting somewhat in a judicial character, yet the foundation of the right to assess exists in the taxing power, and it is not necessary that in imposing an assessment there shall be a hearing before the court provided by law to give validity to such assessment. Due process of law is afforded where there is an opportunity to be heard before the body which is to make the assessment and the

the method whereby the assessment was computed, this may be inquired into in suit on the tax bill.¹⁰ An assessment which is grossly unfair in its apportionment and amount will be revised by the courts.¹¹ This is true especially where the court is by statute given power to act upon such questions. Except where the legislative determination as to the amount and apportionment of benefits, or the determination of the public corporation or specified public officials, is conclusive, the question of the existence and amount of benefits is one of fact. Accordingly, the court cannot say as a matter of law that an assessment is unjust because the assessment against certain tracts of property exceeds the assessment against other tracts.¹² Thus, it has been held that an assessment of two dollars a front foot against land immediately adjoining a park and an assessment of fifty dollars a front foot against land a mile away cannot be said as a matter of law to be an unequal apportionment.¹³ If the jury to which the question of benefits has been submitted has found that the benefit to the property owners exceeds eight hundred thousand dollars, and that the benefit to the city at large is one dollar, it has been said that the court cannot say as a matter of law that the assessment against the city is a merely nominal one.¹⁴

§ 676. Jury trial as to existence and amount of benefits.

Statutes are sometimes found in which provision is made for a jury trial upon the question of benefits at some stage of the assessment proceedings. While a trial by jury upon such question is not a constitutional right,¹ such right undoubtedly exists if conferred by statute.² The correct issue must, of course, be

legislature of a state may provide that such hearing shall be conclusive so far as the Federal Constitution is concerned." *Hibben v. Smith*, 191 U. S. 310, 321, 322, 24 S. 88 [1903]; (affirming *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]).

¹⁰ *Haegele v. Mellinckrodt*, 3 Mo. App. 329 [1877].

¹¹ *Hemingway v. City of Chicago*, 60 Ill. 324 [1871]; *City of Louisville v. Selva*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Kansas City Grading Co. v. Holden*, 32 Mo. App. 490 [1888]; *Parmelee v. Youngstown*, 43 O. S. 162, 1 N. E. 319 [1885].

¹² *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900].

¹³ *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900].

¹⁴ *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900].

¹ See § 202.

² *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897]; *Badger v. Inlet Drainage Dist.*, 141 Ill. 540, 31 N. E. 170 [1893]; *Mascall v. Comrs. Drainage District*, 122 Ill. 620, 14 N. E. 47 [1889]; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900]; *Kansas City v. Bacon*, 147

submitted to the jury. The court must lay down proper rules for the guidance of the jury in determining the question of the amount and existence of benefits. The question cannot be left to the arbitrary determination of the jury without any instructions as to the rules of law applicable thereto.³ Under some statutes the issue is whether the amount assessed upon the owner complaining is greater than his proportionate share of benefits, or in excess of the benefits conferred upon him.* Where this is the issue, the owner cannot have the question of the just proportion of the assessment of other property owners reviewed by the jury.⁵ Since no constitutional right to a jury trial in questions of this sort exists, the right of review by a jury may be denied by statute.⁶ In this connection it may be added that questions of the right of the property owner to a notice and hearing have not been discussed here, since such questions are considered elsewhere.⁷

§ 677. Assessment limited by benefits in fact.

There is a strongly marked and rapidly growing tendency both on the part of the courts and on the part of the legislature to limit the assessment to the benefits received in point of fact as distinguished from benefits fixed by legislative determination or by the determination of the public corporation or public officers authorized by the legislature to determine the existence and amount of benefits,¹ at least if the benefits as determined by the

Mo. 259, 48 S. W. 860 [1898]; *Tyler v. City of St. Louis*, 56 Mo. 60 [1874].

³ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

⁴ *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

⁵ *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

⁶ *Davis v. City of Litchfield*, 155 Ill. 384; 40 N. E. 354 [1895].

⁷ See Chapter XIV.

¹ *Schaefer v. Werling*, 188 U. S. 512, 47 L. 570, 23 S. 449 [1903]; (affirming *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149); *White v. City of Tacoma*, 109 Fed. 32 [1901]; *Bidwell v. Huff*, 103 Fed. 362 [1900]; *City Council of Montgomery v.*

Foster, 133 Ala. 587, 32 So. 610 [1901]; *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; *Bassett v. City of New Haven*, 76 Conn. 70; 55 Atl. 579 [1903]; *City of Peru v. Bartels*, 214 Ill. 515, 73 N. E. 755 [1905]; *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053 [1894]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Greeley v. The Town of Cicero*, 148 Ill. 632, 36 N. E. 603 [1894]; *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Walter v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890]; *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E.

legislature, public corporation or public officer are excessive.²

86 [1890]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Crawford v. People ex rel. Rumsey*, 83 Ill. 557 [1876]; *Greeley v. The People of the State of Illinois*, 60 Ill. 19 [1871]; *St. John v. City of East St. Louis*, 50 Ill. 92 [1869]; *Wright v. Chicago*, 46 Ill. 44 [1867]; *Wray v. Frey*, 158 Ind. 92, 62 N. E. 1004 [1901]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Board of Commissioners of Monroe County v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1896]; *Campbell v. Board of County Commissioners of Monroe County*, 118 Ind. 119, 20 N. E. 772 [1888]; *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306 [1886]; *Smith v. Duck Road Ditching Association*, 54 Ind. 235 [1876]; *Marion Bond Company v. Johnson*, 29 Ind. App. 294, 64 N. E. 626 [1902]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885]; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885]; *City of Auburn v. Paul*, 84 Me. 212, 24 Atl. 817 [1892]; *Dyar v. Farmington, Village Corporation*, 70 Me. 515 [1878]; *Mayor and City Council of Baltimore v. Hughes, Admr.*, 1 Gill & Johnson (Md.) 480, 19 Am. Dec. 243 [1829]; *Cheney v. City of Beverly*, 188 Mass. 81, 74 N. E. 306 [1905]; *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124 [1891]; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900]; *Tyler v. City of St. Louis*, 56 Mo. 60 [1874]; *Neal v. Vansickel*, 72 Neb. 200, 100 N. W. 200 [1904]; *Smith v. City of Omaha*, 49 Neb. 883, 69 N. W. 402 [1896]; *John v. Connell*, 64 Neb. 233, 89 N. W. 806 [1902]; (modifying opinion in *John v. Connell*, 61 Neb. 267); *Zahn v. Borough of Rutherford*, 72 N. J. L. (43 Vr.) 446, 60 Atl. 1123 [1905]; *Rosell, Pros. v. Mayor and Council of Neptune City*, 68 N. J. L. (39 Vr.) 509, 53 Atl. 199 [1902]; *State, Frevert, Pros. v. City of Bayonne*, 63 N. J. L. (34 Vr.) 202, 42

Atl. 773 [1899]; *State, Kohler, Pros. v. Town of Guttenberg*, 38 N. J. L. (9 Vr.) 419 [1876]; *State, Simmons, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 60 [1875]; *Village of Passaic v. State, Del., Lack. & W. R. R.*, 37 N. J. L. (8 Vr.) 538 [1875]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *State, Del., Lackawanna & Western R. R. Co., Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 137 [1874]; *State, Hoboken Land & Improvement Co., Pros. v. City of Hoboken*, 36 N. J. L. (7 Vr.) 291 [1873]; *In the Matter of Lower Chatham*, 35 N. J. L. (6 Vr.) 497 [1872]; *State, Pope, Pros. v. Town of Union, in the County of Hudson*, 32 N. J. L. (3 Vr.) 343 [1867]; *In the Matter of Albany Street*, 11 Wend. 149, 25 Am. Dec. 618 [1834]; *Shoemaker v. City of Cincinnati*, 68 Ohio S. 603, 68 N. E. 1 [1903]; *Walsh v. Sims*, 65 Ohio St. 211, 62 N. E. 120 [1901]; *Walsh v. Barron*, 61 O. S. 15, 76 Am. St. Rep. 354, 55 N. E. 164 [1899]; *Well v. City of Cincinnati*, 45 O. S. 407, 15 N. E. 196 [1887]; *Weston v. Commissioners of Hamilton Co.*, 6 Ohio C. C. 641 [1892]; *Queen City Foundry Co. v. City of Cincinnati*, 8 Ohio N. P. 167 [1901]; *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908]; *King v. Portland*, 38 Or. 402, 52 L. R. A. 812, 63 Pac. 2 [1900]; *City of Erie v. Russell*, 148 Pa. St. 384, 23 Atl. 1102 [1892]; *Opening of Park Avenue, Appeal of Luce Bros.*, 83 Pa. St. (2 Norris) 175 [1876]; *Hutchison v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]; *Allen v. Drew*, 44 Vt. 174 [1872]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Watkins v. City of Milwaukee*, 52 Wis. 98, 8 N. W. 823 [1881].

² *Wathen v. Allison Ditch Dist.*

Thus, an estimate of benefits where land is taken which attempts to charge that part of the land which is not taken with an amount equal to the award of damages for that part which is taken and injury to the residue, is invalid as not based upon the benefits received by the improvement.³ So an assessment which imposes almost the exact cost of the work upon the abutting property on the basis of frontage without any award for damages, although deep cuts are made in front of some lots, and opposite others the street is filled to a grade considerably above the natural level of the land, is invalid as not based upon benefits.⁴ An assessment in which a certain percentage of the original assessment which was apportioned according to benefits is added to such assessments in order to produce a fund sufficient to pay for the cost of the improvement has been held to be invalid, since such addition is made without any inquiry as to whether benefits in fact exist up to such amount.⁵ If the legislature has provided a method in which the question of the amount of benefits is to be raised,⁶ as by appeal to specified officials,⁷ the property owner who wishes to complain of his assessment as being in excess of the benefits conferred must raise the question in the way indicated by the legislature. If he omits to take advantage of the remedy provided by statute he cannot subsequently appeal to the courts.⁸ In jurisdictions in which it is denied that local assessments are based upon the theory of benefits, it is not, of course, necessary that the assessments should be limited to the benefits actually conferred.⁹ This view has been held by the Supreme Court of Iowa.¹⁰ The Supreme

No. 2, 213 Ill. 138, 72 N. E. 781 [1904]; Mayor and City Council of Baltimore v. Johns Hopkins Hospital, 56 Md. 1 [1880].

³ Berdel v. City of Chicago, 217 Ill. 429, 75 N. E. 386 [1905].

⁴ Kersten v. City of Milwaukee, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103 [1900].

⁵ Opening of Park Ave., Appeal of Luce Bros., 83 Pa. St. (2 Norris) 175 [1876].

⁶ See § 1027 *et seq.*; § 1347 *et seq.*

⁷ See § 1027 *et seq.*; § 1347 *et seq.*

⁸ Annie Wright Seminar v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900]; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898].

⁹ Webster v. City of Fargo, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; (affirmed Webster v. City of Fargo, 181 U. S. 394, 45 L. 912, 21 S. 623, 645 [1901]); Rolph v. City of Fargo, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898].

¹⁰ Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898]; Dewey v. City of Des Moines, 101 Ia. 416, 70 N. W. 605 [1897]; City of Muscatine v. Chicago, Rock Island & Peoria Ry. Co., 88 Ia. 291, 55 N. W. 100 [1893]; Gatch v. City of Des Moines, 63 Ia. 718, 18 N. W. 310; Morrison v. Hershire, 32 Ia. 271 [1871]; Warren v. Henly, 31 Ia. 31 [1870].

Court of the United States has declined to reverse the Supreme Court of Iowa on the ground that this view is erroneous, since in the particular case the assessment did not appear to be excessive. The Supreme Court of the United States has reversed a case in which the view has been expressed, but solely on the ground that the Iowa court erred in rendering a personal judgment for the assessment against a non-resident.¹¹ Subsequently the legislature of Iowa has specifically provided by statute that assessments must be limited to the benefits conferred by improvement.¹² Drainage assessments have been said in New Jersey not to be necessarily limited to the benefits conferred by the improvement.¹³ This view is contrary to that entertained by the New Jersey courts with reference to assessments generally.¹⁴ If justifiable at all it can be sustained only on the theory that drainage assessments are not levied on the theory of benefits but on the theory that the owner of land which needs drainage and is a menace to public health can be compelled to drain it or to pay the cost thereof.

§ 678. Value of land as limit of assessment.

If an assessment based on the theory of benefits exceeds in amount the value of the property upon which the assessment is levied, this has been held to show conclusively that the assessment exceeds the amount of benefits conferred by the improvement for which the assessment is levied.¹ Such an assessment is said to amount to confiscation.² Where the boundary of an assessment district divides a lot, an assessment greater than the value of that part of the lot within the assessment district, but

¹¹ *Dewey v. Des Moines*, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899]; (reversing *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897]).

¹² *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa 358, 106 Am. St. Rep. 311, 67 L. R. A. 408, 101 N. W. 141 [1904].

¹³ In the *Matter of the Drainage of the Great Meadows on the Pequett River*, 42 N. J. L. (13 Vr.) 553 [1880]; (affirmed without opinion, *Hoagland v. State*, *Simonton*, *Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]; which was affirmed in *Wurts v.*

Hoagland, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]).

¹⁴ See §§ 118, 651.

¹ *Zoeller v. Kellogg*, 4 Mo. App. 165 [1877].

² *Otter v. Barber Asphalt Pav. Co.* — Ky. —, 96 S. W. 862, 29 Ky. L. R. 1157 [1906]; *Pfaffinger v. Kremer*, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. R. 2368 [1903]; *City of Louisville v. Bitzer*, 115 Ky. 359, 61 L. R. A. 434, 73 S. W. 1115, 24 Ky. Law Rep. 2263 [1903]; *James v. Louisville (Ky.)*, 40 S. W. 912, 19 Ky. L. R. 447, *Preston v. Rudd*, 84 Ky. 156, 7 Ky. L. R. 806 [1886];

less than the value of the entire lot, has been held to be void.³ The value of the land, if divided into lots for residence and business purposes, if greater than its value when undivided, is to be taken to determine whether the assessment exceeds its value.⁴ However, the fact that the assessment upon land is greater than its valuation as appraised for the purpose of general taxation, does not in the absence of special statute establish the fact that such assessment exceeds the benefits conferred.⁵ In Kentucky the theory that assessments must be limited to the amount of the benefits conferred and apportioned in accordance with such benefits was at one time strongly insisted upon.⁶ The modern view entertained by the Kentucky courts, however, is that an assessment may be levied irrespective of the existence of benefits as a fact as long as the assessment does not equal or exceed the value of the property assessed.⁷

§ 679. Restrictions on amount of assessment.

As long as the amount of the assessment does not exceed the benefits conferred upon the property by the improvement for which the assessment is levied, the property owner has no just cause of complaint upon the question of the amount of the assessment, in the absence of some special statute restricting the amount for which the assessment may be levied,¹ even under a constitutional provision requiring the legislature to restrict the powers of public corporations with reference to local assessments so as to prevent abuses therein.² A statutory or constitutional provision restricting taxation to a certain rate, *prima facie* refers to general taxation only and not to assessments for improvements which confer a special benefit,³ or for doing work which it

Broadway v. McAtee, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; Louisville v. Louisville Rolling Mills, 66 Ky. (3 Bush.) 416, 96 Am. Dec. 243 [1867].

³ Pfaffinger v. Kremer, 115 Ky. 498, 74 S. W. 238, 24 Ky. Law. Rep. 2368 [1903].

⁴ Duker v. Barber Asphalt Pav. Co., (Ky.), 25 Ky. Law Rep. 135, 74 S. W. 744 [1903].

⁵ In the Matter of Sackett, Douglas and De Graw Streets, 74 N. Y. 95 [1878].

⁶ Howell v. Bristol, 71 Ky. (8 Bush.) 493 [1871].

⁷ Otter v. Barber Asphalt Pav. Co., — Ky. —, 96 S. W. 862, 29 Ky. L. R. 1157 [1906].

¹ Taylor v. Boyd, 63 Tex. 533 [1885]; Dean v. Borchsenius, 30 Wis. 236 [1872].

² Dean v. Borchsenius, 30 Wis. 236 [1872].

³ Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898]; Morrison v. Morey, 146 Mo. 543, 48 S. W. 629 [1898]; Gray v. Bowles, 74 Mo.

is the legal duty of the land-owner to do.* In some jurisdictions, however, it is provided by specific statutory enactment that the amount of the assessment cannot exceed a specified per cent. of the value of the property to be assessed. Since there is no authority to assess except under a statutory grant of power, full effect must be given to the provisions of such statutes. An assessment cannot be levied in excess of the prescribed percentage.⁵ What this percentage shall be is a question resting entirely in the discretion of the legislature. Under some statutes the limit is fifty per cent.;⁶ under others it is twenty-five per cent.;⁷ and

419 [1881]; *Baldwin v. City of Oswego*, 2 Keyes' Ct. App. 132 [1865]. See § 47.

⁴ *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898].

⁵ *Norton v. Fisher*, 33 Ind. App. 132, 71 N. E. 51 [1903]; *Corey v. City of Ft. Dodge*, 133 Iowa 666, 111 N. W. 6 [1907]; *Henning v. Stengel*, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64 [1902]; *Neff v. Covington Stone and Sand Co.*, 108 Ky. 457, 462, 55 S. W. 697, 56 S. W. 723 [1900]; *Corliss v. Village of Highland Park*, 132 Mich. 152, 93 N. W. 254, 93 N. W. 610, 95 N. W. 416 [1903]; *Wolford v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892]; *Allen v. Krenning*, 23 Mo. App. 561 [1886]; In the Matter of the Petition of Meade, 74 N. Y. 216 [1878]; In the Matter of the Petition of the Second Avenue Methodist Episcopal Church, 66 N. Y. 395 [1876]; *In re Mayor, etc., of City of New York*, 83 App. Div. 513, 82 N. Y. S. 417 [1903]; In the Matter of the Petition of Adams, 13 Hun. (N. Y.) 355 [1878]; *Methodist Episcopal Church of Harlem v. Mayor, etc., of the City of New York*, 55 Howard (N. Y.) 57 [1877]; *Birdseye v. Village of Clyde*, 61 Ohio St. 27, 55 N. E. 169 [1899]; (reversing *Birdseye v. Village of Clyde*, 14 Ohio C. C. 510 [1897]); *City of Salem v. Mulford*, 22 Ohio C. C. 397 [1899]; *Conner v. City of Cincinnati*, 11 Ohio C. C. 336 [1896]; (affirmed 55 O. S. 82); *Charleston v. Werner*,

38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33 [1892]; *Ferry v. City of Tacoma*, 34 Wash. 652, 76 Pac. 277 [1904].

⁶ In the Matter of the Petition of Meade, 74 N. Y. 216 [1878]; In the Matter of the Petition of the Second Avenue Methodist Episcopal Church, 66 N. Y. 395 [1876]; *In re Avenue D, in City of New York*, 106 N. Y. S. 889 [1907]; In the Matter of the Petition of Adams, 13 Hun. (N. Y.) 355 [1878]; *Methodist Episcopal Church of Harlem v. Mayor, etc., of the City of New York*, 55 Howard (N. Y.) 57 [1877]; *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33 [1892]; *Ferry v. City of Tacoma*, 34 Wash. 652, 76 Pac. 277 [1904].

⁷ *Corey v. City of Ft. Dodge*, 133 Iowa 666, 111 N. W. 6 [1907]; *Henning v. Stengel*, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64 [1902]; *Neff v. Covington Stone and Sand Company*, 108 Ky. 457, 55 S. W. 697, 56 S. W. 723 [1900]; *Corliss v. Village of Highland Park*, 132 Mich. 152, 93 N. W. 254, 93 N. W. 610, 95 N. W. 416 [1903]; *Allen v. Krenning*, 23 Mo. App. 561 [1886]; *City of Salem v. Mulford*, 22 Ohio C. C. 397 [1899]; *Conner v. City of Cincinnati*, 11 Ohio C. C. 336; (affirmed 55 O. S. 82 [1896]); *Birdseye v. Village of Clyde*, 61 Ohio St. 27, 55 N. E. 169 [1899]; (reversing *Birdseye v. Village of Clyde*, 14 Ohio C. C. 510 [1897]).

under other statutes it is as low as ten per cent.⁸ These statutes operate in the nature of exemption statutes, relieving the realty from assessment except within the limits prescribed.⁹ Thus, under some statutes property which has been assessed up to twenty-five per cent. of its value to defray the cost of local improvements is exempt for five years thereafter from further local assessment.¹⁰ By specific statutory provision assessments for certain types of public improvements may be restricted to a certain per cent. of the valuation of the property, while assessments for other types of improvements may not be so restricted.¹¹ Questions of this sort are entirely within the discretion of the legislature.

§ 680. Restrictions based on actual value of property.

Under some statutes the percentage to which the amount of local assessments is restricted is a given per cent. of the value of the property.¹ By statute the percentage may be estimated upon the value of the property after the improvement is completed.² In the absence of an effective constitutional provision for uniformity of legislation with reference to cities of different classes, the percentage may by statute be in some cities a percentage of the value after the improvement, but in others a percentage of the value of the property as assessed for taxation.³ If the amount of the assessment is limited to a per cent. of the actual value of the property, a special appraisalment in the as-

⁸ *Norton v. Fisher*, 33 Ind. App. 132, 71 N. E. 51 [1903].

⁹ *Allen v. Krenning*, 23 Mo. App. 561 [1886]; *Pretzinger v. Sunderland*, 63 Ohio St. 132, 57 N. E. 1097 [1900].

¹⁰ *Pretzinger v. Sunderland*, 63 Ohio St. 132, 57 N. E. 1097 [1900].

¹¹ *Norton v. Fisher*, 33 Ind. App. 132, 71 N. E. 51 [1903]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *Wolfert v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892]; *Heman v. Wolff*, 33 Mo. App. 200 [1888]; In the Matter of the Petition of Cram to Vacate an Assessment, 69 N. Y. 452 [1877]; *Sorchan v. City of Brooklyn*, 62 N. Y. 339 [1875]; *Hunt v. Hunter*, 14 Ohio C. C. 503 [1897]; *Conner v. City of*

Cincinnati, 11 Ohio C. C. 336; (affirmed 55 O. S. 82 [1896]); *City of Toledo for the Use of Gates v. Lake Shore & Michigan Southern Railway Company*, 4 Ohio C. C. 113 [1889]; *Macomber v. Hunter*, 7 Ohio N. P. 385 [1900]; *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33 [1892].

¹ *Stutsman v. City of Burlington*, Iowa, 127 Ia. 563, 103 N. W. 800 [1905]; *City of Toledo v. Marlow*, 29 Ohio C. C. 298 [1906]; (affirmed, *City of Toledo v. Marlow*, 75 O. S. 574, 80 N. E. 1124 [1906]).

² *City of Cincinnati v. Oliver*, 31 O. S. 371 [1877].

³ *City of Cincinnati v. Oliver*, 31 O. S. 371 [1877].

assessment proceeding is necessary in order to determine the value thereof.⁴ Such appraisalment is not, however, necessary in condemnation proceedings in which the amount of damages and benefits does not depend upon the value of the property.⁵ Under some statutes it has been held that failure under such circumstances to make a special appraisalment of the property assessed invalidates the assessment;⁶ while under other statutes it seems to be held that if no appraisalment is made the court has power to determine the value of the property, and if it finds that the assessment does not exceed the specified per cent. of the value thereof, it must hold the assessment to be valid.⁷ Under a statute providing that special assessments shall not exceed twenty-five per cent. of the actual value of the property assessed at the time of the levy, the council is not required to hear evidence as to the value of the property assessed.⁸ It is not necessary that commissioners in making their report should show the value placed by them upon each lot of land.⁹ If they state therein in general terms that in no case have they exceeded one-half of the value of the lot assessed in levying assessments, this is sufficient.¹⁰ A recital in the report of the commissioners that they have not exceeded in their assessment one-half of the value of the land to be assessed as valued by them is not conclusive where the report

⁴ *City of Chicago v. Burtice*, 24 Ill. 489 [1860]; *Palmer's Petition*, 1 Abb. Pr. 30 [1865]; *In re Mayor*, etc., of City of New York, 83 App. Div. 513, 82 N. Y. S. 417 [1903]; *Parmelee v. Youngstown*, 43 O. S. 162, 1 N. E. 319 [1885]; *Ayers v. Toledo*, 26 Ohio Cir. Ct. R. 767 [1904].

⁵ *City of Chicago v. Wheeler*, 25 Ill. 478, 79 Am. Dec. 342 [1861].

⁶ *In re Mayor*, etc., of City of New York, 83 App. Div. 513, 82 N. Y. S. 417 [1903].

⁷ *Ayers v. Toledo*, 26 Ohio Cir. Ct. R. 767 [1904].

⁸ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

⁹ *In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York*, 178 N. Y. 421, 70 N. E. 924 [1904]; (reversing *In re Opening of Whitlock Avenue*, 85 N. Y. S. 650).

¹⁰ *In the Matter of the Application of the Mayor, Aldermen and Commonalty of the City of New York*, 178 N. Y. 421, 70 N. E. 924 [1904]; (reversing *In re Opening of Whitlock Avenue*, 85 N. Y. S. 650 [1898]); *In re Avenue D in City of New York*, 106 N. Y. S. 889 [1907]. If the report does not show whether the value of the property is determined as of the date when the title vested in the city or of the date of the report, the objectors should move to send the report back for amendment to show such fact; and if such motion is not made the assessment cannot be attacked for such defect. *In re Avenue D in City of New York*, — N. Y. —, 84 N. E. 956 [1908]; (affirming order in 106 N. Y. S. 889, 122 App. Div. 416 [1907]).

shows that such limitation has been exceeded.¹¹ If the value of the property is to be determined by the commissioners who levy the assessment, their judgment, if honest, will not be disturbed.¹² Their estimate of the value of the property may, however, be so far in excess of the real value thereof as to raise the presumption that the commissioners intentionally overestimated the value of the property. In such cases the court may hear evidence as to the real value of the property and may reduce the amount of the assessment if it finds that the property was intentionally overvalued.¹³

§ 681. Restrictions based on tax valuation.

Under some statutes it is provided that the per cent. specified must be estimated upon the valuation of the property assessed, made for purposes of general taxation.¹ Under such statutes it is usually the last valuation at which such property has been valued for taxation and which is in effect when the levy is made, which is to be taken as the basis for determining the amount of the assessment.² Under a statute which provides, "in no case shall the whole amount to be levied by special assessment upon any lot or premises for any one improvement exceed twenty-five per cent. of the value of such lot or land as valued and assessed for state and county taxation in the last preceding ward taxing roll," it has been held that the last general roll on which taxes for state, county and school purposes have been spread must be taken and not the current roll, even if approved by the board of review.³ The valuation for the year in which the assessment is levied, which is still open for cor-

¹¹ *In re Mayor, etc., of City of New York*, 93 N. Y. S. 84, 103 App. Div. 496 [1905].

¹² *City of Chicago v. Burtice*, 24 Ill. 489 [1860]; (followed in *City of Chicago v. Adams*, 24 Ill. 492).

¹³ *City of Chicago v. Burtice*, 24 Ill. 489 [1860]; (followed in *City of Chicago v. Adams*, 24 Ill. 492).

¹ *Nowlen v. City of Benton Harbor*, 134 Mich. 401, 96 N. W. 450 [1903]; *In the Matter of Petition of Schell*, 76 N. Y. 432 [1879]; *In the Matter of Scholle*, 14 Hun. 14 [1878]; *Crossley v. City of Findlay*, 10 Ohio

C. C. 286 [1895]; *Ferry v. City of Tacoma*, 34 Wash. 652, 76 Pac. 277 [1904].

² *Nowlen v. City of Benton Harbor*, 134 Mich. 401, 96 N. W. 450 [1903]; *In the Matter of the Petition of Schell*, 76 N. Y. 432 [1879]; *In the Matter of Scholle*, 14 Hun. (N. Y.) 14 [1878]; *Crossley v. City of Findlay*, 10 Ohio C. C. 286 [1895]; *Ferry v. City of Tacoma*, 34 Wash. 652, 76 Pac. 277 [1904].

³ *Nowlen v. City of Benton Harbor*, 134 Mich. 401, 96 N. W. 450 [1903].

rection and review, cannot be taken.⁴ It has been suggested as possible that where an assessment is made before the valuation for the current year takes effect, but such assessment is properly sent back for correction after such valuation takes effect, the assessors may then take such valuation as a basis; while if such assessment is not sent back for correction a valuation which becomes a finality after the assessment is filed, and before it is confirmed cannot be taken as a basis therefor.⁵ If it is sought to assess for local improvements land which has for some time been exempt from general taxation and has not been appraised therefor, such as property owned by a religious corporation, the last valuation at which such property was appraised for purposes of general taxation must be resorted to,⁶ even if such valuation was made at a considerable time before the levy of the local assessment.⁷ If it is not shown that any valuation has ever been made for purposes of general taxation of the property which it is sought to assess for local improvements, and the statute provides for restricting the assessment to a certain percentage of its valuation on the tax duplicate, such property cannot be assessed for the local improvement.⁸ The valuation on an assessment roll, consisting of figures under the heading "value of real estate," without anything to indicate whether such figures represent dollars or cents, is insufficient.⁹ In deter-

⁴ In the Matter of Scholle, 14 Hun. (N. Y.) 14 [1878].

⁵ In the Matter of the Petition of Schell, 76 N. Y. 432 [1879]; (reversing 16 Hun, 283, which held that a valuation which became final after the assessment was filed and before it was confirmed should be taken as a basis).

⁶ *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881]; In the Matter of the Petition of St. Joseph's Asylum in the City of New York to Vacate an Assessment, 69 N. Y. 353 [1877].

⁷ *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881]; In the Matter of the Petition of St. Joseph's Asylum in the City of New York to Vacate an Assessment, 69 N. Y. 353 [1877].

⁸ In the Matter of the Application of Churchill to Vacate an Assessment, 82 N. Y. 288 [1880]; In the Matter of the Petition of the Hebrew Benevolent Orphan Asylum to Vacate an Assessment, 70 N. Y. 476 [1877]; (affirming In the Matter of the Hebrew Benevolent Asylum, 10 Hun. (N. Y.) 112 [1877]); In the Matter of the Petition of the Second Avenue Methodist Episcopal Church, 66 N. Y. 395 [1876]; In the Matter of the Petition of the Rector, Church Wardens and Vestrymen of the Church of the Holy Sepulcher, 61 Howard (N. Y.) 315 [1880]; In the Matter of the Petition of Hazleton, 58 Hun. 112, 11 N. Y. S. 557 [1890].

⁹ In the Matter of the Petition of the Rector, Church Wardens and Vestrymen of the Church of the Holy Sepulcher, 61 Howard (N. Y.) 315 [1880].

mining the valuation of the property for general taxation the value of the property as a whole, including improvements which are part of the realty as well as the unimproved realty, must be considered.¹⁹

§ 682. Combination and division of tracts with reference to restriction on assessment.

In the absence of a statute specifically authorizing it, a tract of land held by the owner thereof as an entire tract and so platted, must be considered as a unit for the purpose of valuation.¹ Thus, where the assessment upon an entire tract of land of nearly one thousand feet frontage was less than the specified percentage, but one part of such tract, having a frontage of about two hundred and fifty feet, was much less valuable than the rest, so that if it were considered as a separate tract, the assessment thereon would be less than the proportionate part of the assessment as actually levied, it was held that the tract must be considered as an entirety and that the assessment thereon was valid.² If two or more lots are used and occupied as separate tracts, they cannot be combined for the purpose of determining from their combined valuation the amount of the assessment which may be levied.³ Where a number of lots are indicated upon a plat, but they are used together as one tract, it has been held, under a statute which requires a plat of the property assessed showing the amount assessed against each lot and that the assessment shall not exceed twenty-five per cent. of the actual value of the lot or tract at the time of the levy, that such lots must be assessed separately and cannot be valued as one entire tract.⁴ Under a statute which provides that "no improvement shall be made when the estimated cost thereof shall exceed fifty per cent. of the assessed value," and there is no

¹⁹ *Mound City Construction Company v. Macgurn*, 97 Mo. App. 403, 71 S. W. 460 [1902]; *Findlay v. Frey*, 51 Ohio St. 390, 38 N. E. 114 [1894]; (reversing *Frey v. City of Findlay*, 7 Ohio C. C. 311 [1893]); *Corry v. Foltz, O'Brien & Co.*, 29 O. S. 320 [1876].

¹ *Schroder v. Overman*, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899];

(affirming *Schroder v. Overman*, 18 Ohio C. C. 385 [1899]).

² *Schroder v. Overman*, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; (affirming, *Schroder v. Overman*, 18 Ohio C. C. 385 [1899]).

³ *Corry v. Foltz, O'Brien & Co.*, 29 O. S. 320 [1876].

⁴ *Stutsman v. City of Burlington*, Iowa, 127 Ia. 563, 103 N. W. 800 [1905].

provision for appraising the property, it has been held that the word "property" refers to all the property in the assessment district; that the total assessment cannot exceed fifty per cent. of the value thereof; but that such assessment is not invalid because the assessment upon certain lots exceeds fifty per cent. of their valuation.⁵

§ 683. Effect of limiting lien to certain depth.

By statute it may be provided that the lien of the assessment is to be restricted to a certain specified depth from the street. Under such statutes, if the tract to be assessed extends to a greater depth, only that part which is within the prescribed depth can be valued in determining the amount of the assessment which may be levied.¹ This principle applies where the council is required to determine the usual depth of lots in the neighborhood and unplatted land is to be assessed to such depth.² Under such a statute which provides especially for the assessment of land in bulk, the customary size of lots in such city must be regarded as well as the recorded plat thereof;³ and it may be determined that a large tract, though appearing upon a recorded plat as a lot, is land in bulk within the meaning of such statute.⁴

§ 684. Division of improvement or of payments.

The public corporation cannot evade a statutory limit upon the amount of local assessments by dividing an improvement and levying different assessments for the various parts thereof, each within the statutory limit.¹ Within the meaning of this rule an

⁵ *Ferry v. City of Tacoma*, 34 Wash. 652, 76 Pac. 277 [1904].

¹ *Rawson v. City of Des Moines*, 133 Iowa 514, 110 N. W. 918 [1907]; *Asphalt & Granitoid Const. Co. v. Hauessler*, 201 Mo. 400, 100 S. W. 14 [1907]; (affirming, *Asphalt & Granitoid Const. Co. v. Hauessler*, — Mo. App. —, 80 S. W. 5 [1904]); *Wolfert v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892]; *Stifel v. Brown*, 24 Mo. App. 102 [1887]; *Parmelee v. Youngstown*, 43 O. S. 162, 1 N. E. 319 [1885]; *Bailey v. City of Zanesville*, 20 Ohio C. C. 236 [1900].

² *Parmelee v. Youngstown*, 43 O. S.

162, 1 N. E. 319 [1885]; *Bailey v. City of Zanesville*, 20 Ohio C. C. 236 [1900]; *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

³ *Springer v. Avondale*, 35 O. S. 620 [1880].

⁴ *Springer v. Avondale*, 35 O. S. 620 [1880]. [In this case the usual size of lots in the neighborhood was one acre. The tract in question contained three acres and one-half. It was provided by statute that land in bulk is to be assessed to the average depth of lots in the neighborhood].

⁵ *Kreling v. Muller*, 86 Cal. 435, 25 Pac. 10 [1890]; *In the Matter of the Petition of Walter*, 75 N. Y. 354

improvement consisting of paving the street with stone block pavement and another improvement consisting of setting and re-setting the curbing and gutter stones and paving the sidewalks were held to be in legal effect one improvement and the sum of the two assessments could not exceed the statutory limit.² Under a statute which exempts for five years from assessment for the improvement of another street, property which has been assessed for the improvement of a street up to twenty-five per cent. of its tax value, an assessment levied for the construction of a sidewalk is regarded as being levied for the improvement of a street.³ If the maximum assessment has been made for the construction of a street, further assessment cannot be made for the construction of a sidewalk.⁴ If the improvements which are constructed are in fact distinct ones and the assessment for each of them does not exceed the prescribed limit, the fact that the aggregate assessment for all the improvements exceeds the prescribed limit does not invalidate the assessment.⁵ Under a statute providing that special assessments shall not exceed in any one year five per cent. of the assessed value of the property an assessment exceeding such five per cent. is invalid, though made payable at the option of the owner in annual installments, each of which is less than five per cent.⁶

§ 685. Waiver of statutory restrictions.

Under a statute providing that assessments shall not exceed a certain percentage of the value of the property assessed unless

[1878]; *Pretzinger v. Sunderland*, 63 Ohio St. 132, 57 N. E. 1097 [1900]; *Hunt v. Hunter*, 11 Ohio C. C. 69 [1895]; *Cincinnati for Use, etc., v. Jung*, 7 Ohio N. P. 665 [1900]. "While the town authorities cannot improve a street by piecemeal so as in all to exceed 25 per centum of the value of the property to be charged, it does not appear that this was done in this case, and such a question cannot be raised unless it appears that the limit has in fact been exceeded." *Neff v. Covington Stone and Sand Co.*, 108 Ky. 457, 462, 55 S. W. 697, 56 S. W. 723 [1900].

² In the Matter of the Petition of *Walter*, 75 N. Y. 354 [1878]; (reversing 14 Hun, 148).

³ *Pretzinger v. Sunderland*, 63 Ohio St. 132, 57 N. E. 1097 [1900].

⁴ *Pretzinger v. Sunderland*, 63 Ohio St. 132, 57 N. E. 1097 [1900].

⁵ *Crane v. Siloam Springs*, 67 Ark. 30, 55 S. W. 955 [1899]; *Warren v. Postel*, 99 Cal. 294, 33 Pac. 930 [1893]; *Allen v. Krenning*, 23 Mo. App. 561 [1886]; *Drake v. Cincinnati*, 25 Ohio Cir. Ct. 373 [1903]; *Hunt v. Hunter*, 14 Ohio C. C. 503 [1897]; *City of Cincinnati for the Use of Wilson v. Fugman*, 5 Ohio N. P. 14 [1897]; *Cole v. Hunter*, 5 Ohio N. P. 13 [1897].

⁶ *Corliss v. Village of Highland Park*, 146 Mich. 597, 110 N. W. 45 [1906].

three-fourths of the abutting property owners petition for such improvement, in which case the restriction shall apply only to the property of those who did not sign the petition, it has been held that if less than three-fourths of the property owners sign the petition and such fact is known to the city, the property of the signers of such petition cannot be assessed in an amount exceeding the statutory limit.¹ If more than three-fourths of the owners sign, the restriction as to the amount of the assessment is waived.² If one of the signers of a petition signed by three-fourths of the property owners is the owner of a perpetual leasehold, the restriction upon the percentage of the value of the property to be assessed is waived as to the fee.³ If, however, the owners of three-fourths of the abutting property sign such petition they are estopped from denying that their property is assessable.⁴ Under a statute which provides that the assessment shall be limited to fifty per cent. of the valuation of the real property, exclusive of improvements, unless a petition is filed, in which case a "higher percentage" may be imposed, the assessment under a petition fixing the cost at two hundred per cent. of the value of the property, may equal such two hundred per cent., and is not necessarily limited to a fraction of the value of the property.⁵ It has been held that acquiescence in making the improvement, and the voluntary payment of the first installment may estop the property owner from claiming that the assessment was in excess of the statutory limit.⁶

§ 686. Effect of exceeding statutory limit.

An assessment which exceeds the statutory limit is invalid and cannot be enforced.¹ It is held in many jurisdictions that the

¹ *Hays v. City of Cincinnati*, 62 Ohio St. 116, 56 N. E. 658 [1900]; *Baker v. Schott*, 10 Ohio C. C. 81 [1894]; *Storer v. City of Cincinnati*, 4 Ohio C. C. 279 [1889].

² *Squier v. City of Cincinnati*, 5 Ohio C. C. 400 [1891].

³ *Village of St. Bernard v. Kemper*, 60 O. S. 244, 54 N. E. 267 [1899]; (reversing *Kemper v. Village of St. Bernard*, 14 Ohio C. C. 134 [1897].

⁴ *Doppes v. City of Cincinnati*, 16 Ohio C. C. 183 [1898].

⁵ *James v. City of Seattle*, — Wash. —, 95 Pac. 273 [1908].

⁶ *Monroe v. City of Cleveland*, 29 Ohio C. C. 633 [1907].

¹ *Corliss v. Village of Highland Park*, 132 Mich. 152, 93 N. W. 524, 93 N. W. 610, 95 N. W. 416 [1903]; In the Matter of the Hebrew Benevolent Orphan Asylum, 10 Hun (N. Y.) 112 [1877]; In the Matter of the Petition of Cram to Vacate an Assessment, 69 N. Y. 452 [1877]; In the Matter of the Petition of the Second Avenue Methodist Episcopal Church, 66 N. Y. 395 [1876]; In the Matter of Palmer to Have Assessment for

invalidity of such assessment extends only to the excess of the amount of the assessment over the statutory limit and that the rest of such assessment is enforceable.² If interest on bonds which are issued to pay the cost of an improvement is added to the cost of the improvement and the aggregate exceeds the statutory limit the assessment is invalid as to such excess, even if the cost of the improvement is within the statutory limit and the assessment is made payable in installments.³ If several lots are assessed together, without a separate valuation for each, there is no basis for reduction of the assessment and it must accordingly be vacated entirely.⁴ The difference between the cost of the improvement and the assessment as limited by statutes of the type under discussion, is ordinarily to be paid by the public corporation which has constructed the improvement out of funds raised by general taxation.⁵ If an assessment in excess of the statutory limit is divided into installments and some of such installments have been paid in full, the excess over the statutory rate thus paid in is to be deducted from the subsequent assessments in the order of their maturity and not by a pro rata deduction from each.⁶ Where, however, the excess over the statutory limit is made by adding two distinct assessments, payment of one in full does not give the property owner a right to a credit upon the other assessment.⁷ If the statutes prescribe a given means of obtaining relief where the assessment exceeds the specified per cent. of the valuation of the property, such remedy

Building Sewer in Thirty-Fourth Street Vacated as to Certain Property Assessed, 31 Howard (N. Y.) 42 [1863]; *Palmer's Petition*, 1 Abb. Pr. 30 [1865]; *Commissioners of the District of Kensington v. Keith*, 2 Pa. St. (2 Barr.) 218 [1845].

² *Fitzgerald v. Walker*, 55 Ark. 148 17 S. W. 702 [1891]; *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *Baily v. City of Sioux City*, 133 Iowa 276, 110 N. W. 839 [1907]; *Morton v. Sullivan*, — Ky. —, 96 S. W. 807 [1906]; *In the Matter of the Petition of O'Hare*, 5 Hun. (N. Y.) 287 [1875]; *Birdseye v. Village of Clyde*, 61 Ohio St. 27, 55 N. E. 169 [1899]; (reversing, *Birdseye v. Village of Clyde*, 14 Ohio C. C. 510 [1897]).

³ *City of Salem v. Mulford*, 22 Ohio C. C. 397 [1899].

⁴ *In the Matter of the Petition of Cram to Vacate an Assessment*, 69 N. Y. 452 [1877].

⁵ *City of Cincinnati v. Diekmeier*, 31 O. S. 242 [1877]; *Upington v. Oviatt*, 24 O. S. 232 [1873]; *City of Toledo for Use of Gates v. Lake Shore & Michigan Southern Railway Company*, 4 Ohio C. C. 113 [1889]; *Keszler v. City of Cincinnati*, 3 Ohio C. C. 223 [1888]; *Ryan & Company v. City of Cincinnati*, 1 Cin. Sup. Ct. (Ohio) 245 [1871].

⁶ *Pipe v. Cummings*, 36 O. S. 213 [1880].

⁷ *Brooks v. Village of Norwood*, 12 Ohio C. C. 257 [1896].

must be resorted to.⁸ Failure so to do is regarded as a waiver of the objection.⁹ Property owners cannot complain of an assessment on the ground that it exceeds the statutory limit as to other property owners who are not complaining.¹⁰ Only property owners who are assessed in excess of the statutory limit can complain.¹¹

§ 687. Change of statutory restriction*.

The rate of the assessment is controlled, ordinarily, by the statute which was in force when the improvement proceedings were begun.¹ If a public corporation has entered into a contract whereby the contractor is to be paid by the assessments levied upon the property benefited and the city is not to be liable except as property owner, a change of statute between the time of making such contract and the passage of the assessment ordinance reducing the percentage of the value of the property assessed for which the assessment may be levied from fifty to twenty-five per cent. cannot affect such assessment, since the rights of the contractor have already been fixed by contract and a statute impairing his rights would be void as impairing the obligation of a contract.² Under a statute which provides that a statutory amendment shall not affect pending proceedings unless express provision for such retroactive effect is made, a statute which is passed after a preliminary resolution is adopted, and which changes the assessments which may be levied in five years from thirty-three per cent. of the valuation for taxation to thirty-three and one-third per cent. of the actual value as enhanced by the improvement, cannot apply to such assessment.³

*Methodist Episcopal Church of Harlem v. Mayor, etc., of the City of New York, 55 Howard (N. Y.) 57 [1877].

⁹Methodist Episcopal Church of Harlem v. Mayor, etc., of the City of New York, 55 Howard (N. Y.) 57 [1877].

¹⁰Corliss v. Village of Highland Park, 132 Mich. 152, 93 N. W. 610, 93 N. W. 254, 95 N. W. 416 [1903].

¹¹Corliss v. Village of Highland Park, 132 Mich. 152, 93 N. W. 610, 93 N. W. 254, 95 N. W. 416 [1903].

¹Monroe v. City of Cleveland, 29 Ohio C. C. 633 [1907].

²Goodale v. Fennell, 27 O. S. 426, 22 Am. Rep. 321 [1875]. [This question was raised but not decided in Finnell v. Howells, 2 Cin. Sup. Ct. (Ohio) 150 [1872], as it was held that the statute, by its saving clause, required the assessment to be levied under the former statute.]

³City of Toledo v. Marlow, 28 Ohio C. C. 298 [1906]; (affirmed City of Toledo v. Marlow, 75 O. S. 574, 80 N. E. 1124 [1906]).

§ 688. Necessity of apportionment.

An assessment is a form of a tax possessing many of the ordinary attributes and incidents of taxation,¹ and accordingly the very nature of the local assessment demands a fair apportionment upon a just and reasonable basis.² As has already been pointed out,³ an assessment is not a tax within the meaning of the constitutional provisions which require that a tax shall be apportioned according to the value of the property taxed. An assessment possesses a uniformity of its own,⁴ which consists in the actual or theoretical apportionment of the assessment according to the benefits conferred by the improvement. The rule of apportionment as laid down by statute must be complied with substantially.⁵ Under a statute which provides for assessing certain property upon a certain basis of apportionment the improvement cannot be divided into sections arbitrarily so as to prevent the assessment from being uniform upon all the property designated, according to the basis prescribed.⁶ Since apportionment according to benefits is at best an approximation,⁷ and since the decision of the legislature as to what property is benefited, is final and conclusive, at least if not grossly erroneous,⁸ the principle that assessments must be fairly apportioned according to benefits is not violated by reason of including in the assessment

¹ See § 89.

² *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Gilkerson v. Scott*, 76 Ill. 509 [1875]; *Law v. Madison, Smyrna & Graham Turnpike Co.*, 30 Ind. 77 [1868]; *City of Lexington v. McQuillan's Heirs*, 39 Ky. (9 Dana.) 513, 35 Am. Dec. 159 [1840]; *City of Manistee v. Harley*, 79 Mich. 238, 44 N. W. 603 [1890]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *City of El Paso v. Mundy Bros.*, 85 Tex. 316, 20 S. W. 140 [1892]; *Fulkerson v. City of Bristol*, 105 Va. 555, 54 S. E. 468 [1906]. "The basis of all taxation is equality, and no tax of any kind can be sustained when it appears that the several parcels of property properly chargeable with the tax are made to bear unequally the burden thereof. This proposition is almost axiomatic." *Howell v. City of Ta-*

coma, 3 Wash. 711, 713, 28 Am. St. Rep. 83, 29 Pac. 447 [1892]. "A principle of equity which exists independent of any constitutional recognition would dictate that the assessment should be upon the land of each proprietor, as nearly as practicable in proportion to the benefit received." *Yeatman v. Crandall*, 11 La. Ann. 220, 221 [1856].

³ See § 147.

⁴ *Kuehner v. City of Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893].

⁵ *Simmons v. City of Millville*, — N. J. L. —, 66 Atl. 895 [1907]. See § 690 *et seq.*

⁶ *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69; *Jaeger v. Burr, Administrator*, 36 O. S. 164 [1880]. See § 574.

⁷ See § 689.

⁸ See § 553 *et seq.*

district property which should have been omitted,⁹ or by omitting property which should have been included,¹⁰ under legislative authority for such inclusion or omission.

§ 689. Apportionment a mere approximation.

Since no human beings are perfect, nothing which is operated and controlled by human agencies can be absolutely perfect and, accordingly, even the best government falls short of perfection. Accordingly, a perfect equality in apportionment between the amount of the assessment and the amount of the benefits can never be secured.¹ A substantial approximation to an apportionment according to the benefits is the most that can be hoped for, and if this is secured the assessment cannot be attacked because it is not absolutely perfect.²

⁹ *Northern Indiana R. R. Co. v. Connelly*, 10 O. S. 160.

¹⁰ *State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Road Commissioners*, 41 N. J. L. (12 Vr.) 83.

¹ *Chadwick v. Kelly*, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming *Kelly v. Chadwick*, 104 La. 719, 29 So. 295 [1901]); *Cheney v. City of Beverly*, 188 Mass. 81, 74 N. E. 306 [1905]. "Perfect equality of tax burdens may never be expected, but in a series of years the plan adopted by the city council will be as likely as any other to equitably distribute the cost of such improvements as here proposed, not especially, though often incidentally, beneficial to abutting owners." *Grunewald v. City of Cedar Rapids*, 118 Ia. 222, 228, 229, 91 N. W. 1059 [1902]. No system of assessment "can attain absolute equality or bring about exact justice." *Wallace v. Shelton*, 14 La. Ann. 498, 500 [1859]. "To secure an exact equality in this as in everything else dependent upon human government is impossible. Perfection in legislation is the dream of visionary minds." *Yeatman v. Crandall*, 11 La. Ann. 220, 221 [1856]. "The exact extent of the benefit necessary to uphold such an assessment is incapable of definition." *City of Atlanta*

v. Hamlein, 96 Ga. 381, 385, 23 S. E. 408 [1895]. "Absolute equality in making assessments may find a place in theory but is not attainable in practice." *City of Findlay v. Frey*, 51 O. S. 390, 402, 403, 38 N. E. 114 [1894]. "Equality can never be anything but an approximation." *Allen v. Drew*, 44 Vt. 174 [1872].

² *Chadwick v. Kelly*, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming *Kelly v. Chadwick*, 104 La. 719, 29 So. 295 [1901]); *City of Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408 [1895]; *Grunewald v. City of Cedar Rapids*, 118 Iowa 222, 91 N. W. 1059 [1902]; *Howell v. Bristol*, 71 Ky. (8 Bush.) 493 [1871]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Minor v. Daspit*, 43 La. Ann. 337, 9 So. 49 [1891]; *Wallace v. Shelton*, 14 La. Ann. 498 [1859]; *City of New Orleans v. Elliott*, 10 La. Ann. 59 [1855]; *Cheney v. City of Beverly*, 188 Mass. 81, 74 N. E. 306 [1905]; *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885]; *Lynn v. City of Brooklyn*, 28 Barb. (N. Y.) 609 [1858]; *City of Findlay v. Frey*, 51 O. S. 390, 38 N. E. 114 [1894]; *Allen v. Drew*, 44 Vt. 174 [1872]. "In cases where

§ 690. Apportionment according to benefits in fact.

A rule of apportionment which is found in many statutes and in some constitutional provisions is that the amount of the assessment which is to be levied upon real property is to be apportioned among the various tracts thereof in accordance with the benefits which actually enure to each separate tract by reason of the improvement for which the assessment is levied. Where such statutes are in force they are now recognized as valid in all jurisdictions in which assessments for benefits can be levied, and an assessment under such statutes is valid if it is apportioned in accordance with the benefits conferred and invalid if not so apportioned.¹ Such statutes are, on the

all the lots taxed are actually benefited by the sewers we think that such an apportionment of the taxes must be held to be legal and valid, although in some few instances, on account of peculiar circumstances or mistakes in the appraisal of the lots, some one or more of the lot owners may have to pay more of the cost of the construction of the sewers than is fairly his or their proportion to pay. Absolute and exact justice in such cases can never be attained. In all cases some persons will be required to pay slightly more and some slightly less than their fair proportion." *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402 [1886]; (quoted in *City of Kansas City v. Gibson*, 66 Kan. 501, 503, 72 Pac. 222 [1903]).

¹ *Martin v. District of Columbia*, 205 U. S. 135, 51 L. 743, 27 S. 440 [1907]; (reversing 26 App. D. C. 140, 146 [1905]); *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]); *Violet v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming *Violet v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *Wight v. Davidson*, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (reversing *Davidson v. Wight*, 16 App. D. C. 371 [1900]); *Burlington Sav. Bank v.*

City of Clinton, Iowa, 106 Fed. 269 [1901]; *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899]; *Ritter v. Drainage Dist. No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *People of the State of California v. Hagar*, 52 Cal. 171 [1877]; *Doyle v. Austin*, 47 Cal. 353 [1874]; *Piper's Appeal in the Matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Appeal of North Beach and Mission Railroad Company in the Matter of Widening Kearney St.*, 32 Cal. 500 [1867]; *McGilvery v. City of Lewiston*, 13 Ida. 338, 90 Pac. 348 [1907]; *Clark v. City of Chicago*, 229 Ill. 363, 82 N. E. 370 [1907]; *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358 [1905]; *Tecliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692 [1902]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Illinois Central R. R. Co. v. Commissioners of East Lake Fork Special Drainage District*, 129 Ill. 417, 21 N. E. 925 [1890]; *Hundley & Rees v. Commissioners, etc., of Lincoln Park*, 67 Ill. 559 [1873]; *Bedard v. Hall*, 44 Ill. 91 [1867]; *City of Ottawa v. Spencer*, 40 Ill. 211 [1866]; *City of Chicago v. Larned*, 34 Ill. 203 [1864]; *City of Ottawa v. Macy*, 20 Ill. 413 [1858];

one hand, somewhat difficult in application, since they require an inquiry into the existence and amount of benefits as a fact as preliminary to making the apportionment according to such benefits. This is usually done by providing

Leeds v. Defrees, 157 Ind. 392, 61 N. E. 930 [1901]; Norton v. Fisher, 33 Ind. App. 132, 71 N. E. 51 [1903]; Morrow v. Geeting, 15 Ind. App. 358, 41 N. E. 848 [1896]; Temple v. Hamilton County, 134 Ia. 706, 112 N. W. 174 [1907]; Sisson v. Board of Supervisors of Buena Vista County, 128 Iowa 442, 70 L. R. A. 440, 104 N. W. 454 [1905]; Owens v. City of Marion, 127 Ia. 469, 103 N. W. 381 [1905]; Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 781 [1885]; Mayor and City Council of Baltimore v. Ullman, 79 Md. 469, 30 Atl. 43 [1894]; Voight v. City of Detroit, 123 Mich. 547, 82 N. W. 253 [1900]; Brady v. Hayward, 114 Mich. 326, 72 N. W. 233 [1897]; Nelson v. City of Saginaw, 106 Mich. 659, 64 N. W. 499 [1895]; Beecher v. City of Detroit, 92 Mich. 268, 52 N. W. 731 [1892]; Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564, 52 N. W. 1028 [1892]; Adams v. Bay City, 78 Mich. 211, 44 N. W. 138 [1889]; Warren v. City of Grand Haven, 30 Mich. 24 [1874]; Hoyt v. City of East Saginaw, 19 Mich. 39, 2 Am. Rep. 76 [1869]; State of Minnesota ex rel. Cunningham v. District Court of Ramsey Co., 29 Minn. 62, 11 N. W. 133 [1882]; Kansas City v. Bacon, 157 Mo. 450, 57 S. W. 1045 [1900]; Garrett v. City of St. Louis, 25 Mo. 505, 69 Am. Dec. 475 [1857]; Tusting v. City of Asbury Park, — N. J. Sup. —, 62 Atl. 183 [1905]; Dean v. Mayor and Aldermen of the City of Paterson, 68 N. J. L. (39 Vr.) 664, 54 Atl. 836 [1902]; Van Wagoner, Pros. v. Mayor and Aldermen of the City of Paterson, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902]; Dooling, Pros. v. Ocean City, 67 N. J. L. (38 Vr.) 215, 50 Atl. 62 [1901]; State, Cow-

ard, Pros. v. Mayor, etc., of the City of North Plainfield, 63 N. J. L. (34 Vr.) 61, 42 Atl. 805 [1899]; State, Buess, Pros. v. Town of West Hoboken, 51 N. J. L. (22 Vr.) 267, 17 Atl. 110 [1889]; State, Ward, Pros. v. Commissioners of Streets and Sewers, 49 N. J. L. (20 Vr.) 552, 10 Atl. 109 [1887]; State, Kean, Pros. v. Driggs Drainage Company, 45 N. J. L. (16 Vr.) 91 [1883]; State, Bergen County Savings Bank, Pros. v. Inhabitants of Township of Union in the County of Bergen, 44 N. J. L. (15 Vr.) 599 [1882]; State, Johnson, Pros. v. Inhabitants of City of Trenton, 43 N. J. L. (14 Vr.) 166 [1881]; State, Wetmore, Pros. v. City of Elizabeth, 41 N. J. L. (12 Vr.) 152 [1879]; State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Road Commissioners, 41 N. J. L. (12 Vr.) 83 [1879]; State, Youngster, Pros. v. Mayor and Aldermen of Paterson, 40 N. J. L. (11 Vr.) 244 [1878]; State, Kohler, Pros. v. Town of Guttenberg, 38 N. J. L. (9 Vr.) 419 [1876]; State, Simmons, Pros. v. City of Passaic, 38 N. J. L. (9 Vr.) 60 [1875]; Village of Passaic v. State, Del., Lack. & W. R. R., 37 N. J. L. (8 Vr.) 538 [1875]; State, Graham, Pros. v. Mayor of Paterson, 37 N. J. L. (8 Vr.) 380 [1875]; State, Agens, Pros. v. Mayor, etc., of Newark, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; State, Kingsland, Pros. v. Inhabitants of Township of Union in the County of Bergen, 37 N. J. L. (8 Vr.) 268 [1874]; State, Del., Lackawanna & Western R. R. Co., Pros. v. Village of Passaic, 37 N. J. L. (8 Vr.) 137 [1874]; State, Pudney, Pros. v. Village of Passaic, 37 N. J. L. (8 Vr.) 65 [1874]; State, Hoboken Land &

for some body, such as commissioners, a jury, viewers and the like to decide upon the amount of benefits conferred upon each tract of land. On the other hand such statutes are eminently just and fair, and conform most closely to the theory of benefits which underlies the entire doctrine of local assessments. In some of the early cases it was held that assessments could not be apportioned in accordance with the benefits conferred upon the land assessed.² This holding was based upon the theory that an assess-

Improvement Co., *Pros. v. Mayor*, etc., of Hoboken, 36 N. J. L. (7 Vr.) 291 [1873]; *State, Baxter, Pros. v. Mayor and Aldermen of Jersey City*, 36 N. J. L. (7 Vr.) 188 [1873]; *In the Matter of Lower Chatham*, 35 N. J. L. (6 Vr.) 497 [1872]; *State, Evans, Pros. v. Mayor and Common Council of Jersey City*, 35 N. J. L. (6 Vr.) 381 [1872]; *State, Abrey, Pros. v. Cannon*, 33 N. J. L. (4 Vr.) 218 [1868]; *State, Van Horne, Pros. v. Town of Bergen*, 30 N. J. L. (1 Vr.) 307 [1863]; *State, Culver, Pros. v. Inhabitants of Town of Bergen in the County of Hudson*, 29 N. J. (5 Dutch.) 266 [1861]; *State, Zabrieski, Pros. v. Mayor and Common Council of Hudson City*, 29 N. J. L. (5 Dutch.) 115 [1860]; *State, Ogden, Pros. v. Mayor, etc., of City of Hudson*, 29 N. J. L. (5 Dutch.) 104 [1860]; *State, Malone, Pros. v. Mayor, etc., of Jersey City*, 28 N. J. L. (4 Dutch.) 500 [1860]; *State, Water Commissioners of Jersey City, Pros. v. City of Hudson*, 27 N. J. L. (3 Dutcher) 214 [1858]; *The State, Mann, Pros. v. Mayor and Common Council of Newark*, 1 Dutcher (25 N. J. L.) 399 [1856]; *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 36 [1883]; *People of the State of New York ex rel. Lehigh Valley R. R. Co. v. City of Buffalo*, 147 N. Y. 675, 42 N. E. 344 [1895]; *Voght v. City of Buffalo*, 133 N. Y. 483, 31 N. E. 340 [1892]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *O'Reilly v. City of Kingston*, 39 Hun. 285

[1886]; *People ex rel. Crowell v. Lawrence*, 36 Barb. 178 [1862]; *Lyon v. City of Brooklyn*, 28 Barb. 609 [1858]; *Lewis v. Laylin*, 46 O. S. 663, 23 N. E. 288 [1889]; *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855]; *Kummer v. City of Cincinnati*, 27 Ohio C. C. 683 [1905]; *Weston v. Commissioners of Hamilton County*, 6 Ohio C. C. 641 [1892]; *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908]; *Oregon & California R. R. Co. v. City of Portland*, 25 Ore. 229, 22 L. R. A. 713, 35 Pac. 452 [1894]; *Masters v. City of Portland*, 24 Ore. 161, 33 Pac. 540 [1893]; *King v. City of Portland*, 2 Ore. 146 [1865]; *Scranton City v. Bush*, 160 Pa. St. 499, 28 Atl. 926 [1894]; *Extension of Hancock Street*, 18 Pa. (6 Harr.) 26 [1851]; *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; *In the Matter of Westlake Ave., Seattle*, 40 Wash. 144, 82 Pac. 279 [1905]; *Alexander v. City of Tacoma*, 35 Wash. 366, 77 Pac. 686 [1904]; *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901]; *Pittelkow v. City of Milwaukee*, 94 Wis. 651, 69 N. W. 803 [1896].

²*Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Co.*, 45 Ala. 322 [1871]; *Mayor, Aldermen, etc., of Mobile v. Dargan*, 45 Ala. 310 [1871]; *Municipality No. 2 Praying for the Opening of Benton Street v. White*, 9 La. Ann. 446 [1854]; *People ex rel. Griffing v. Mayor and*

ment was a tax within the meaning of the constitutional provisions requiring taxes to be uniform and levied in proportion to the value of the property taxed.³ The result of this theory was to render local assessments invalid, since the area to be assessed could not be limited to the land benefited, but had to be the entire area of the public corporation which sought to levy the assessment. If levied on these principles it was not a local assessment but a general tax levied for a specific purpose. These early cases have been overruled and the validity of assessments apportioned according to benefits is now recognized everywhere.⁴

§ 691. Construction of statutes as to apportionment on basis of benefits.

Where this theory is applied, a statute which does not expressly or impliedly limit the assessment to the amount of benefits conferred by the improvement is invalid.¹ Since the courts endeavor to construe a statute so as to render it valid rather than so as to render it unconstitutional,² we find that in many cases a provision restricting the amount of the assessment to the benefits conferred is by construction read into statutes in which such provision is not inserted in express terms; and a statute which provides that an assessment shall be apportioned according to benefits conferred is held in many jurisdictions to imply that the amount of the assessment is not merely to be apportioned according to benefits, but also to be limited by the amount of the benefits.³ A statute which provided that the county court

Common Council of the City of Brooklyn, 9 Barb. (N. Y.) 535 [1850]; *People ex rel. Post v. Mayor etc., of Brooklyn*, 6 Barb. (N. Y.) 209 [1849]; *Stinson v. Smith, Treas.*, 8 Minn. 366 [1863].

³ See § 147 *et seq.*

⁴ *Mayor and Aldermen of Birmingham v. Klein*, 89 Ala. 461, 8 L. R. A. 369, 7 So. 386 [1889]; *People ex rel. Griffin v. Mayor, etc., of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266 [1851]; *Arnold v. Mayor and Aldermen of City of Knoxville*, 115 Tenn. 195, 90 S. W. 469 [1905]. See § 86. South Carolina is an exception to this statement. See § 159.

¹ See § 690.

² See §§ 79, 228.

³ *Martin v. District of Columbia*, 205 U. S. 135, 27 S. 440 [1907]; (reversing, 26 App. D. C. 140, 146 [1905]); *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming *Veit v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]); *Ritter v. Drainage Dist. No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707 [1897]; *Sisson v. Board of Supervisors of Buena Vista County*, 128 Iowa 442, 70 L. R. A. 440, 104 N. W. 454 [1905]; *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *Voight v. City*

should assess the cost of fencing a district "upon the land in said district, assessing each parcel of land according to its value as shown by the last county assessment on file in the office of the county clerk," is held to intend that assessments shall not to be levied in excess of benefits.⁴ The fact that the legislature has provided a hearing in order to determine the total amount of the benefits conferred, tends to strengthen the presumption that the legislature intended to limit the amount of the assessment to the amount of benefits.⁵ An Indiana statute,⁶ provided for apportioning an assessment according to frontage, but also provided for a hearing at which such assessments could be corrected. It was held at such hearing the assessments were to be reduced to the amount of benefits if it was shown that as apportioned in the first instance they exceeded such benefits. This statute was accordingly upheld by the Indiana courts,⁷ and in view of the construction placed upon it by the Indiana courts it

of Detroit, 123 Mich. 547, 82 N. W. 253 [1900]; *Beecher v. City of Detroit*, 92 Mich. 268, 52 N. W. 731 [1892]; *State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Road Commissioners*, 41 N. J. L. (12 Vr.) 83 [1879]; *State, Kohler, Pros. v. Town of Guttenburg*, 38 N. J. L. (9 Vr.) 419 [1876]; *Village of Passaic v. State, Del., Lack. & W. R. R. Co.*, 37 N. J. L. (8 Vr.) 538 [1875]; *In the Matter of Lower Chatham*, 35 N. J. L. (6 Vr.) 497 [1872].

⁴ *Stiewel v. Fencing District, No. 6, of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

⁵ *Voigt v. Detroit City*, 184 U. S. 115, 46 L. 459, 22 S. 337 [1902]; (affirming *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900].

⁶ *Burns' Rev. Statutes of Indiana*, §§ 4288-4298; known as the Barrett law.

⁷ *Wrey v. Frey*, 158 Ind. 92, 62 N. E. 1004 [1901]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]. "We conclude, therefore, that the principles applicable to assessments for local improvements are these: The legislature

may create or authorize a municipality to create a local taxing district for local improvement purposes which includes part only of the property within the municipality; the legislature may declare conclusively that only the property within the taxing district shall be specially assessed on account of local improvement within that district; each parcel of contributing property may be assessed only to the extent that it actually receives benefits; the taxing district as a whole may be assessed only to the extent of the sum of the special benefits actually received by the several parcels of contributing property; the improvement so far as its cost exceeds the special benefits resulting to the several parcels of property in the taxing district is a benefit to the municipality at large, and such excess must be borne by the general treasury; property owners affected by an improvement within a taxing district are entitled to a hearing on the question of special benefits." *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899].

was held that such statute was not in violation of any provision in the Federal Constitution.⁸ A statute providing that the expense of making an improvement should be assessed "fairly and equitably" upon the land on the line of such improvement was held to intend that the assessments should not exceed the benefits conferred by the improvement.⁹ Under a statute providing for the apportionment of assessments according to benefits the same result has been reached by a different theory. It has been said that the statute is to be applied and recognized as valid except in cases in which the assessment exceeds the benefits; and that in such cases the courts will protect the owners of such tracts as are assessed in excess of benefits.¹⁰ A statute which provides for determining the portion of the cost to be assessed upon adjacent property and for assessing such proportion upon such property "as provided by law or by ordinance of such city" is held impliedly to limit the assessment to the amount of benefit and to require its apportionment on that basis.¹¹ A statute requiring an assessment "as provided by law or by ordinance," does not require an arbitrary assessment by frontage.¹² A like construction has been given to a statute which requires the expense to be assessed "fairly and equitably" upon the property benefited.¹³ A statute which authorizes the expense of grading a street to be assessed upon the lands fronting upon the street in proportion to the benefit received has been held to mean that the assessment district consisted of the land fronting upon the improvement and that the apportionment upon such land was to be entirely upon the basis of benefits.¹⁴ Where it is necessary to apportion an assessment in accordance with the actual benefits, a statute or ordinance which provides for apportioning the assessment upon the land benefited by the improvement in proportion to the "advantage" that each tract receives from the improvement is held to be valid, since the term "advantage" is

⁸ *Schaefer v. Werling*, 188 U. S. 516, 23 S. 449, 47 L. 510 [1903]; (affirming, *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149).

⁹ *State, Hutton, Pros. v. Inhabitants of Township of West Orange*, 39 N. J. L. (10 Vr.) 453 [1877].

¹⁰ *Weston v. Commissioners of Hamilton Co.*, 6 Ohio C. C. 641 [1892].

¹¹ *Burlington Sav. Bank v. City of Clinton, Iowa*, 106 Fed. 269 [1901].

¹² *Burlington Sav. Bank v. City of Clinton, Iowa*, 106 Fed. 269 [1901].

¹³ *State, Hutton, Pros. v. Inhabitants of Township of West Orange*, 39 N. J. L. (10 Vr.) 453 [1877].

¹⁴ *State, Graham, Pros. v. Mayor etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875].

in this connection synonymous in legal effect with benefits.¹⁵ It is sometimes provided by constitutional or statutory provisions that assessments are to be apportioned according to the increased value of the property benefited due to the special benefits derived from the improvement for which assessment is levied. Since the most correct and accurate rule for determining the existence and amount of special benefits is that it is the increase in value of the property benefited due to such improvement,¹⁶ this rule is merely another and more accurate way of stating the rule that assessments are to be apportioned according to benefits. Such provisions are therefore valid and enforceable.¹⁷ Even under a constitution which provides that assessments shall be "ad valorem" and uniform,¹⁸ it has been held that assessments may be made according to the value of the benefits added by the improvement.¹⁹ Under a constitutional provision to the effect that "no city, town or other municipality shall make any assessment for the cost of sidewalks or street paving or for the cost of the construction of any sewers against property in excess of the increased value of such property by reason of the special benefits derived from such improvements," it has been held that an apportionment according to the special benefits in no case to exceed four dollars per front foot and in no case to exceed the special benefits accruing to such property is valid.²⁰ The legislature may provide for assessing certain classes of property in proportion to the benefits conferred and for assessing other classes on a different basis.²¹ Thus, the cost of a certain portion of the work may be assessed upon a street railway company the tracks of which occupy a part of the street, while the assessment against the abutting property owners may be apportioned in accordance

¹⁵ *State, Wetmore, Pros. v. City of Elizabeth*, 41 N. J. L. (12 Vr.) 152 [1879]; *State, Simmons, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 60 [1875]; *Village of Passaic v. State, Delaware, Lackawanna & Western Railroad Company, Pros.*, 37 N. J. L. (8 Vr.) 538 [1875]; *State, Tims, Pros. v. Mayor and Common Council of City of Newark*, 1 Dutcher (25 N. J. L.) 399 [1856].

¹⁶ See § 653.

¹⁷ *Ince v. Board of Public Works of Mobile*, 135 Ala. 187, 93 Am. St.

Rep. 20, 33 So. 678 [1902]; *Doyle v. Austin*, 47 Cal. 353 [1874].

¹⁸ Article XIX., § 27, Constitution of Arkansas [1874].

¹⁹ *Ahern v. Board of Improvement Dist. No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901]; *Carson v. St. Francis Levee District*, 59 Ark. 513, 27 S. W. 590 [1894].

²⁰ *Inge v. Board of Public Works of Mobile*, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902].

²¹ *The Fair Haven and Westville R. R. Co. v. City of New Haven*, 75 Conn. 442, 53 Atl. 960 [1903].

with benefits.²² It may be provided that the assessment shall be made according to frontage, but that if recovery cannot be had upon such assessment the property owner shall be liable according to benefits conferred.²³

§ 692. Construction of assessment as to apportionment on basis of benefits.

Under statutes which require apportionment according to benefits a report of the body levying or apportioning the assessment which shows that the assessment was apportioned upon all the land within the assessment district in accordance with the benefits conferred upon each tract, is sufficient,¹ subject to the right of the property owners, in some jurisdictions to show that the rule of apportionment set forth in the report was not, in fact, adopted.² On the other hand, if the report fails to show that the question of benefits was considered and that the apportionment was made in accordance with the benefits, such report is insufficient.³ A public corporation which attempts to levy an assessment under such a statute must comply therewith in at least a substantial manner.* If the legislature provides that the assessment shall be apportioned in accordance with benefits and leaves it to the city or other public corporation to determine how such benefits shall be ascertained, the determination and action of such public corporation will not be set aside by the courts as long as it appears that the public corporation

²² *The Fair Haven and Westville R. R. Co. v. City of New Haven*, 75 Conn. 442, 52 Atl. 960 [1903].

²³ *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899].

¹ *Nelson v. City of Saginaw*, 106 Mich. 659, 64 N. W. 499 [1895]; *Adams v. Bay City*, 78 Mich. 211, 44 N. W. 138 [1889]; *Extension of Hancock Street*, 18 Pa. St. (6 Harr.) 26 [1851].

² *People ex rel. Parker v. County Court of Jefferson*, 55 N. Y. 604 [1874].

³ *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *State, Buess, Pros. v. Town of West Hoboken*, 51 N. J. L. (22 Vr.) 267, 17 Atl. 110

[1889]; *State, Souther, Pros. v. Village of South Orange*, 46 N. J. L. (17 Vr.) 317 [1884]; *State, Hoboken Land & Improvement Co., Pros. v. Mayor of Hoboken*, 36 N. J. L. (7 Vr.) 291 [1873]; *State, Evans, Pros. v. Mayor and Common Council of Jersey City*, 35 N. J. L. (6 Vr.) 381 [1872]; *State, Van Horne, Pros. v. Town of Bergen*, 30 N. J. L. (1 Vr.) 307 [1863]; *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutch.) 500 [1860]; *State, Tims, Pros. v. Mayor and Common Council of Newark*, 1 Dutcher (25 N. J. L.) 399 [1856].

⁴ *Kelly v. The City of Cleveland*, 34 O. S. 438 [1878]; *Meissner v. City of Toledo*, 31 O. S. 387 [1877].

honestly exercised its own discretion without abuse thereof.⁵ It is provided by statute in reference to assessments for drainage that certain officials shall classify the lands in the district according to the relative benefits which they may receive from such improvement. Such a statute is held to be valid and assessments may be apportioned according to the classification made in compliance therewith.⁶ If the amount of benefits assessed is reduced upon appeal, the assessment must be apportioned according to the benefits as reduced, although the assessment was levied before the hearing on appeal.⁷ If lands are omitted from the original classification by mistake, they may be included and assessed upon reclassification.⁸ In assessments for other improvements lands may be classified on a basis of benefits.⁹

§ 693. Compliance with statute requiring apportionment according to benefits—Assessment according to frontage.

Under a statute which provides that assessments must be apportioned according to special benefits conferred the attempt is often made to levy an assessment by some arbitrary method, such as according to frontage, area and the like. An assessment under such statute which ignores the question of benefits existing in point of fact and which attempts to apportion the cost upon some arbitrary basis is invalid.¹ If the improvement is one which con-

⁵ *Hoyt v. City of East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76 [1869]; *People of the State of New York ex rel. Lehigh Valley Railroad Company v. City of Buffalo*, 147 N. Y. 675, 42 N. E. 344 [1895]; *Oregon & California R. R. Co. v. City of Portland*, 25 Ore. 229, 22 L. R. A. 713, 35 Pac. 452 [1894]; *In re City of Seattle*, — Wash. —, 91 Pac. 548 [1907].

⁶ *People ex rel. Pollard v. Swigert*, 130 Ill. 608, 22 N. E. 787 [1890]; *Klinger v. The People ex rel. Conkle*, 130 Ill. 509, 22 N. E. 600 [1890]; *The People ex rel. Davidson v. Cole*, 128 Ill. 158, 21 N. E. 6 [1890]; *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890]; *The People ex rel. Barber v. Chap-*

man, 127 Ill. 387, 19 N. E. 872 [1890].

⁷ If no opportunity for such defense is given at an earlier stage, such relief may be had on application for judgment. *The People ex rel. Ijams v. Myers*, 124 Ill. 95, 16 N. E. 89 [1889].

⁸ *Boul v. The People ex rel. Baker*, 127 Ill. 240, 20 N. E. 1 [1890].

⁹ *Viaduct, City of Denver v. Kennedy*, 33 Colo. 80, 80 Pac. 122, 80 Pac. 467 [1905].

¹ *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905]; *State, Culver, Pros. v. Town of Bergen*, in the County of Hudson, 29 N. J. L. (5 Dutcher) 266 [1861]; *People ex rel. Connelly v. Reis*, 96 N. Y. S. 597, 109 App. Div. 748 [1905]; *People ex rel. Tietjen v. Reis*,

fers substantially the same benefit upon each front foot of property benefited thereby, and it appears that the body levying the assessment found this to be the fact and acted thereon, such method of apportionment is valid.² This is true, even where, owing to buildings, some tracts of land are of much greater value per front foot than others.³ If, on the other hand, it appears that the body levying and apportioning the assessment ignored the question of benefits and apportioned the assessment according to frontage in an arbitrary manner, such assessment is invalid.⁴ If the statute provides for apportioning an assess-

96 N. Y. S. 601, 109 App. Div. 919 [1905]; Appeal of Wheeler, 80 N. Y. S. 204, 39 Misc. Rep. 484 [1902]; *In re City of New York*, 78 N. Y. S. 51, 38 Misc. Rep. 600 [1902]; *Blanchard v. City of Barre*, 77 Vt. 420, 60 Atl. 970 [1905]; *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35 [1879]; *Johnson v. Milwaukee*, 40 Wis. 315 [1876].

² *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *Sanitary District of Chicago v. City of Joliet*, 189 Ill. 270, 59 N. E. 566 [1901]; *Jenks v. City of Chicago*, 48 Ill. 296 [1868]; *State ex rel. Wheeler v. Dist. Court of Ramsey County*, 80 Minn. 293, 83 N. W. 183 [1900]; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903]; *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905]; *Kirtland v. Parker*, — N. J. L. —, 68 Atl. 913 [1908]; *Dooling, Pros. v. Ocean City*, 67 N. J. L. (38 Vr.) 215, 50 Atl. 62 [1901]; *State, Johnston, Pros. v. Inhabitants of City of Trenton*, 43 N. J. L. (14 Vr.) 166 [1881]; *State, Hunt, Pros. v. Mayor, etc., of Rahway*, 39 N. J. L. (10 Vroom) 646 [1877]; *State, Van Solinger, Pros. v. Town of Harrison*, 39 N. J. L. (10 Vr.) 51 [1876]; *State, Kohler, Pros. v. Town of Guttenburg*, 38 N. J. L. (9 Vr.) 419 [1876]; *State, Pudney, Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 65 [1874]; *O'Reilly v. City of Kingston*, 39 Hun. 285 [1886]; *In the Matter of Anderson*,

60 Barb. 375 [1871]; *In the Matter of Gardner*, 41 Howard 255 [1871]; *In the Matter of Anderson*, 39 Howard, 184 [1870]; *Shoemaker v. City of Cincinnati*, 68 O. S. 603, 68 N. E. 1 [1903]; *Nulsen v. Cincinnati*, 27 Ohio Cir. Ct. 383 [1905]; *Queen City Foundry Co. v. City of Cincinnati*, 8 Ohio N. P. 167 [1901]; *Alexander v. City of Tacoma*, 35 Wash. 366, 77 Pac. 686 [1904]; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236 [1896]; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983 [1898]; (*distinguishing*, *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896]).

³ *O'Reilly v. City of Kingston*, 39 Hun. 285 [1886].

⁴ *Crawfordsville Music Hall Association v. Clements*, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 742 [1894]; *City of Duluth v. Davidson*, 97 Minn. 378, 107 N. W. 151 [1906]; *State of Minnesota ex rel. Cunningham v. District Court of Ramsey Co.*, 29 Minn. 62, 11 N. W. 133 [1882]; *John v. Connell*, 64 Neb. 233, 89 N. W. 806 [1902]; (*modifying opinion in John v. Connell*, 61 Neb. 267); *State, Zabrieski, Pros. v. Mayor and Common Council of Hudson City*, 29 N. J. L. (5 Dutch.) 115 [1860]; *State, Ogden, Pros. v. Mayor and Common Council of City of Hudson*, 29 N. J. L. (5 Dutch.) 104 [1860]; *State, Water Commissioners of Jersey City, Pros. v. Mayor and Common Council of*

ment according to benefits, it is not necessary that it be apportioned according to frontage.⁶ Under such statute, an arbitrary apportionment according to frontage, ignoring benefits, is improper.⁶ If the proceedings show that an attempt has been made to apportion the assessments in accordance with benefits, the fact that the assessment is not the same upon each front foot of property benefited thereby does not invalidate it.⁷

§ 694. Assessments upon other basis of apportionment.

If the improvement is one which confers substantially the same benefit upon each unit of area of the property benefited and the proceedings show that the body apportioning the assessment has considered this fact and based its apportionment thereon, an apportionment according to area is not invalid.¹ Where the statute provides that the council is to make the apportionment according to benefits, the fact that council in apportioning an assessment for a sewer considers the area of the various tracts of land does not invalidate the assessment.² On the other hand, if it appears that the body apportioning the assessment apportions it arbitrarily according to area without any reference to benefits, such apportionment is invalid.³ Under a statute providing for apportioning an assessment according to benefits, an apportionment of the cost of work done in front of each tract

City of Hudson, 27 N. J. L. (3 Dutcher) 214 [1858]; Donovan v. City of Oswego, 39 Misc. 291, 79 N. Y. S. 562 [1902]; Elwood v. City of Rochester, 43 Hun. 102 [1887]; Kummer v. Cincinnati, 27 Ohio Cir. Ct. R. 683 [1905]; Violet v. City Council of Alexandria, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; Elma v. Carney, 9 Wash. 466, 37 Pac. 707 [1894]; Hayes v. Douglas Co., 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

⁵Dickinson v. City Council of Worcester, 138 Mass. 555 [1885]; State of Minnesota ex rel. Minnesota Transfer R. Co. v. District Court of Ramsey County, 68 Minn. 242, 71 N. W. 27 [1896]; In the Matter of Opening Grant Ave., 175 N. Y. 509,

67 N. E. 1083 [1903]; (affirming, 78 N. Y. S. 737, 76 App. Div. 87 [1902]).

⁶Town of Elma v. Carney, 9 Wash. 466, 37 Pac. 707 [1894].

⁷State of Minnesota ex rel. Minnesota Transfer R. Co. v. District Court, 68 Minn. 242, 71 N. W. 27 [1896]; Voght v. City of Buffalo, 133 N. Y. 483, 31 N. E. 340 [1892].

¹Minneapolis & St. Louis Railroad Co. v. Lindquist, 119 Iowa 144, 93 N. W. 103 [1903]; Hennessy v. Douglass County, 99 Wis. 129, 74 N. W. 983 [1898].

²Minneapolis & St. Louis Railroad Co. v. Lindquist, 119 Iowa 144, 93 N. W. 103 [1903].

³People ex rel. Parker v. County Court of Jefferson Co., 55 N. Y. 604 [1874].

of land made arbitrarily without any reference to the benefits conferred thereby is invalid.⁴ So an assessment of the cost of the work in front of the land assessed, plus fifteen per cent., is invalid.⁵ Under such statutes it has been held that the value of the land benefited may be considered in determining the amount of benefits conferred by the improvement.⁶ On the other hand the fact that it does not appear affirmatively that the body apportioning the assessment considered the value of the property does not invalidate the assessment.⁷ Where an apportionment to be made according to benefits is to be passed upon by a jury it is improper for the court merely to tell the jury to determine whether the assessment was correct and just.⁸ Such an instruction would substitute the jury's idea of a proper apportionment for the rule laid down by law. Such error may, however, be corrected by other parts of the charge.⁹ Under statutes which provide for apportioning an assessment according to benefits the attempt has been made to apportion the assessment arbitrarily according to the distance of the property assessed from the improvement for which the assessment is levied. Such arbitrary method of assessment is held to be invalid under such statutes.¹⁰ In assessments for the cost of levees based on the theory of benefits, the officials making the assessments have sometimes adopted the rule that the value of each tract would be enhanced in proportion to the depth of the inundation which would exist in the absence of such levee. Such a rule has been upheld as a proper method of determining the benefits conferred by such improvement.¹¹ In other cases, however, the reason suggested by the

⁴ *State, Baxter, Pros. v. Mayor and Aldermen of Jersey City*, 36 N. J. L. (7 Vr.) 188 [1873].

⁵ *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35 [1879].

⁶ *Piper's Appeal in the Matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *State, Hunt, Pros. v. Mayor and Common Council of City of Rahway*, 39 N. J. L. (10 Vr.) 646 [1877]; *In re City of Seattle*, — Wash. —, 91 Pac. 548 [1907].

⁷ *Scammon v. City of Chicago*, 42 Ill. 192 [1866].

⁸ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

⁹ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

¹⁰ *State ex rel. Scotter v. Brill*, 58 Minn. 152, 59 N. W. 989 [1894]; *State of Minnesota ex rel. Shannon v. Judges of District Court of Eleventh Judicial District*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122 [1892]; If the assessment thus apportioned is offered as a compromise of an original valid assessment its invalidity cannot affect the validity of the original assessment. *Holt v. City Council of Somerville*, 127 Mass. 408 [1879].

¹¹ *Memphis Land & Timber Co. v. St. Francis Levee District*, 64 Ark. 258, 42 S. W. 763 [1897].

courts is inconsistent with the validity of such rule of apportionment.¹²

§ 695. Apportionment on a "proportionate" basis.

According to some constitutional and statutory provisions assessments are to be levied in a "just proportion,"¹ or assessments must be "proportional and reasonable."² Such provisions are held in legal effect to require assessments to be apportioned according to benefits conferred by the improvement.³ Under such a statute complaint cannot be made that the assessment is not levied on the basis of frontage.⁴ Under such provisions particular methods of apportionment, if fairly proportionate to the amount of benefits conferred in the particular case, have been upheld. Thus, an assessment for widening and laying out a street levied in proportion to the value of the property assessed,⁵ or an assessment levied by classifying lands according to their value per front foot and assessing the different classes at different percentages,⁶ or an assessment charging each tract of land with the cost of curbing and laying a sidewalk in front of each tract,⁷ or an assessment for the construction of an elevated roadway apportioned according to frontage but varying according to the height of the structure in front of the respective lots,⁸ have in each case been held to be valid. Under such statutes a provision for assessing the cost of the work in proportion to the increase of value has been held not to imply a limitation of the

¹²Reclamation Dist. No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156 [1898].

¹Beecher v. City of Detroit, 92 Mich. 268, 52 N. W. 731 [1892].

²Smith v. Mayor and Aldermen of Worcester, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902].

³Smith v. Mayor and Aldermen of Worcester, 182 Mass. 232, 59 L. R. A. 728, 65 N. E. 40 [1902]; Stark v. City of Boston, 180 Mass. 293, 62 N. E. 375 [1902]; Lincoln v. Street Commissioners of the City of Boston, 176 Mass. 210, 57 N. E. 356 [1900]; Holt v. City Council of Somerville, 127 Mass. 408 [1879]; Chase v. Board of Aldermen of Springfield, 119 Mass. 556 [1876]; Butler v. City of Worcester, 112 Mass. 541 [1873];

Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]; Beecher v. City of Detroit, 92 Mich. 268, 52 N. W. 731 [1892]; Paulson v. City of Portland, 16 Ore. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (affirmed in Paulsen v. Portland, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]).

⁴Dickinson v. City Council of Worcester, 138 Mass. 555 [1885].

⁵Dorgan v. City of Boston, 94 Mass. (12 Allen) 223 [1866].

⁶Butler v. City of Worcester, 112 Mass. 541 [1873].

⁷Howe v. City of Cambridge, 114 Mass. 388 [1874].

⁸King v. Portland, 38 Ore. 402, 52 R. A. 812, 63 Pac. 2 [1900].

assessment to the amount of the benefit and therefore to be unconstitutional.⁹ So if the assessment is not distributed ratably and proportionately upon the property benefited, the owner of property upon which an undue proportion of the assessment has been levied can complain, even though the assessment does not exceed the amount of the benefits.¹⁰

§ 696. Apportionment on "just and equitable" basis.

Under some statutes it is provided that assessments must be apportioned upon a "just and equitable" basis, or some other similar indefinite expression is used. If the context shows that the legislature by this expression intended an assessment upon the basis of benefits or on some other basis recognized as a proper one, such method of apportionment is valid.¹ Thus, if the statute elsewhere provides for assessing each tract of land in proportion to the benefit derived from the improvement,² or if it provides for a just and equitable assessment of benefits,³ the context shows that the assessment is to be according to the benefits conferred. A statute which provides for assessing the cost of

⁹ *Harwood v. Donovan*, 188 Mass. 487, 74 N. E. 914 [1905]; *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124 [1901]. "The question of difficulty in dealing with cases of this kind is, How far may the court interfere with the legislative determination of a method for making special assessments? Of course, if a statute shows on its face that it entirely disregards the relation of the benefits to the taxes to be assessed upon the respective estates, it is plainly unconstitutional. In many cases, however, it is impossible to estimate the amount of benefit with absolute accuracy and methods of determination must be adopted which are practicable and which at the same time will give a reasonable approximation to accuracy. The selection of methods is primarily a matter for the Legislature, and much latitude must be allowed it in the exercise of its judgment and discretion in regard to a subject of this kind. It is only when its discretion is plainly one

that will be likely to result in taxation that is either disproportional or unreasonable that the court can interfere." *White v. Gove*, 183 Mass. 333, 335, 336, 67 N. E. 359 [1903].

¹⁰ *Early v. City of Ft. Dodge*, — Ia. —, 113 N. W. 766 [1907].

¹ *Keighley's Case*, 10 Rep. 139 a. b.; *Stark v. City of Boston*, 180 Mass. 293, 62 N. E. 375 [1902]; *Kingman*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 [1891]; *Allison Land Co. v. Tenaflv*, 68 N. J. L. (39 Vr.) 205, 52 Atl. 231 [1902]; (affirmed, *Allison Land Co. v. Borough of Tenaflv*, 69 N. J. L. (40 Vr.) 587, 55 Atl. 39); *People v. Common Council of City of Kingston*, 99 N. Y. S. 657, 114 App. Div. 326 [1906].

² *People v. Common Council of City of Kingston*, 99 N. Y. S. 657, 114 App. Div. 326 [1906].

³ *Allison Land Co. v. Tenaflv*, 68 N. J. L. (39 Vr.) 205, 52 Atl. 231 [1902]; (affirmed, *Allison Land Co. v. Borough of Tenaflv*, 69 N. J. L. (40 Vr.) 587, 55 Atl. 39).

improvement "fairly and equitably" upon the land on the line of such improvement is held to intend an assessment upon such property according to benefits and hence to be valid.⁴ Under a statute which provides that commissioners shall assess such part of the expense of a street improvement upon a city and such part locally as they may deem just, it is held that the commissioners are not required to assess any portion of the expense upon the city unless in the exercise of their judgment they deem it just to do so.⁵ A statute which provides for a "just and equitable assessment" and that the excess should be borne by the city at large is held to intend that the assessment must be according to benefits.⁶ Power cannot be given to commissioners, however, to apportion an assessment in any way that they may choose. Such an arbitrary exercise of power by persons who are officials of a public corporation is contrary to our theory of government.⁷ Ordinances will accordingly be construed so as to provide a method of apportionment where such construction can be deduced from the language used.⁸ Accordingly, if a statute provides that the commissioners shall apportion the assessment in a "just and equitable" manner and that the context shows that they are given power to apportion such assessment as they choose without reference to any legal standard, such statutes and the assessments levied thereunder are invalid.⁹ So, if the apportionment of assessments is to be reviewed by a jury, a charge that instructs them to sustain the assessment if they believe it to be "correct and just" is improper, since it leaves the question of

⁴State, Hutton, Pros. v. Inhabitants of Township of West Orane, 39 N. J. L. (10 Vr.) 453 [1877].

⁵People ex rel. Howlett v. Mayor and Common Council of the City of Syracuse, 63 N. Y. 291 [1875].

⁶Smith v. Mayor and Common Council of City of Newark, 32 N. J. Eq. (5 Stew.) 1 [1880].

⁷State, Mayor and Common Council of City of Newark, Pros. v. Inhabitants of Verona Township, 58 N. J. L. (29 Vr.) 595, 33 Atl. 959 [1896]; State, New York and Greenwood Lake Rv. Co., Pros. v. Board of Township Committee of Township of Kearney, 55 N. J. L. (26 Vr.) 463, 26 Atl. 800 [1893]; State, Gaines,

Pros. v. Hudson County Avenue Commissioners, 37 N. J. L. (8 Vr.) 12 [1874].

⁸Moale v. Mayor and City Council of Baltimore, 61 Md. 224 [1883].

⁹State, Van Houten v. Patterson, 37 N. J. L. (8 Vr.) 412 [1875]; State, New Brunswick Rubber Co., Pros. v. Commissioners of Streets and Sewers in the City of New Brunswick, 38 N. J. L. (9 Vr.) 190, 20 Am. Rep. 380 [1875]; Bogert v. City of Elizabeth, 27 N. J. Eq. (12 C. E. Green) 568 [1876]; (reversing Bogert v. City of Elizabeth, 25 N. J. Eq. (10 C. E. Gr.) 426 [1874]); Barnes v. Dyer, 56 Vt. 469 [1884].

what is correct and just to the arbitrary determination of the jury.¹⁰ This defect may, however, be cured by the context of the charge. An assessment levied under a statute which provides merely that an assessment is to be just and equitable is most clearly invalid when an arbitrary and unfair apportionment has in effect been made.¹¹ Thus, if an assessment made under such a statute shows that the commissioners paid no attention to benefits, but levied the assessment arbitrarily on a basis of frontage without any reference to the existence of benefits in fact, such assessment is invalid.¹² A statute which requires an assessment to be laid ratably upon abutting property which is benefited by the improvement has been held to be valid under a constitutional provision which provides that assessments shall be "proportional and reasonable."¹³ A statute authorizing "reasonable assessments in the way of water rents" has been held to be valid.¹⁴

§ 697. Apportionment according to value.

In some assessment statutes it is provided that assessments are to be apportioned according to the value of the property benefited or according to the valuation thereof upon the tax duplicate. Such a method of apportionment is held to be valid and not to be in violation of the provisions found in most constitutions.¹ This rule is in accordance with that which has already been stated,² to the effect that even where assessments are to be ap-

¹⁰ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

¹¹ *State, Hampton, Pros. v. Mayor and Aldermen of the City of Paterson*, 36 N. J. L. (7 Vr.) 159 [1873].

¹² *State, Hampton, Pros. v. Mayor and Aldermen of City of Paterson*, 36 N. J. L. (7 Vr.) 159 [1873]; *State, Becker, Pros. v. Gardner*, 34 N. J. L. (5 Vr.) 327 [1870].

¹³ *Jones v. Board of Aldermen of City of Boston*, 104 Mass. 461 [1870].

¹⁴ *Allentown v. Henry*, 73 Pa. St. (23 P. F. Smith) 404 [1873].

¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing, *Bradley v. Fallbrook Irrigation District*, 68 Fed. 948 [1895]); *Triggs v. Owens*, 94 Cal. 317, 29 Pac. 643 [1892];

Houston v. McKenna, 22 Cal. 550 [1863]; *Grunewald v. City of Cedar Rapids*, 118 Ia. 222, 91 N. W. 1059 [1902]; *Board of Commissioners of County of Monroe v. Harrell*, 147 Ind. 500, 46 N. E. 124 [1896]; *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *Burguières v. Sanders*, 111 La. 109, 35 So. 478 [1903]; *Richardson v. Morgan*, 16 La. Ann. 429 [1862]; *Mason v. Police Jury of the Parish of Texas*, 9 La. Ann. 368 [1854]; *Daily v. Swope*, 47 Miss. 367 [1872]; *Page v. City of St. Louis*, 20 Mo. 136 [1854]; *In re Lakeview Ave. in City of Seattle*, — Wash. —, 89 Pac. 156 [1907]; *City of Seattle v. Yesler*, 1 Wash. 577 [1878].

² See § 694.

portioned upon the basis of benefits in fact, the value of the property assessed may be considered in determining the amount of benefits.³ Constitutional provisions may require in specific terms an assessment on the basis of valuation.^{3*} Under such provisions an assessment may be apportioned upon the basis of the increase of value due to the benefits conferred by the improvement,⁴ since the constitutional provision which requires the assessment to be *ad valorem* does not say of what the value is to be taken; and hence it may be either the value of the property or of the benefits.⁵ A provision that land should be assessed for fencing "according to its value as shown by the last county assessment," impliedly limits the amount of the assessment to the amount of benefits conferred.⁶ A statute which provides that if the jury "shall find that any number of tracts or parcels of land within the benefit district are benefited ratably in proportion to the assessed value thereof as shown by the books of the assessor, they may so assess them" is not mandatory and does not require the jury to take the assessor's book as a guide unless they find that the property is benefited in such proportion.⁷ In some of the older cases it has been held that benefits must be apportioned according to the value of the property assessed and could not be apportioned on any other basis.⁸ This rule, however, is based upon the theory that an assessment is a tax for the purpose of determining what is a proper apportionment; a theory which, as has been said elsewhere, is now abandoned.⁹ If the improvement is one which benefits property substantially upon a basis of frontage, an assessment according to valuation, which results in an assessment upon some tracts three or four times as much per front foot as on others, has

³ Piper's Appeal in the Matter of Widening Kearney St., 32 Cal. 530 [1867]; Butler v. City of Worcester, 112 Mass. 541 [1873]; Garrett v. City of St. Louis, 25 Mo. 505, 69 Am. Dec. 475 [1857]; State, Hunt, Pros. v. Mayor and Common Council of City of Rahway, 39 N. J. L. (10 Vr.) 646 [1877].

^{3*} Town of Monticello v. Banks, 48 Ark. 251, 2 S. W. 852.

⁴ First v. Street Improvement District No. 120, — Ark. —, 109 S. W. 526 [1908]; Ahern v. Board of Improvement District No. 3 of Tex-

arkana, 69 Ark. 68, 61 S. W. 575 [1901]. See § 690.

⁵ First v. Street Improvement District No. 120, — Ark. —, 109 S. W. 526 [1908].

⁶ Stiewel v. Fencing District, No. 6 of Johnson, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

⁷ Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600 [1896].

⁸ Richardson v. Morgan, 16 La. Ann. 429 [1862]; Yeatman v. Crandell, 11 La. Ann. 220 [1856]; Stinson v. Smith, 8 Minn. 366 [1863].

⁹ See § 147 *et seq.*

been held to be invalid.¹⁰ If the statute provides a method of objecting to an assessment, failure to object in such way to an assessment based upon the valuation of the property assessed operates as a waiver of such objection.¹¹ An assessment based upon valuation has been held in some jurisdictions not to be a true assessment, but rather to be a form of general taxation.¹² The nature of such an exaction has been discussed elsewhere.¹³ In determining the value of property, commissioners may take into consideration the view therefrom.¹⁴ If by statute an assessment is to be apportioned according to the value of the property assessed, it has been held that the value of the land without reference to the value of the improvements thereon may be taken as a basis of apportionment.¹⁵ However, under a statute authorizing a city to apportion the cost of an improvement upon adjacent property "by foot frontage, according to benefits, or by land values, as the common council shall determine," an assessment based upon the value of land, exclusive of the improvements on each tract has been held to be invalid.¹⁶ Where the assessors in apportioning an assessment according to benefits determine that the amount of benefits is not affected by the improvements upon the land, this error, if any, is one of judgment and does not amount to the application of a wrong rule of law, since the assessors seem to be acting on the theory that the benefits are not in fact affected by the improvements and not on the theory that they have no legal right to consider the improvements.¹⁷

§ 698. Apportionment according to frontage held valid.

In many statutes it has been provided that the assessment is to be apportioned upon the property in the assessment district

¹⁰ *Howell v. City of Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447 [1892].

¹¹ *Northwestern and Pacific Hypotheek Bank v. City of Spokane*, 18 Wash. 456, 51 Pac. 1070 [1898].

¹² *Miller v. Hixson*, 64 O. S. 39, 59 N. E. 749 [1901]; *Bowles v. State of Ohio*, 37 O. S. 35 [1881].

¹³ See §§ 36, 38.

¹⁴ *In re Lakeview Ave. in City of Seattle*, — Wash. —, 89 Pac. 156 [1907].

¹⁵ *Moore v. City of Paola*, 63 Kan. 867, 66 Pac. 1040 [1901]; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402 [1886]; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885]; *Burns v. Mayor and City Council of Atchison*, 2 Kan. (2nd. Ed.) 448 [1864]; *Snow v. City of Fitchburg*, 136 Mass. 83 [1883]; *Brewer v. City of Springfield*, 97 Mass. 152 [1867].

¹⁶ *Walker v. City of Ann Arbor*, 118 Mich. 251, 76 N. W. 394 [1898].

¹⁷ *Hoffeld v. City of Buffalo*, 130 N. Y. 387, 29 N. E. 747.

according to the frontage of each separate tract within such district. The validity of such method of apportionment has been attacked sharply in many cases. Upon the question of its validity there is a sharp conflict of authority, although such conflict is more marked in the *obiter* in which the courts have stated their reasons for arriving at their decision than it is in the actual adjudications themselves. If the legislature has provided for apportioning assessments according to the front foot rule, this seems to be held in the great majority of jurisdictions to be a valid and conclusive determination by the legislature that the benefits conferred by the improvement are conferred according to frontage and, accordingly, such a method of assessment is held to be a valid and proper one.¹ In the greater number of cases

¹City of Seattle v. Kelleher, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; Chadwick v. Kelley, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming, Kelley v. Chadwick, 104 La. 719, 29 So. 295 [1901]); Loeb v. Columbia Township Trustees, 179 U. S. 472, 45 L. 280, 21 S. 174 [1901]; (reversing, Loeb v. Trustees of Columbia Township, Hamilton County, O., 91 Fed. 37 [1899]); Parsons v. District of Columbia, 170 U. S. 45, 42 L. 943, 18 S. 521 [1898]; (affirming, Parsons v. District of Columbia, 8 App. D. C. 391 [1896]); Field v. Barber Asphalt Paving Co., 117 Fed. 925 [1902]; City Council of Montgomery v. Moore, 140 Ala. 638, 37 So. 291 [1903]; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500 [1900]; Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283 [1895]; White v. Harris, 103 Cal. 528, 37 Pac. 502 [1894]; Treanor v. Houghton, 103 Cal. 53, 36 Pac. 1081 [1894]; Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127 [1889]; Whiting v. Quackenbush, 54 Cal. 306 [1880]; Oakland Paving Company v. Reir, 52 Cal. 270 [1877]; People of the State of California v. Lynch, 51 Cal. 15, 21 Am. 677 [1875]; Houston v. McKenna, 22 Cal. 550 [1863]; City of Denver v. Campbell, 33 Colo. 162, 80 Pac. 142 [1905]; City of Denver v. Londoner, 33 Colo. 104, 80

Pac. 117 [1904]; City of Denver v. Knowles, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892]; Hayden v. City of Atlanta, 70 Ga. 817 [1883]; People ex rel. Raymond v. Latham, 203 Ill. 9, 67 N. E. 403 [1903]; Ronan v. People ex rel. Shafter, 193 Ill. 631, 61 N. E. 1042 [1901]; Job v. City of Alton, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; Cramer v. City of Charleston, 176 Ill. 507, 52 N. E. 73 [1898]; Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821 [1898]; People ex rel. Gleason v. Yancey, 167 Ill. 255, 47 N. E. 521 [1897]; Palmer v. City of Danville, 166 Ill. 42, 46 N. E. 629 [1897]; Chicago & Northwestern R. Ry. Co. v. Village of Elmhurst, 165 Ill. 148, 46 N. E. 437 [1897]; Payne v. Village of South Springfield, 161 Ill. 285, 44 N. E. 105 [1896]; Ware v. City of Jerseyville, 158 Ill. 234, 41 N. E. 736 [1895]; The Chicago & Alton R. R. Co. v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; Green v. City of Springfield, 130 Ill. 515, 22 N. E. 602 [1890]; Wilbur v. City of Springfield, 123 Ill. 395, 14 N. E. 871 [1889]; White v. The People ex rel. City of Bloomington, 94 Ill. 604 [1880]; Palmer v. Stumph, 29 Ind. 329 [1868]; Coburn v. Bossert, 13 Ind. App. 359, 40 N. E. 281 [1895];

in which this rule is stated the property owner who complained of the assessment did not show that in the particular case any marked injustice was done by such method of apportionment. An assessment is not a tax within the meaning of the constitutional

Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902]; Hackworth v. City of Ottumwa, 114 Ia. 467, 87 N. W. 424 [1901]; Dittoe v. City of Davenport, 74 Ia. 66, 36 N. W. 895 [1887]; Kentig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882]; City of Burlington v. Quick, 47 Ia. 222 [1877]; Burnes v. Mayor and City Council of Atchison, 2 Kan. (2d Ed.) 448 [1864]; S. D. Moody & Co. v. Spotorno, 112 La. 1108, 36 So. 838 [1904]; Kelly v. Chadwick, 104 La. 719, 29 So. 295 [1903]; (affirmed Chadwick v. Kelly, 187 U. S. 540, 47 L. 293, 23 S. 175 [1901]); Rosetta Gravel, Paving & Improvement Co. v. Jollisaint, 51 La. Ann. 804, 25 So. 477; City of New Orleans Praying for Opening of Casacaloo and Moreau Streets, 20 La. Ann. 497 [1868]; New Orleans v. Elliott, 10 La. Ann. 59 [1855]; Mayor and City Council of Baltimore v. Stewart, 92 Md. 535, 48 Atl. 165 [1901]; Alberger v. The Mayor and City Council of Baltimore, 64 Md. 1, 20 Atl. 988 [1885]; Moale v. Mayor and City Council of Baltimore, 61 Md. 224 [1883]; Mayor and City Council of Baltimore v. Johns Hopkins Hospital, 56 Md. 1 [1880]; Cass Farm Co. v. Detroit, 124 Mich. 433, 83 N. W. 108 [1900]; City of Kalamazoo v. Francoise, 115 Mich. 554, 73 N. W. 801 [1898]; Sheley v. City of Detroit, 45 Mich. 431, 8 N. W. 52 [1881]; Motz v. City of Detroit, 18 Mich. 494 [1869]; McGee v. Board of County Commissioners of Hennepin County, 84 Minn. 472, 88 N. W. 6 [1901]; State of Minnesota ex rel. Chapin v. Reis, 38 Minn. 371, 38 N. W. 97 [1888]; Wilzinski v. City of Greenville, 85 Miss. 393, 37 So. 807 [1905]; Town of Macon v. Patty, 57 Miss. 378, 34 Am.

Rep. 451 [1879]; Ross v. Gates, 183 Mo. 338, 81 S. W. 1107 [1904]; Meier v. City of St. Louis, 180 Mo. 391, 79 S. W. 955 [1903]; City of St. Charles ex rel. Budd v. Deemer, 174 Mo. 122, 73 S. W. 469 [1902]; Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163 [1902]; Prior v. Buehler & Cooney Construction Company, 170 Mo. 439, 71 S. W. 205 [1902]; Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014 [1895]; The City of St. Joseph to use of Gibson v. Farrell, 106 Mo. 437, 17 S. W. 497 [1891]; Neenan v. Smith, 50 Mo. 525 [1872]; City of St. Louis to use of McGrath v. Clemens, 49 Mo. 552 [1872]; Creaner v. Bates, 49 Mo. 523 [1872]; The Mayor, etc., of City of Lexington v. Long, 31 Mo. 369 [1861]; Adams v. Green, 74 Mo. App. 125 [1898]; Forry v. Ridge, 56 Mo. App. 615 [1893]; City of Nevada to use of Gilfillan v. Morris, 43 Mo. App. 586 [1891]; Eyerman v. Hardy, 8 Mo. App. 311 [1880]; Seibert v. Tiffany, 8 Mo. App. 33 [1879]; People of the State of New York ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902]; In the Matter of Van Antwerp, 56 N. Y. 261 [1874]; Wilmington v. Yopp, 71 N. C. 76; Webster v. City of Fargo, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; Roberts v. First National Bank of Fargo, 8 N. D. 504, 79 N. W. 1049 [1899]; Rolph v. City of Fargo, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898]; Oliver v. City of Newberg, — Or. —, 91 Pac. 470 [1907]; Franklin v. Hancock, 204 Pa. St. 110, 53 Atl. 644 [1902]; Harrisburg v. McPherran, 200 Pa. St. 343, 49 Atl. 988 [1901]; Scranton v. Koehler, 200 Pa. St. 126, 49 Atl. 792 [1901]; Beaumont v. Wilkes Barre City, 142 Pa. St. 198, 21 Atl.

provisions requiring taxation to be uniform and apportioned according to the value of the property which is taxed. Such a method of apportionment is not, therefore, rendered invalid by the fact that it ignores the valuation of the property assessed.² While in many of these cases this rule is laid down in very broad terms,³ and while it is sometimes said that the legislative determination as to the existence of benefits and their apportionment according to frontage is so conclusive that the question of the existence of benefits in point of fact is immaterial and cannot be inquired into,⁴ the decisions do not necessarily involve these

88 [1891]; Beltzhoover Borough v. Maple, 130 Pa. St. 335; *sub nomine* Maple v. Borough of Beltzhoover, 18 Atl. 650 [1899]; Washington Avenue, 69 Pa. St. (19 P. F. Smith) 352, 8 Am. Rep. 255 [1871]; Wray v. Mayor of Pittsburg for use, etc., 46 Pa. St. (10 Wright) 365 [1863]; Magee v. Commonwealth for the use of the City of Pittsburg, 46 Pa. St. (10 Wright) 358 [1863]; Spring Garden v. Wistar, 18 Pa. St. (6 Harr.) 195 [1852]; In the Matter of Dorrance Street, 4 R. I. 230 [1856]; Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447 [1898]; Winona & St. Paul R. Co. v. City of Watertown, 1 S. Dak. 46, 44 N. W. 1072 [1890]; Arnold v. Mayor and Aldermen of City of Knoxville, 115 Tenn. 195, 90 S. W. 469 [1905]; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. 230 [1888]; Norfolk City v. Ellis, 67 Va. (26 Grattan) 224 [1875]; Austin v. City of Seattle, 2 Wash. 667, 27 Pac. 557 [1891]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892]; Weeks v. City of Milwaukee, 10 Wis. 242 [1860].

² Whiting v. Quackenbush, 54 Cal. 306 [1880]; People of the State of California v. Lynch, 51 Cal. 15, 21 Am. 677 [1875]; Hayden v. City of Atlanta, 70 Ga. 817 [1883]; City of New Orleans Praying for Opening of Casacaloo and Moreau Streets, 20 La. Ann. 497 [1868]; New Orleans v. Elliott, 10 La. Ann. 59 [1855]; Beaumont v. Wilkes Barre City, 142 Pa.

St. 198, 21 Atl. 88 [1891]; Winona & St. P. R. Co. v. City of Watertown, 1 S. Dak. 46, 44 N. W. 1072 [1890]; Arnold v. Mayor and Aldermen of Knoxville, 115 Tenn. 195, 90 S. W. 469 [1905]; Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. 230 [1888]; Norfolk City v. Ellis, 67 Va. (26 Grattan) 224 [1875]; Austin v. City of Seattle, 2 Wash. 667, 27 Pac. 557 [1891]. So held under a specific constitutional provision allowing assessments without regard to valuation. McGee v. Board of County Commissioners of Hennepin County, 84 Minn. 472, 88 N. W. 6 [1901]; State of Minnesota ex rel. Stateler v. Reis, 38 Minn. 371, 38 N. W. 97 [1888].

³ Webster v. City of Fargo, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; (affirmed Webster v. City of Fargo, 181 U. S. 394, 45 L. 912, 21 S. 623, 645 [1901]).

⁴ Jennings v. Le Breton, 80 Cal. 8, 21 Pac. 1127 [1889]; People ex rel. Raymond v. Latham, 203 Ill. 9, 67 N. E. 403 [1903]; Ronan v. People ex rel. Shafter, 193 Ill. 631, 61 N. E. 1042 [1901]; Job v. City of Alton, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; Cramer v. City of Charleston, 176 Ill. 507, 52 N. E. 73 [1898]; Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821 [1898]; People ex rel. Gleason v. Yancey, 167 Ill. 255, 47 N. E. 521 [1897]; Chicago & N. W. R. Ry. Co. v. Village of Elmhurst, 165 Ill. 148, 46 N. E. 437 [1897]; Payne v. Vil-

principles. Whether a statute which authorizes assessments according to frontage is unconstitutional is a question which has been avoided by some courts by holding that if such assessment is a violation of the constitution, the defect is apparent upon the face of the proceedings and that accordingly an action in equity cannot be maintained to set such assessment aside as being a cloud on the title.⁵

§ 699. Apportionment according to frontage held valid if limited by statute to benefits.

In many cases the validity of the front foot rule is upheld but in a modified and less extreme form. Where the statute provides for an apportionment in accordance with the front foot rule, but also provides for a hearing before the assessment becomes a finality, at which hearing the property owner who complains of the assessment may have his assessment reduced to the amount of the benefits conferred upon his property if he shows that the assessment as apportioned according to frontage exceeds such benefits, such statute is held to be valid, both under state and federal constitutions and an assessment levied thereunder and apportioned according to frontage is valid.¹ Such

lage of South Springfield, 161 Ill. 285, 44 N. E. 105 [1896]; Ware v. City of Jerseyville, 158 Ill. 234, 41 N. E. 736 [1895]; The Chicago & Alton R. R. Co. v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; Green v. City of Springfield, 130 Ill. 515, 22 N. E. 602 [1890]; Wilbur v. City of Springfield, 123 Ill. 395, 14 N. E. 871 [1889]; White v. The People ex rel. City of Bloomington, 94 Ill. 604, [1880]; Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902]; Hackworth v. City of Ottumwa, 114 Ia. 467, 87 N. W. 424 [1901]; Dittoe v. City of Davenport, 74 Ia. 66, 36 N. W. 895 [1887]; City of Burlington v. Quick, 47 Ia. 222 [1877]; S. D. Moody & Co. v. Spotorno, 112 La. 1108, 36 So. 836 [1904]; Kelly v. Chadwick, 104 La. 719, 29 So. 295 [1901]; Wilzinski v. City of Greenville, 85 Miss. 393, 37 So. 807 [1905]; Ross v. Gates, 183 Mo. 338,

81 S. W. 1107 [1904]; Webster v. City of Fargo, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; Roberts v. First National Bank of Fargo, 8 N. D. 504, 79 N. W. 1049 [1899]; Rolph v. City of Fargo, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892].

⁵ Conde v. City of Schenectady, 164 N. Y. 258, 58 N. E. 130 [1900].

¹ The leading case in Indiana on this point is Adams v. City of Shelbyville, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899] where a statute providing for an apportionment of the cost of an improvement according to frontage was upheld on the theory that by a fair construction of the entire statute provision was made for a hearing at which the amount of the assessment could be reduced to the amount of actual benefits if, as

an assessment is *prima facie* valid;² but this presumption is not conclusive and if the assessment exceeds the benefits conferred, it is invalid.³ In other jurisdictions the front foot rule is upheld where there has been a preliminary hearing or inquiry of some sort provided for by law, for the purpose of determining the benefits received by the property assessed; and where the public officials authorized by statute to determine the question of benefits have decided that the benefits are apportioned according to frontage and they accordingly apportion the assessment in the same way. If provision is made for a hearing as to the existence and amount of benefits during the pendency of the assessment proceedings, and if at such hearing the public officers having authority to levy and apportion the assessment de-

apportioned originally, it exceeded the benefits.

This view has since been adopted in many Indiana cases: *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company v. Tabor*, 168 Ind. 419, 77 N. E. 741 [1906]; *Voris v. Pittsburgh Plate Glass Co.*, 163 Ind. 599, 70 N. E. 249 [1904]; *McKee v. Town of Pendleton*, 162 Ind. 667, 69 N. E. 997 [1904]; *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150 [1903]; *Deane v. Indiana Macadam & Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903]; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021 [1901]; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004 [1901]; *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930 [1901]; *City of Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 998, 1100 [1900]; *Marion Bond Company v. Johnson*, 29 Ind. App. 294, 64 N. E. 626 [1902].

The Supreme Court of the United States, adopting the construction placed upon this statute by the state courts, has held such assessments to be valid under such construction. *Schaefer v. Werling*, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming, *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149).

The Indiana method of apportioning benefits has been held to be unconstitutional by an inferior

Federal Court. *Charles v. City of Marion*, 100 Fed. 538 [1900], but this case must be regarded as practically overruled by decisions of the United States Supreme Court recognizing the validity of such method of apportionment. *Hibben v. Smith*, 191 U. S. 310, 24 S. 881 [1903]; (affirming *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]); *Schaefer v. Werling*, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149 [1900]). These cases followed, *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 47 L. R. A. 797, 57 N. E. 114 [1899], and the cases based thereon.

The same view has been expressed by the courts of other states: *Mayor and City Council of Baltimore v. Stewart*, 92 Md. 535, 48 Atl. 165 [1901]; *Alberger v. The Mayor and City Council of Baltimore*, 64 Md. 1, 20 Atl. 988 [1885]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *People of the State of New York, ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902].

² *City of Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100 [1900].

³ *McKee v. Town of Pendleton*, 154 Ind. 652, 57 N. E. 532 [1900].

cide that such benefits are apportioned according to frontage, and they therefore determine to apportion the assessment according to frontage, such method of apportionment is upheld as valid.⁴ Where this theory obtains an assessment levied according to frontage without any preliminary inquiry as to the apportionment of benefits seems to be regarded as invalid as made by an arbitrary rule which ignores benefits. While, under a statute providing for apportioning assessments according to the actual benefits, the public officers authorized to levy and apportion the assessment may find as a fact that the benefits are conferred upon the property in proportion to its frontage and may accordingly apportion the benefits upon the same basis,⁵ yet under such statutes if it does not appear affirmatively that such public officials inquired into the benefits as a question of fact and found that they were apportioned according to frontage, but on the contrary it appears that such public officials arbitrarily selected the front foot rule as a method of apportionment without reference to the existence of benefits as a matter of fact, such apportionment is invalid.⁶ Where this view obtains it seems

⁴ *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903]; *Fair Haven & Westville R. R. Co. v. City of New Haven*, 75 Conn. 442, 53 Atl. 960 [1903]; *Sanitary District of Chicago v. City of Joliet*, 189 Ill. 270, 59 N. E. 566 [1901]; *Minneapolis & St. Louis Railroad Co. v. Lindquist*, 119 Iowa 144, 93 N. W. 103 [1903]; *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905]; *Dooling v. Ocean City*, 67 N. J. L. (38 Vr.) 215, 50 Atl. 62 [1901]; *Long Branch Police, Sanitary and Improvement Commission v. Dobbins* 61 N. J. L. (32 Vr.) 659, 40 Atl. 599 [1898]; *State, Central New Jersey Land and Improvement Co. v. Mayor and Council of the City of Bayonne*, 56 N. J. L. (27 Vr.) 297, 28 Atl. 713 [1893]; *State, Raymond, Pros. v. Mayor and Council of Borough of Rutherford*, 55 N. J. L. (26 Vr.) 441, 27 Atl. 172 [1893]; *State, Hunt, Pros. v. Mayor and Common Council of Rahway*, 39 N. J. L. (10 Vroom) 646 [1887]; *State, Van Solinger, Pros. v.*

Town of Harrison, 39 N. J. L. (10 Vr.) 51 [1876]; *State, Kohler, Pros. v. Town of Guttenburg*, 38 N. J. L. (9 Vr.) 419 [1876]; *State, Pudney, Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 65 [1874]; *People ex rel. Crowell v. Lawrence*, 36 Barb. 178 [1862]; *In the Matter of Gardner*, 41 Howard 255 [1871]; *King v. Portland*, 38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900]; *Alexander v. City of Tacoma*, 35 Wash. 366, 77 P. 686 [1904]; *City of New Whatcom v. Bellingham Bay Improvement Company*, 16 Wash. 131, 47 Pac. 236 [1896]; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 984 [1898].

⁵ See § 693.

⁶ *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893]; *City of Springfield v. Sale*, 127 Ill. 359 20 N. E. 86 [1890]; *Stevens v. City of Port Huron*, 149 Mich. 536, 113 N. W. 291 [1907]; *Warren v. City of Grand Haven*, 30 Mich. 24 [1874]; *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503,

to be immaterial whether injustice was done in the particular case or not, since the public officers and not the court are to apportion the assessment, and an assessment made by them upon an arbitrary rule is regarded as invalid, even if it may give the same result which would have been reached under the proper rule of apportionment. The owners of the property assessed are entitled to the judgment of the assessing officials on the question of the amount of benefits and whether the benefits are conferred according to frontage.⁷ If the proceedings do not show affirmatively that the assessing officials exercised an independent judgment upon this question, no presumption in favor of such exercise of judgment exists.⁸ On the contrary, since the report

104 N. W. 553 [1905]; *State of Minnesota ex rel. Cunningham v. District Court of Ramsey Co.*, 29 Minn. 62, 11 N. W. 133 [1882]; *Morse v. City of Omaha*, 67 Neb. 426, 92 N. W. 734 [1903]; *John v. Connell*, 64 Neb. 233, 89 N. W. 806 [1902]; (modifying opinion in *John v. Connell*, 61 Neb. 267, 85 N. W. 82); *Pollon v. Mayor and Council of Borough of Rutherford*, 65 N. J. L. (36 Vr.) 538, 47 Atl. 439 [1900]; *State, Frevert, Pros. v. Mayor and Council of City of Bayonne*, 63 N. J. L. (44 Vr.) 202, 42 Atl. 773 [1899]; *State, Buess, Pros. v. Town of West Hoboken*, 51 N. J. L. (22 Vr.) 267, 17 Atl. 110 [1889]; *State, Simmons, Pros. v. City of Passaic*, 42 N. J. L. (13 Vr.) 524 [1880]; *State, Kohler, Pros. v. Town of Guttenberg*, 38 N. J. L. (9 Vr.) 419 [1876]; *State, Cronin, Prosecutor v. Mayor and Aldermen of Jersey City*, 38 N. J. L. (9 Vr.) 410 [1876]; *State, Bogart, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 57 [1875]; *Village of Passaic v. State, Delaware, Lackawanna & Western Railroad Company, Pros.*, 37 N. J. L. (8 Vr.) 538 [1875]; *State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City*, 37 N. J. L. (8 Vr.) 128 [1874]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *State, Becker, Pros. v. Gardner*, 34 N. J. L. (5 Vr.) 327 [1870]; *State, Mann,*

Pros. v. Mayor and Common Council of Jersey City, 24 N. J. L. (4 Zabriskie) 662 [1855]; *State, Zabriskie, Pros. v. Mayor and Common Council of Hudson City*, 29 N. J. L. (5 Dutch) 115 [1861]; *State, Ogden, Pros. v. Mayor and Common Council of City of Hudson*, 29 N. J. L. (5 Dutch.) 104 [1860]; *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutch.) 500 [1860]; *State, Water Commissioners of Jersey City, Pros. v. City of Hudson*, 27 N. J. L. (3 Dutcher) 21 [1858]; *Kumer v. City of Cincinnati*, 27 Ohio C. C. 683 [1905]; *Nulsen v. City of Cincinnati*, 27 Ohio Cir. Ct. 383 [1905]; *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; *Kersten v. City of Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900]; *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896]. See § 693.

⁷ *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893]; *State, Becker, Pros. v. Gardner*, 34 N. J. L. (5 Vr.) 327 [1870]; *State, Ogden, Pros. v. Mayor and Common Council of City of Hudson*, 29 N. J. L. (5 Dutch.) 104 [1860].

⁸ *State, Buess, Pros. v. Town of West Hoboken*, 51 N. J. L. (22 Vr.) 267, 17 Atl. 110 [1889]; *State, New*

of their proceedings should show all that they did, there is said to be rather a negative presumption that they did not exercise such judgment if their report does not show it.⁹ The invalidity of such assessments is especially clear if it is shown that the benefits are not in fact conferred according to frontage.¹⁰

§ 700. Apportionment according to frontage held valid if not in excess of benefits in specific case.

The third theory, which may be classed as one intermediate between the two already given, has been adopted in many jurisdictions. An apportionment according to frontage has been held valid if it appears that benefits can fairly be regarded as apportioned in the same way and if the property owner does not show that in the specific case his property has been assessed in excess of the benefits conferred upon him by the improvement for which the assessment is made.¹ In other cases it is said that if the

Brunswick Rubber Co., *Pros. v. Commissioners of Streets and Sewers in City of New Brunswick*, 38 N. J. L. (9 Vr.) 190, 20 Am. 380 [1875]; *State, Zabrieski v. Mayor and Common Council of City of Hudson*, 29 N. J. L. (5 Dutch.) 115 [1860].

⁹ *Warren v. City of Grand Haven*, 30 Mich. 24, [1874].

¹⁰ *State, Frevert, Pros. v. Mayor and Council of City of Bayonne*, 63 N. J. L. (34 Vr.) 202, 42 Atl. 773 [1899]; *State, Simmons, Pros. v. City of Passaic*, 42 N. J. L. (13 Vr.) 524 [1880]; *Appeal of Wheeler*, 80 N. Y. S. 204, 39 Misc. Rep. 484 [1902]; *Donovan v. City of Oswego*, 39 Misc. 291, 79 N. Y. S. 562 [1902]; *Nulsen v. City of Cincinnati*, 27 Ohio Cir. Ct. 383 [1905]; *Karsten v. City of Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900].

¹ *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906]; *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905]; *Cheney v. City of Beverly*, 188 Mass. 81, 74 N. E. 306 [1905]; *Dexter v. City of Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379 [1900]; *Trustees*

of Phillip's Academy v. Inhabitants of Andover, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841 [1900]; *Sears v. Board of Aldermen of City of Boston*, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138, 1 Mun. Corp. Cas. 497 [1899]; *Weed v. Mayor and Aldermen of Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898]; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903]; *People v. City of Buffalo*, 107 N. Y. S. 281 [1907]; *In re Phelps*, 96 N. Y. S. 862, 110 App. Div. 69 [1905]; *Shoemaker v. City of Cincinnati*, 68 O. S. 603, 68 N. E. 1 [1903]; *Walsh v. Sims*, 65 O. S. 211, 62 N. E. 120 [1901]; *Walsh v. Barron*, 61 O. S. 15, 47 L. R. A. 156, 55 N. E. 164 [1899]; *Schroder v. Overman*, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; *City of Cincinnati v. Manss*, 54 Ohio St. 257, 43 N. E. 687 [1896]; *City of Cincinnati v. Batsche*, 52 Ohio St. 324, 27 L. R. A. 536, 40 N. E. 21 [1895]; *Findlay v. Frey*, 51 O. S. 390, 38 N. E. 114 [1894]; *Caldwell v. Village of Carthage*, 49 O. S. 334, 31 N. E. 602 [1892]; *Cincinnati v. Seasongood*, 46 O. S. 296, 21 N. E. 630 [1889]; *Upington v. Oviatt*, 24

assessment of the cost of the improvement according to frontage results in an assessment which exceeds the benefits, such assessment is invalid in the specific case,² especially if no provision is made for considering benefits as a question of fact.³

§ 701. Apportionment according to frontage held invalid.

In some jurisdictions it is held that an assessment by which the cost of an improvement is apportioned according to frontage is necessarily invalid.¹ In some of these cases the reason of the decision is that assessments are regarded as taxes within the meaning of the constitutional provision requiring taxes to be uniform and apportioned according to the value of the property taxed.² The application of this principle, as has already been stated,³ results in the entire overthrow of local assessments

O. S. 232 [1873]; Northern Ind. R. Co. v. Connelly, 10 O. S. 160 [1859]; Ernst v. Kunkle, 5 O. S. 521 [1856]; Taylor v. Wapakoneta, 26 Ohio Cir. Ct. R. 285 [1904]; Bailey v. City of Zanesville, 20 Ohio C. C. 236 [1900]; Dixon v. City of Cincinnati, 11 Ohio C. C. 629 [1894]; City of Toledo for the Use of Gates v. Lake Shore & Michigan Southern Ry. Co., 4 Ohio C. C. 113 [1889]; Queen City Foundry Co. v. City of Cincinnati, 8 Ohio N. P. 167 [1901]; Edwards v. City of Columbus, 7 Ohio N. P. 614 [1900]; Ridenour v. Saffin, 1 Handy (Ohio) 464 [1855]; King v. Portland, 38 Or. 402, 52 L. R. A. 812, 63 Pac. 2 [1900]; Wilson v. Salem, 24 Or. 504, 34 Pac. 9, 691 [1893]; King v. Portland, 2 Or. 146 [1865]; Allen v. Drew, 44 Vt. 174 [1872]; Haubner v. City of Milwaukee, 124 Wis. 153, 101 N. W. 930 [1904]; Application for rehearing denied, 102 N. W. 578 [1905]; Hayes v. Douglas County, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896]. In some of the earlier cases in these jurisdictions the validity of the front rule is expressed in much stronger terms. City of Cleveland v. Wick, 18 O. S. 303 [1868]; (overruled as to the particular question involved in Cincinnati, Lebanon &

Northern Ry. Co. v. Cincinnati, 62 O. S. 465, 49 L. R. A. 566, 57 N. E. 229 [1900]).

²White v. City of Tacoma, 109 Fed. 32 [1901].

³Bidwell v. Huff, 103 Fed. 362 [1900].

¹Peay v. City of Little Rock, 32 Ark. 31 [1877]; Clapp v. City of Hartford, 35 Conn. 66 [1868]; Asberry v. City of Roanoke, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360 [1895].

²Town of Monticello v. Banks, 48 Ark. 251, 2 S. W. 852 [1887]; Mayor, Aldermen, etc., of Mobile v. Royal Street Railroad Co., 45 Ala. 322 [1871]; Mayor, Aldermen, etc., of Mobile v. Dargan, 45 Ala. 310 [1871]; Create v. City of Chicago, 56 Ill. 422 [1870]; St. John v. City of St. Louis, 50 Ill. 92 [1869]; Holbrook v. Dickinson, 46 Ill. 285 [1867]; Bedard v. Hall, 44 Ill. 91 [1867]; Scammon v. City of Chicago, 42 Ill. 192 [1866]; The City of Ottawa v. Spencer, 40 Ill. 211 [1866]; The City of Chicago v. Larned, 34 Ill. 203 [1864]; Sutton's Heirs v. Louisville, 5 Dana (Ky.) 28 [1837]; Taylor, McBean & Co. v. Chandler, 9 Heisk. (Tenn.) 349; *sub nomine* McBean v. Chandler, 24 Am. Rep. 308 [1872]. See § 150 *et seq.*

See § 147 *et seq.*

and restricts public improvements to general taxation as a means of raising revenue to pay the expense thereof. These decisions have either been overruled or have been abrogated by subsequent constitutional provisions which were enacted for the purpose of doing away with the rule thus laid down and of making local assessments possible.⁴

§ 702. **Apportionment according to frontage as affected by Norwood v. Baker.**

The entire question of the validity of an apportionment according to frontage has been confused by a decision of the Supreme Court of the United States rendered some years since which, by reason of its *obiter* rather than by the actual adjudication, threatened to overthrow all systems of apportionment on the basis of frontage as being in conflict with the Fourteenth Amendment to the Constitution of the United States.¹ In that case the village of Norwood had appropriated a strip of land for the purpose of opening a street through a large tract of land belonging to Ellen R. Baker. The damages awarded to the property owner amounted to two thousand dollars and this amount, together with the costs, witness fees, expenses of advertisement and attorneys' fees, amounting in all to more than twenty-two hundred dollars, was assessed back upon her land in compliance with the statute and apportioned upon the residue of her land which was not appropriated, in proportion to frontage. The assessment was levied without any reference to the actual benefits; it appeared that the assessment greatly exceeded the amount of benefit conferred upon the property; and no means existed whereby the court could determine what the benefits in fact were. An injunction against the collection of the assessment was allowed, with permission to the village of Norwood to levy a re-assessment upon a proper basis. Since this was a case in which it was very doubtful whether any benefit was conferred upon the property by taking a part of it for the purpose of a street, the case might have been decided on the ground that the entire cost of the improvement cannot be apportioned according to frontage where such method of apportionment re-

⁴ See § 150 *et seq.*

¹ Norwood v. Baker, 172 U. S. 269,

43 L. 443, 19 S. 187 [1898]; (affirm-

ing, Baker v. Village of Norwood, 74 Fed. 997 [1896].

sults in an assessment in excess of the benefit conferred. This rule had already been laid down,² and had been applied in cases much like the one at bar,³ without exciting much comment. The Supreme Court, however, did not base its decision upon this ground, but rendered an opinion from which three judges dissented, in which it appeared to be held that an apportionment of the entire cost of improvement according to frontage was necessarily erroneous, irrespective of its application to the particular case. With this interpretation this case was followed by a number of the lower Federal courts and assessments levied on the basis of frontage were held to be invalid.⁴ As will be seen from a comparison of these cases with those decided subsequently by the Supreme Court of the United States, many of these judgments were reversed by the Supreme Court of the United States.⁵ The courts of some of the states construed *Norwood v. Baker* in the same way and also held assessments apportioned on the basis of frontage to be invalid.⁶ The principle thus introduced in the law of assessments was so marked a departure from the views previously entertained by a majority of

² See § 308.

³ *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688 [1888].

⁴ *Charles v. City of Marion*, 100 Fed. 538 [1900]; *Cowley v. City of Spokane*, 99 Fed. 840 [1900]; *Lyon v. Town of Tonawanda*, 98 Fed. 361 [1899]; *Fay v. City of Springfield*, 94 Fed. 409 [1899]; *Loeb v. Trustees of Columbia Township of Hamilton County, O.*, 91 Fed. 37 [1899]. The same view was held by the courts of the District of Columbia: *Davidson v. Wight*, 16 App. D. C. 371 [1900].

⁵ See notes 7 and 13 this section.

⁶ *Dodsworth v. City of Cincinnati*, 18 Ohio C. C. 288, 10 Ohio C. D. 177 [1899]; *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]. It has been queried whether this rule applied to assessments for the performance of a legal duty, such as the construction of sidewalk's, *Lentz v. City of Dallas*, 96 Tex. 258, 72 S. W. 59 [1903]. The earlier rule in Texas upholding assessments on a basis of frontage, such as *Adams*

v. Fisher, 75 Tex. 657, 6 S. W. 772 [1890] was declared to be invalid in *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]. "While assessments of this character as distinguished from general taxation rest upon the basis of benefits or presumed benefits to the property assessed it is not essential to their validity that an actual enhancement in value or other benefit be shown to the owner. The passage of the ordinance by the city council, under the power granted in the charter, is conclusive of the propriety of the improvement and of the question of benefit to the owners of the abutting property. *Ludlow v. Railway*, 78 Ky. 360, quoted and followed *Adams v. Fisher*, 75 Tex. 657; quoted and not followed in *Hutcheson v. Storrie*, 92 Tex. 685, 691, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899]; which follows its understanding of *Norwood v. Baker*, 172 U. S. 269, and overrules *Adams v. Fisher*, 75 Tex. 657.

the state courts, that, if applied, it would entirely upset most of the state systems of local assessments. Accordingly, many of the state courts refused to follow the opinion in *Norwood v. Baker*, and adhered to their former decisions that such assessments were valid.⁷ In Alabama the Supreme Court at first in *obiter* regarded *Norwood v. Baker* as an authority to be followed and as rendering invalid an apportionment on the basis of frontage,⁸ but it subsequently repudiated this view.⁹ In Minnesota assessments by the front foot for water pipes were held to be valid if apportioned according to frontage,¹⁰ under a constitutional provision expressly authorizing such apportionment. Subsequently the court held that such assessments, while valid as far as the constitution of Minnesota was concerned, were invalid under the United States Constitution as interpreted in *Norwood v. Baker*;¹¹ but on rehearing the court declined to follow *Norwood v. Baker* and upheld the validity of such apportionment.¹² The

⁷ *City Council of Montgomery v. Moore*, 140 Ala. 638, 37 So. 291 [1903]; *City Council of Montgomery v. Foster*, 133 Ala. 587, 32 So. 610 [1901]; *Chapman v. Ames*, 135 Cal. 246, 67 Pac. 1125 [1901]; *San Francisco Paving Co. v. Bates*, 134 Cal. 39, 66 Pac. 2 [1901]; *City of Kansas City v. Gibson*, 66 Kan. 501, 72 Pac. 222 [1903]; *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Lincoln v. Street Commissioners*, 176 Mass. 210, 214, 57 N. E. 356 [1900]; *Cass Farm Co. v. City of Detroit*, 124 Mich. 433, 83 N. W. 108 [1900]; (affirmed, *Cass Farm Co. v. City of Detroit*, 181 U. S. 396, 21 S. 644, 645 [1901]); *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L. R. 492, 58 S. W. 934 [1900]; (affirmed, *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 21 S. 625 [1901]); *Shoemaker v. City of Cincinnati*, 68 O. S. 603, 68 N. E. 1 [1903]; *Schroder v. Overman*, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; (affirming, *Schroeder v. Overman*, 18 Ohio C. C. 385 [1899]). "We should be slow to believe that anything in *Norwood v. Baker*, 172 U. S. 269, or in any other authoritative decision

threw doubt on the validity of such assessments on the ground supposed, provided they did not exceed the special benefits to the estates concerned." *Lincoln v. Street Commissioners*, 176 Mass. 210, 214, 57 N. E. 356 [1900].

⁸ *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 Mo. 522 [1899].

⁹ *City Council of Montgomery v. Moore*, 140 Ala. 638, 37 So. 291 [1903]. [In this case the court spoke of its opinion in *Montgomery v. Birdsong* as a "wabble."]

¹⁰ *State of Minnesota v. Robert P. Lewis Co.*, 72 Minn. 87, 75 N. W. 108; *sub nomine Ramsey County v. Robert P. Lewis Co.*, 42 L. R. A. 639 [1898].

¹¹ *State v. Robert P. Lewis Co.*, 82 Minn. 390, 85 N. W. 207, 86 N. W. 611; *sub nomine Ramsey County v. Robert P. Lewis Co.*, 53 L. R. A. 421 [1901].

¹² *State v. Robert P. Lewis Co.*, 82 Minn. 390, 85 N. W. 207, 86 N. W. 611; *sub nomine Ramsey County v. Robert P. Lewis Co.*, 53 L. R. A. 421 [1901].

question of the meaning and scope of the decision in *Norwood v. Baker* finally was submitted to the Supreme Court of the United States in a series of cases involving the improvement of streets already opened as distinguished from the opening of a street which was the improvement in *Norwood v. Baker*. In these cases a majority of the Supreme Court of the United States upheld the validity of assessments apportioned on a basis of frontage.¹³ A comparison of *Norwood v. Baker*,¹⁴ with the cases in which the Supreme Court of the United States upheld the validity of assessments apportioned on the basis of frontage, discloses the fact that the views of the nine judges then on the bench could be classified by means of the votes of these judges into three groups, although as some of the judges did not write opinions, the exact views of each judge cannot be ascertained. In each group there were three judges. The first group held the assessment in *Norwood v. Baker*,¹⁵ to be invalid and also held the assessment in *French v. Barber Asphalt Paving Co.*,¹⁶ to be invalid. A second group held the assessment in *Norwood v. Baker* to be valid and held the assessment in *French v. Barber Asphalt Co.*, to be valid. The third group, consisting of three judges, distinguished the two lines of cases; holding the assess-

¹³ *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430, 25 S. 466 [1905]; (affirming, 76 S. W. 1097, 25 Ky. L. R. 1024); *Chadwick v. Kelly*, 187 U. S. 540, 47 L. 293, 23 S. 175 [1903]; (affirming, *Kelly v. Chadwick*, 104 La. 719, 29 So. 295 [1901]); *Farrell v. West Chicago Park Commissioners*, 181 U. S. 404, 45 L. 924, 21 S. 609, 645 [1901]; *Shumate v. Heman*, 181 U. S. 402, 45 L. 922, 21 S. 645 [1901]; (affirming, *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900]); *Wormley v. District of Columbia*, 181 U. S. 402, 45 L. 921, 21 S. 609 [1901]; *City of Detroit v. Parker*, 181 U. S. 399, 45 L. 917, 21 S. 624-645 [1901]; (reversing, *Parker v. City of Detroit*, 103 Fed. 357 [1900]); *Cass Farm Co. v. City of Detroit*, 181 U. S. 396, 45 L. 916, 21 S. 644, 645 [1901]; (affirming *Cass Farm Co. v. City of Detroit*, 124 Mich. 433, 83 N. W. 108 [1900]); *Web-*

ster v. Fargo, 181 U. S. 394, 45 L. 912, 21 S. 623 [1901]; (affirming, *Webster v. City of Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]); *Town of Tonawanda v. Lyon*, 181 U. S. 389, 45 L. 908, 21 So. 609 [1901]; (reversing, *Lyon v. Town of Tonawanda*, 98 Fed. 361 [1899]); *Wight v. Davidson*, 181 U. S. 371, 21 S. 616 [1901]; (reversing, *Davidson v. Wight*, 16 App. D. C. 371 [1900]); *French v. Barber Asphalt Paving Company*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; (affirming, *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]); *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 45 L. 280, 21 S. 174 [1901]; (reversing, *Loeb v. Trustees of Columbia Township of Hamilton County, O.*, 91 Fed. 37 [1899]).

¹⁴ 172 U. S. 269.

¹⁵ 172 U. S. 269.

¹⁶ 181 U. S. 324.

ment in *Norwood v. Baker* to be invalid and the assessment in *French v. Barber Asphalt Paving Co.* to be valid. The distinction which has been practically adopted by the Supreme Court of the United States between the two lines of cases is therefore a distinction which was made by one-third of the judges and repudiated by two-thirds of them. Nevertheless, in view of the decision of the majority upon the question of the validity of the assessments in question, the distinction thus made by the minority now stands as the settled law of the court. In view of the number of cases which have been decided on this question, it may be regarded as settled that, outside of assessments for the cost of appropriating land, an assessment for the cost of an improvement, apportioned on the basis of frontage, is not in violation of the Fourteenth Amendment to the Constitution of the United States, and that if not in violation of the constitution of the state, levying such assessment it cannot, therefore, be assailed upon constitutional ground. The difficulty of reconciling *Norwood v. Baker* with *French v. Barber Asphalt Paving Co.* and the line of cases following the latter case has been commented on by some of the state courts which have endeavored to follow both lines of cases.¹⁷

§ 703. Frontage as affected by varying depth or value.

If apportionment according to frontage is proper, the fact that the tracts of land assessed are of different values per front foot does not make such method of apportionment unjust in the

¹⁷ The Supreme Court of Alabama said: "This court put itself in harmony with the foregoing texts and decisions in the case of *Mayor and Aldermen of Birmingham v. Klein*, 89 Ala. 461, decided 1889; and has so remained if we leave out of view some wabbling in dicta superinduced by what we supposed, what was generally supposed, and what three of the judges of the Supreme Court of the United States yet believe was the effect of that court's decision in the case of *Norwood v. Baker*, 172 U. S. 289." *City Council of Montgomery v. Moore*, 140 Ala. 638, 649, 650, 37 So. 291 [1903]. The Su-

preme Court of Massachusetts said: "It is difficult to understand what is the exact meaning of the majority of the court in *French v. Barber Asphalt Paving Co.* (181 U. S. 324) and the cases that follow it, for they seemingly reaffirm *Norwood v. Baker* and distinguish it from the cases then decided." *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]. In *Smith v. Worcester*, 182 Mass. 220, 59 L. R. A. 728, 65 N. E. 40 [1902], the court says of *Norwood v. Baker* that it was "a decision to which, while it stood unqualified we were bound to defer."

particular case.¹ It has been said that apportionment according to frontage is proper if the lots are substantially of the same depth.² This observation was not necessary to the determination of this case, as the lots were of substantially the same depth. Where the lots are of varying depths, it has been said that such fact does not make an apportionment by the front foot improper.³ If, however, it is provided that assessments shall be apportioned according to benefits, and an assessment is in fact apportioned according to frontage, the fact that the lots differ greatly in value may be considered in determining whether the assessment is in fact apportioned according to benefits by adopting the front foot rule.⁴

§ 704. Frontage in case of corner lots.

The peculiar shape of the tract of land which is to be assessed is in some cases held to affect the propriety of levying an assessment according to frontage. If the lot is a parallelogram its frontage is easily determined. The only question which can be presented arises where the lot is located at the intersection of two streets and it is claimed by the property owner that its depth cannot be regarded as its frontage upon the street upon which its greatest depth lies. It is generally held that the entire distance for which a lot extends along a street is to be regarded as its frontage, even if it also fronts for a shorter distance upon another street.¹ In Ohio, however, it has been held that if a lot fronts upon one street and its depth lies along another its frontage on the latter street cannot be regarded as exceeding the distance of its frontage upon the other street.² If the lot

¹ *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889]; *O'Reilly v. City of Kingston*, 39 Hun. 285 [1886]; *Elwood v. City of Rochester*, 43 Hun. 102 [1887].

² *City of Denver v. Knowles*, 17 Colo. 204, 17 L. R. A. 135, 30 Pac. 1041 [1892].

³ *Diggins v. Hortshorne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Tripp v. City of Yankton*, 10 S. D. 516, 74 N. W. 447 [1898].

⁴ *Donovan v. City of Oswego*, 39 Misc. 291; 79 N. Y. S. 562 [1902]. See on the same question *Annell of Wheeler*, 80 N. Y. S. 204, 39 Misc. Rep. 484 [1902].

¹ *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1895].

² *Haviland v. City of Columbus*, 50 O. S. 471, 34 N. E. 679 [1893]; *Wolfe v. Village of Avondale*, 14 Ohio C. C. 375 [1897]; *Calkins v. City of Toledo*, 12 Ohio C. C. 202 [1896]; *Manns v. City of Cincinnati*, 10 Ohio C. C. 549 [1895]; *Baker v. Schott*, 10 Ohio C. C. 81 [1894]; *Roonev v. City of Toledo*, 9 Ohio C. C. 287 [1894]; *Gibson v. City of Cincinnati*, 9 Ohio C. C. 243 [1894]; *Barnev v. City of Dayton*, 8 Ohio C. C. 480 [1894].

is a parallelogram its frontage is *prima facie* the shorter dimension and its depth the greater.³ This is, however, merely a *prima facie* rule, since the lot may be so improved as to render its greater dimension its front.⁴ Which side is the front of the lot is essentially a question of fact.⁵ It is the condition of the lot at the time that the improvement is made that determines which side is the front.⁶ Access to the side as incidental to the general use of the lot does not render its greatest depth its frontage.⁷ If a corner lot is not a parallelogram but is a triangle, it has been held in Ohio that its assessable frontage should not exceed the length of its base or rear line on its greatest breadthwise frontage.⁸

§ 705. Frontage as affected by irregular shape of lot.

Outside of the problems presented by corner lots we find other problems presented by the irregular or unusual shape of the tract of land which it is sought to assess. If a tract is an irregular shape and only a portion thereof fronts upon the improvement the length of its actual frontage upon the improvement must be used in apportioning the assessment.¹ Thus, if a tax was to be apportioned at a certain amount per front foot and a certain amount per square foot, the area of the entire tract was to be used in determining the apportionment according to area, but only the actual frontage upon the improvement was to be used in determining the apportionment according to frontage.² Difficult problems are presented where narrow strips of land are so situated with reference to an improvement that the greatest

³ Haviland v. City of Columbus, 50 O. S. 471, 34 N. E. 679 [1893].

⁴ City of Findlay v. Frey, 51 O. S. 390, 38 N. E. 114 [1894]; Haviland v. City of Columbus, 50 O. S. 471, 34 N. E. 679 [1893]; Bently v. Toledo, 7 Ohio N. P. 388 [1900]; Shattuck v. City of Cincinnati, 1 Ohio N. P. 394 [1895]; Burgrave v. City of Cincinnati, 1 Ohio N. P. 80 [1894]; Schmidt v. City of Cincinnati, 1 Ohio N. P. 48 [1894].

⁵ Findlay v. Frey, 51 O. S. 390, 38 N. E. 114 [1894]; (reversing Frey v. City of Findlay, 7 Ohio C. C. 311 [1893]); Betz v. City of Canton, 18 Ohio C. C. 676 [1893].

⁶ Sandrock v. Columbus, 51 O. S. 317, 42 N. E. 255 [1894].

⁷ Daiber v. Toledo, 7 Ohio N. P. 389 [1900]; Wehage v. City of Cincinnati, 1 Ohio N. P. 82 [1894].

⁸ Tompkins v. Village of Norwood, 18 Ohio C. C. 883 [1897]; Tompkins v. Village of Norwood, 1 Ohio N. P. 83 [1894]. See on this question Toledo v. Ainsworth, 7 Ohio N. P. 391 [1900].

¹ Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692 [1887]. See on this question Ryan v. Sumner, 17 Wash. 228, 49 Pac. 487 [1897].

² Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692 [1887].

length of such strip lies along the improvement. In such a case the apportionment of an assessment according to frontage would frequently operate as confiscation of such strip of land. Accordingly, assessments on the basis of frontage have in such cases been held invalid as to such strips of land.³ On the other hand under a statute which provided that if the lots abutting on a street improved were not of substantially equal depth, then the same should be assessed to a substantially equal depth not less than twenty feet nor more than one hundred fifty feet from the street improved, as the board of public works might determine, it was held that strips of land less than twenty feet in depth were not exempt from an assessment.⁴ If an entire tract of land fronts on a street for over six hundred feet, and about five hundred feet of such frontage is from one hundred to two hundred feet deep, while the rest of such lot was shallow, being on one side only twelve feet deep, it has been held proper to apportion the assessment uniformly according to frontage upon the entire strip.⁵ The problem of determining to what depth a tract of land must extend in order to make the operation of a front foot rule work a confiscation is one impossible of general solution. It is possible to think of a number of tracts of land of depths so varying that it is easy to see that such an apportionment will operate as confiscation of the shallowest strips and yet will be a perfectly fair apportionment as to the deepest ones; and yet it may be impossible to determine the precise depth a lot must have in order that confiscation may cease to exist and a just and fair assessment may begin.⁶

§ 706. Use of land as affecting apportionment according to frontage.

In some jurisdictions it is held that apportionment according to frontage is proper in the case of land within a city which is closely and compactly built up, but is improper in the case of

³ *City of Atlanta v. Hamlein*, 101 Ga. 697, 29 S. E. 14 [1897]; *City of Atlanta v. Hamlein*, 96 Ga. 381; 23 S. E. 408 [1895]; *Iowa Pipe & Tile Company v. Callahan*, 125 Iowa 358, 106 Am. St. Rep. 311, 67 L. R. A. 408, 101 N. W. 141 [1904].

⁴ *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904].

⁵ *Moal v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883].

⁶ For a discussion of the power to assess narrow strips of land, see § 632.

rural property.¹ The question of what property is rural and what is closely and compactly built up is therefore material in determining the propriety of apportionment according to frontage in these jurisdictions. This question has been considered elsewhere in detail.²

§ 707. Construction and application of statutes requiring apportionment according to frontage.

If it is provided by statute that an assessment must be apportioned upon the basis of frontage this method of apportionment must be followed and an assessment cannot be levied upon any other basis.¹ If by statute the cost of a street improvement is to be charged according to area, but the cost of a sidewalk according to frontage, a curb is regarded as part of the sidewalk,² even if there is not sufficient space left upon one side of the street to construct a sidewalk thereon.³ If a statute providing

¹ *Anderson v. Lower Merion Township*, 217 Pa. 369, 66 Atl. 1115 [1907]; *Philadelphia to use v. Gowen*, 202 Pa. St. 453, 52 Atl. 3 [1902]; *City of Philadelphia to use of Mack v. Gorges*, 180 Pa. St. 296, 36 Atl. 868 [1897]; *Witman v. City of Reading*, 169 Pa. St. 375, 32 Atl. 576 [1895]; *McKeesport v. Soles*, 165 Pa. St. 628, 30 Atl. 1019 [1895]; *Scranton City v. Bush*, 160 Pa. St. 499, 28 Atl. 926 [1894]; *Philadelphia to use, etc. v. Sheridan*, 148 Pa. St. 532, 24 Atl. 80 [1892]; *Hand v. Fellows*, 148 Pa. St. 456, 23 Atl. 1126 [1892]; *Keith v. Philadelphia*, 126 Pa. St. 575, 17 Atl. 883 [1889]; *City of Scranton v. Penn. Coal Co.* 105 Pa. St. 445 [1884]; *Ferson's Appeal*, 96 Pa. St. 140 [1880]; *City of Philadelphia to use of Johnson v. Rule*, 93 Pa. St. 15 [1880]; *Craig v. City of Philadelphia*, 89 Pa. St. (8 Norris) 265 [1879]; *Bidwell v. City of Pittsburg*, 85 Pa. St. (4 Norris) 412, 27 Am. Rep. 662 [1877]; *Kaiser v. Weise*, 85 Pa. St. (4 Norris) 366 [1877]; *Seely v. City of Pittsburg*, 82 Pa. St. (1 Norris) 360, 22 Am. Rep. 760 [1876]; *Washington Avenue*, 69 Pa. St. (19 P. F. Smith) 363, 8 Am. Rep. 255 [1871];

City of Allentown v. Adams, 5 Sadler (Pa.) 253, 8 Atl. 430 [1887]; *Steward v. City of Philadelphia to use*, (Pa.) 7 Atl. 192 [1886]; *City of Philadelphia v. Feith*, (Pa.) 2 Atl. Rep. 207 [1886]; *City of Philadelphia v. Manderfield*, 32 Pa. Super. Ct. 373 [1907]; *Cleveland v. Tripp*, 13 R. I. 50 [1880]. It has been said that the front-foot rule as applied to rural or farm lands is "so plainly unfair or extortionate that it could not be sustained." *Cleveland v. Tripp*, 13 R. I. 50, 61, quoted in *Bishop v. Tripp*, 15 R. I. 466, 467, 8 Atl. 692 [1889].

² See § 610.

³ *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891]; *United States ex rel. Henderson v. Edmunds*, 3 Mackey (D. C.) 142 [1884]; *Lill v. City of Chicago*, 29 Ill. 31 [1862]; *Fitzgerald v. City of Sioux City*, 125 Iowa, 396, 101 N. W. 268 [1904]; *S. D. Moody & Co. v. Spotorno*, 112 La. 1108, 36 So. 836 [1904].

² *Joyes v. Shadburn*, — Ky. —, 11 Ky. L. Rep. 892, 13 S. W. 361 [1890].

³ *Marshall v. Barber Asphalt Paving Co.*, (Ky.), 66 S. W. 734, 23 Ky. L. R. 1971 [1902]; (sub-

for an improvement does not prescribe the method of apportionment and the assessing officials apportion the assessment according to frontage, such assessment may be made valid by subsequent legislation providing for the collection of such assessments.⁴ If by statute an assessment is to be apportioned according to the frontage abutting on the improvement a property owner cannot be assessed for that part of his lot which abuts upon a part of the street which has not been improved.⁵ Under a statute which provides for assessing the cost of an improvement upon the property benefited according to frontage the cost of the entire improvement must be ascertained and apportioned.⁶ Such a statute does not provide for assessing each lot with the cost of work done in front thereof,⁷ nor does it make each block or square a taxing district,⁸ even if the assessment district is by statute, made to run on each side of the street to the center line of the abutting blocks.⁹ Under an apportionment according to frontage property cannot be assessed for a greater frontage than that it actually possesses. An error in the statement of frontage is, however, immaterial if it does not affect the apportionment.¹⁰ Furthermore, if a property owner petitions for an improvement and in such petition states the frontage of his property he is estopped from claiming that it is a smaller frontage than the amount thus stated.¹¹ If an assessment is to be apportioned according to frontage different tracts of property which are respectively benefited by two or more different improvements.

stitute for opinion in *Marshall v. Barber Asphalt Paving Co.*, (Ky.), 66 S. W. 182, which modified *Marshall v. Barber Asphalt Paving Co.*, (Ky.), 52 S. W. 1117, 21 Ky. L. R. 712).

⁴ *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. 1098 [1878].

⁵ *Town of Salem v. Henderson*, 13 Ind. App. 363, 41 N. E. 1062 [1895].

⁶ *People ex rel. Raymond v. Grover*, 203 Ill. 24, 67 N. E. 165 [1903]; *Moody & Co. v. Chadwick*, 52 La. Ann. 888, 28 So. 361 [1900]; *Neenan v. Smith*, 60 Mo. 292 [1875]; *Weber v. Schergens*, 59 Mo. 389 [1875]; *Neenan v. Smith*, 50 Mo. 525 [1872]; *City of use of McGrath v. Clemens*, 49 Mo. 552 [1872]; *Fowler v. City of St. Joseph*, 37 Mo.

228 [1866]; *Eyerman v. Hardy*, 8 Mo. App. 311 [1880]; *Seibert v. Tiffany*, 8 Mo. App. 33 [1879].

⁷ *Neenan v. Smith*, 30 Mo. 525 [1872].

⁸ *Barber Asphalt Paving Company v. Watt*, 51 La. Ann. 1345, 26 So. 7 [1889]; *Moody & Co. v. Chadwick*, 52 La. Ann. 1888, 28 So. 361 [1900]; *Weber v. Schergens*, 59 Mo. 369 [1879].

⁹ *Oliver v. City of Newberg*, — Or. —, 91 Pac. 470 [1907].

¹⁰ *Morse v. City of Buffalo*, 35 Hun. 613 [1885].

¹¹ *City of Cincinnati v. Manss*, 54 Ohio St. 257, 43 N. E. 687 [1896]; *Edwards v. City of Columbus*, 7 Ohio N. P. 614 [1900].

cannot be lumped together and an assessment for the combined improvements levied upon the aggregate of frontage thus obtained.¹² If an assessment is to be apportioned according to frontage, it is error to omit land which should be assessed where such omission will increase the assessment upon the rest of the property assessed.¹³ If the condition of the property at the time that the assessment was ordered determines whether such property is assessable or not, property which was assessable when the improvement was ordered but has subsequently been appropriated by the city for a street cannot be deducted from the total frontage in apportioning the amount of the assessment.¹⁴

§ 708. Assessment of fixed sum per front foot.

Statutes and ordinances are sometimes found which provide for levying an assessment at a certain fixed sum per front foot. Such provisions may be regarded as a legislative determination that the benefits amount to at least the sum so fixed and are apportioned according to frontage. On this theory such assessments have been upheld as long as they do not exceed the cost of the improvement.¹ Assessments of this sort are generally imposed for sewers,² and water pipes.³ Under a constitutional provision specifically authorizing it, a statute authorizing a charge of a certain sum per foot for laying water pipe, and an

¹² Jones v. District of Columbia, 3 App. D. C. 26 [1894]; Mayor and Aldermen of Savannah v. Weed, 96 Ga. 670, 23 S. E. 900 [1895]; People ex rel. Hanberg v. Stearns, 213 Ill. 184, 72 N. E. 728 [1904]; City of Covington v. Matson, (Ky.) 17 Ky. L. Rep. 1323, 34 S. W. 897 [1896]; State v. Pillsbury, 82 Minn. 359, 85 N. W. 175 [1901]. Such an assessment for a system of sewers which might, however, be regarded as an entire improvement, was held to be valid in *Inhabitants of Leominster v. Conant*, 130 Mass. 384, 2 N. E. 690 [1885].

¹³ Bacon v. Mayor and Aldermen of Savannah, 91 Ga. 500, 17 S. E. 749 [1893].

¹⁴ Spangler v. The City of Cleveland, 35 O. S. 469 [1880]. See on this question *Schott v. City of Cincinnati*, 3 Ohio N. P. 311 [1895].

¹ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 493, 18 S. 521 [1898]; (affirming *Parsons v. District of Columbia*, 8 App. D. C. 391 [1896]); *English v. Mayor and Council of Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158 [1896]; *People of State of New York ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902]; *City of Allentown v. Hower*, 93 Pa. St. (12 Norris) 332 [1880]; *Cleveland v. Tripp*, 13 R. I. 50 [1880]; *Allen v. Drew*, 44 Vt. 174 [1872].

² *People of the State of New York ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902].

³ *City of Allentown v. Hower*, 93 Pa. St. 332 [1880], *Allen v. Drew*, 44 Vt. 174 [1872].

assessment levied under such statute have been upheld.⁴ In cases of this sort assessments have been held to be invalid for special reasons. Thus, if the amount thus raised by assessment greatly exceeds the cost of the improvement,⁵ or if an assessment is levied upon a number of different tracts of property variously benefited by different improvements to pay the aggregate cost of all the improvements,⁶ such assessments have been held to be invalid. In jurisdictions in which the courts have committed themselves to the doctrine that assessments must be apportioned according to benefits in fact, assessments of this sort have been held to be invalid as not based upon actual benefits.⁷ A charge of seventy-five cents per foot of frontage for laying water pipe has been held invalid.⁸ In so holding the courts have expressed the view that assessments for water pipes could not be sustained on the theory that they were assessments under the police power for the purpose of charging the owner for the cost of an improvement which he was bound in law to make, and that if they could not be sustained under the theory of assessments for benefits they could not be sustained at all.⁹ A charge of two dollars and a half per annum, plus the charges for the water used, has been held invalid.¹⁰

§ 709. Entire cost of improvement apportioned according to frontage.

It is frequently provided by statute that the entire cost or a certain specified proportion of the cost shall be levied upon property in the assessment district in accordance with some specified rule of apportionment. The rule most frequently adopted is that of apportionment according to frontage. Where this

⁴ *State v. Robert P. Lewis Co.*, 82 Minn. 390, 85 N. W. 207, 86 N. W. 611; *sub nomine*, *Ramsey County v. Robert P. Lewis Co.*, 53 L. R. A. 421 [1901]; *State v. Robert P. Lewis Company*, 72 Minn. 87, 42 L. R. A. 639, 75 N. W. 108 [1898].

⁵ *Minnesota Linseed Oil Company v. Palmer*, 20 Minn. 468 [1871-4]; *Ankeny v. Palmer*, 20 Minn. 477 [1874].

⁶ *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 [1901].

⁷ *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64

N. E. 362 [1902]; *Doughten v. City of Camden*, 72 N. J. L. (43 Vr.) 451, 3 L. R. A. (N. S.) 817, 63 Atl. 170 [1906]; *State, Culver, Pros. v. Mayor and Aldermen of Jersey City*, 45 N. J. L. (16 Vr.) 256 [1883].

⁸ *Doughten v. City of Camden*, 72 N. J. L. (43 Vr.) 451, 3 L. R. A. (N. S.) 817, 63 Atl. 170 [1906].

⁹ *Doughten v. City of Camden*, 72 N. J. L. (43 Vr.) 451, 3 L. R. A. (N. S.) 817, 63 Atl. 170 [1906].

¹⁰ *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362 [1902].

rule is adopted two distinct questions are presented; one, as to the power of the legislature to impose the entire cost of the improvement or a specified proportion thereof upon the owners of the land assessed without making provision for any inquiry into benefits; and the other as to the power of the legislature to provide for apportioning the assessment according to frontage. These two questions are in their nature distinct, since it is possible, though not usual, for the legislature to provide for apportioning the entire cost or a specified amount thereof upon some other basis; or for the legislature to provide for an inquiry into the total amount of benefits and then provide for the apportionment of the amount thus ascertained upon a basis of frontage. Whether the legislature can provide for assessing the entire cost of improvement or a specified portion thereof upon the property in the assessment district is a question the solution of which depends upon the power of the legislature to determine the existence and amount of benefits conclusively without reference to the existence of benefits in point of fact. In many jurisdictions it is held that the legislature has power to determine that the entire cost of the improvement or a fixed proportion thereof does not exceed the amount of benefits conferred by the improvement for which provision is made, and that accordingly the legislature may provide for assessing the cost of the improvement upon the property in the assessment district.¹ A modified

¹Wight v. Davidson, 181 U. S. 371, 45 L. 900, 21 S. 924 [1901]; (reversing Davidson v. Wight, 16 D. C. App. 371 [1900]); Bauman v. Ross, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (reversing District of Columbia v. Armes, 8 App. D. C. 393 [1896]; Bauman v. Ross, 9 App. D. C. 260 [1896]; Abbott v. Ross, 9 App. D. C. 289 [1896]); Walston v. Nevin, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (affirming Nevin v. Roach, 86 Ky. 492, 5 S. W. 546 [1889]); Mattingly v. District of Columbia, 97 U. S. 687, 24 L. 1098 [1878]; Zehnder v. Barber Asphalt Paving Co., 108 Fed. Rep. 570 [1901]; (reversing Zehnder v. Barber Asphalt Paving Co., 106 Fed. Rep. 103 [1901]); City Council of Montgomery

v. Moore, 140 Ala. 638, 37 So. 291 [1903]; Treanor v. Houton, 103 Cal. 53, 36 Pac. 1081 [1894]; City of Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122 [1905]; 80 Pac. 467 [1905]; The Park Ecclesiastical Society v. City of Hartford, 47 Conn. 89 [1879]; Hungerford v. Hartford, 39 Conn. 279 [1872]; Clapp v. City of Hartford, 35 Conn. 66 [1868]; English v. Wilmington, 2 Marvel (Del.) 63, 37 Atl. 158 [1896]; Mayor and Aldermen of Savannah v. Weed, 96 Ga. 670, 23 S. E. 900 [1895]; Hayden v. City of Atlanta, 70 Ga. 817 [1883]; Board of Commissioners of Montgomery County v. Fullen, 111 Ind. 410, 12 N. E. 298 [1887]; Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge, 115 Ia. 368, 89 N. W. 7

form of this rule is that an apportionment is to be regarded as

[1902]; *Hackworth v. City of Ottumwa*, 114 Ia. 467, 87 N. W. 424 [1901]; *Wblif v. City of Keokuk*, 48 Ia. 129 [1878]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *Blair v. City of Atchison*, 40 Kan. 353; 19 Pac. 815 [1888]; *Olsson v. City of Topeka*, 42 Kan. 709; 21 Pac. 219 [1889]; *City of Louisville v. American Standard Asphalt Co.*, 31 Ky. L. R. 133, 102 S. W. 806 [1907]; *German Protestant Orphan Asylum v. Barber Asphalt Pav. Co.*, 26 Ky. Law Rep. 805, 82 S. W. 632 [1904]; *Specht v. Barber Asphalt Paving Co.*, — Ky. —; 26 Ky. Law Rep. 193, 80 S. W. 1106 [1904]; *Louisville Ry. Co. v. Southwestern Alcatraz Asphalt & Construction Co.*, — Ky. —, 24 Ky. Law Rep. 2380, 74 S. W. 237 [1903]; *Zender v. Barber Asphalt Paving Co.*, 24 Ky. Law Rep. 2279, 74 S. W. 201 [1903]; *R. B. Park & Co. v. Cane*, — Ky. —, 24 Ky. Law Rep. 2294, 73 S. W. 1121 [1903]; *Wagner v. Gast*, 24 Ky. L. Rep. 1401, 71 S. W. 533 [1903]; *City of Louisville v. Selvaage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899]; *City of Covington v. Matson*, 17 Ky. L. Rep. 1323, 34 S. W. 897 [1896]; *Fox v. Middlesborough Town Co.*, 96 Ky. 262, 28 S. W. 776 [1894]; *Boone v. Nevin*, — Ky. —, 15 Ky. L. Rep. 547, 23 S. W. 512 [1893]; *Joyes v. Shadburn*, — Ky. —, 11 Ky. L. Rep. 892, 13 S. W. 361 [1890]; *Beck v. Obst*, 75 Ky. (12 Bush.) 268 [1876]; *Broadway Baptist Church v. McAtee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]; *S. D. Moody & Co. v. Spotorno*, 112 La. 1108, 36 So. 836 [1904]; *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70 [1899]; *Trustees of Phillips Academy v. Inhabitants of Andover*, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841 [1900]; *Motz v. City of*

Detroit, 18 Mich. 494 [1869]; *State of Minnesota ex rel. Powell v. District Court of Ramsey County*, 47 Minn. 406, 50 N. W. 476 [1891]; *State of Minn. ex rel. Stateler v. Reis*, 38 Minn. 371, 38 N. W. 97 [1888]; *Wilzinski v. City of Greenville*, 85 Miss. 393, 37 So. 807 [1905]; *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904]; *Collier Estate v. Western Paving & Supply Co.*, 180 Mo. 362, 79 S. W. 947 [1904]; *City of St. Charles ex rel. Budd v. Deemar*, 174 Mo. 122, 73 S. W. 469 [1902]; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163 [1902]; *Prior v. Buehler & Conney Construction Co.* 170 Mo. 439, 71 S. W. 205 [1902]; *City of St. Joseph to use of Gibson v. Farrel*, 106 Mo. 437, 17 S. W. 497 [1891]; *City of Sedalia v. Coleman*, 82 Mo. App. 560 [1899]; *Adams v. Green*, 74 Mo. App. 125 [1898]; *Forry v. Ridge*, 56 Mo. App. 615 [1893]; *Eyerman v. Hardy*, 8 Mo. App. 311 [1880]; *Seibert v. Tiffany*, 8 Mo. App. 33 [1879]; *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203 [1904]; *People of the State of New York ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902]; *Genet v. City of Brooklyn*, 99 N. Y. 296, 1 N. E. 777 [1885]; *Webster v. City of Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; *Roberts v. First National Bank of Fargo*, 8 N. D. 504, 79 N. W. 1049 [1898]; *Rolph v. City of Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898]; *Franklin v. Hancock*, 204 Pa. St. 110, 53 Atl. 644 [1902]; *Harrisburg v. McPherran*, 200 Pa. St. 343, 49 Atl. 988 [1901]; *Morewood Avenue, Chamber's Appeal*, 159 Pa. St. 20, 28 Atl. 123 [1893]; *Beaumont v. Wilkes Barre City*, 142 Pa. St. 198, 21 Atl. 888 [1891]; *Beltzhoover Borough v. Maple*, 130 Pa. St. 335: *sub nomine Maple v. Borough of Beltzhoover*, 18 Atl. 650 [1889];

valid unless the invasion of private rights is flagrant.² In other jurisdictions a less extreme position has been taken, partly because statutes under which assessments are made do not themselves go to such extremes. A statute which provides for assessing the cost of the improvement upon the property in the assessment district up to the amount of the benefits actually conferred is valid.³ On the same principle, a statute which provides for assessing the entire cost or a certain specified amount thereof upon the property in the assessment district, but which further provides for a hearing of some sort at which any assessment which exceeds the amount of benefits may be reduced to the amount of benefits actually conferred is held to be valid.⁴ If it is shown

Wray v. The Mayor of Pittsburgh for use, etc., 46 Pa. St. (10 Wright) 365 [1863]; Magee v. Commonwealth, 46 Pa. St. 358; Schenley v. Commonwealth for use of City of Allegheny, 36 Pa. St. (12 Casey), 64 [1859]; Spring Garden v. Wistar, 18 Pa. St. (6 Harr.) 195 [1852]; in the Matter of Dorrance Street, 4 R. I. 230 [1856]; Brandhuber v. City of Pierre, — S. D. —, 113 N. W. 569 [1907]; Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447 [1898]; Norfolk v. Ellis, 67 Va. (26 Grattan) 224 [1875]; Town of Elma v. Carney, 9 Wash. 466, 37 Pac. 707 [1894]; City of Seattle v. Yesler, 1 Wash. 577 [1878]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892].

²Grand Rapids School Furniture Co. v. Grand Rapids, 92 Mich. 564, 52 N. W. 1028 [1892].

³Goodrich v. Detroit, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]); Minnesota & M. Land & Improvement Co. v. City of Billings, 111 Fed. Rep. 972, 50 C. C. A. 70 [1901]; Watson v. City of Chicago, 115 Ill. 78, 3 N. E. 430 [1886]; Mayor and Aldermen of City of Baltimore v. Stewart, 92 Md. 535, 48 Atl. 165 [1901]; Alberger v. The Mayor and City Council of Baltimore, 64 Md. 1, 20 Atl.

988 [1885]; State ex rel. Moore v. Common Council of Ashland, 88 Wis. 599, 60 N. W. 1001 [1894]; Voight v. City of Detroit, 123 Mich. 547, 82 N. W. 255 [1900]. "Each assessment must stand on its own merits. The benefits assessed are not required to cover the expenses of opening a street. So far as they may go they are to be appropriated to that purpose, but any deficiency in the amount is required by the express terms of the ordinance to be paid by the city. It is very clear that if the assessment of another can not increase or diminish the assessment of the party complaining he can have no interest to be subverted by asking an instruction from the court submitting to a jury the question of that other's assessment. . . . The assessment of benefits to the appellants rested entirely upon the actual and substantial benefits each one had received from the opening of the street in question, and so far as that assessment was concerned it mattered not what was the amount of the damages" allowed to an owner of realty for land taken to open a street. Hawley v. Mayor and City Council of Baltimore, 33 Md. 270 [1870].

⁴Schaefer v. Werling, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming Schaefer v. Werling, 186 Ind. 704, 60 N. E. 149); Graham v.

that the improvement does not in fact increase the value of the property assessed, no assessment can be levied therefor.⁵ In some jurisdictions the courts have gone to an extreme in emphasizing the importance of determining benefits as a fact and in minimizing the weight to be given to the determination of the legislature that the amount of the benefits conferred by the improvement equals or exceeds its cost. In these jurisdictions a statute which provides for assessing the entire cost of an improvement upon property in the assessment district is held to be invalid, without reference to whether in the particular case the assessment exceeds the actual benefits or not.⁶ This result is reached upon the theory that the property owner has in the first instance the right to the determination by the public officials who are

City of Chicago, 187 Ill. 411, 58 N. E. 393 [1900]; *Middaugh v. City of Chicago*, 187 Ill. 230, 58 N. E. 459 [1900]; *Morrell v. Union Drainage District No. 1*, 118 Ill. 139, 8 N. E. 675 [1887]; *Pittsburgh, C. C. & St. L. Ry. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906]; *Deane v. Indiana Macadam and Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Marion Bond Co. v. Johnson*, 29 Ind. App. 294, 64 N. E. 626 [1902].

⁵ *City of Atlanta v. Hanlein*, 101 Ga. 697, 29 S. E. 14 [1897]; *City of Atlanta v. Hanlein*, 96 Ga. 381, 23 S. E. 408 [1895]. (A case where, after the improvement, the property was worth a little more than one-third of the assessment.)

⁶ *Fay v. City of Springfield*, 94 Fed. 409 [1899]; *Loeb v. Trustees of Columbia Township, Hamilton County, O.*, 91 Fed. 37 [1899]; *Wright v. Chicago*, 46 Ill. 44 [1867]; *Harwood v. Street Commissioners of City of Boston*, 183 Mass. 348, 67 N. E. 362 [1903]; *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903]; *Lorden v. Coffey*, 178 Mass. 489, 60 N. E. 124 [1901]; *City of Detroit v. Judge of Recorder's Court*, 112 Mich.

588, 42 L. R. A. 638, 71 N. W. 149 [1897]; *City of Detroit v. Daly*, 68 Mich. 503, 37 N. W. 11 [1888]; *State, Frevert, Pros. v. Mayor and Council of the City of Bayonne*, 63 N. J. L. (34 Vr.) 202, 42 Atl. 773 [1899]; *State, Reynolds, Pros. v. Mayor and Aldermen of City of Paterson*, 48 N. J. L. (19 Vr.) 435, 5 Atl. 896 [1886]; *State, Kean, Pros. v. Driggs Drainage Co.*, 45 N. J. L. (16 Vr.) 91 [1883]; *State, Watrous, Pros. v. City of Elizabeth*, 40 N. J. L. (11 Vr.) 278 [1878]; *State, Hutton, Pros. v. Inhabitants of Township of West Orange*, 39 N. J. L. (10 Vr.) 453 [1877]; *State, Agens, Pros. v. Mayor and Common Council of City of Newark*, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *State, Del., Lackawanna & Western R. Co., Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 137 [1874]; *Bogert v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Green) 568 [1876]; (reversing *Bogert v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Green) 427 [1877]); *Guest v. Brooklyn*, 69 N. Y. 506 [1877]; *City of Asheville v. Wachovia Loan & Trust Co.*, 143 N. C. 36, 55 S. E. 800 [1906].

entrusted with the power of levying and apportioning the assessment as to the question of the amount of benefits conferred by the improvement.⁷ So statutes which provide that a certain proportion of the cost shall be assessed upon the abutting property in proportion to frontage have been held to be invalid.⁸ Under a statute which provides for an assessment according to benefits the city cannot without any inquiry as to the existence and amount of benefits provide for assessing a specified sum upon the property in the assessment district.⁹ Under such a statute, if the question of the apportionment of the assessment is to be left to a jury, it is error to charge the jury that they are bound to apportion the entire expense of the appropriation proceeding, even though they may find that the amount thus assessed is in excess of the benefits received by some of the property assessed.¹⁰ Thus, under statutes which provide for assessing according to benefits, the cost cannot be apportioned according to frontage,¹¹ as where the sewer is in excess of the size necessary to drain the property assessed,¹² or the cost of all the sewers in a district is added together and the sum is divided by the total frontage,¹³ at least if the result is an assessment in excess of the benefits and not apportioned thereto. The theory which seems to be most just and rational is that the legislature may assess the entire cost or a certain specified portion thereof upon the property in the assessment district, but that if in any particular case the assessment exceeds the actual benefits conferred, the owner of such property will be relieved from the amount of the assessment in excess of the actual benefits.¹⁴ This theory gives due weight to the *prima facie* validity of the legislative determination that the aggregate amount of benefits conferred by the improvement equal or exceed the cost thereof or that proportion of the cost

⁷ See §§ 271, 673; *In re Park Avenue Sewer*, 169 Pa. St. 433, 32 Atl. 574 [1895].

⁸ *Jones v. Dist. of Columbia*, 3 App. D. C. 26 [1894].

⁹ *Greeley v. The People*, 60 Ill. 19 [1871]; *Kersten v. City of Milwaukee*, 106 Wis. 200, 48 L. R. A. 651, 81 N. W. 948, 1103 [1900].

¹⁰ *Tyler v. City of St. Louis*, 56 Mo. 60 [1874].

¹¹ *Park Avenue Sewer, Appeal of*

Parker, 169 Pa. St. 433, 32 Atl. 574 [1895].

¹² *Park Avenue Sewer, Appeal of Parker*, 169 Pa. St. 533, 32 Atl. 574 [1895].

¹³ *Witman v. City of Reading*, 169 Pa. St. 375, 32 Atl. 576 [1895].

¹⁴ *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900]; *Schroder v. Overman*, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; *King v. Portland*, 38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900].

which is to be borne by the property owners, while at the same time it provides relief in cases in which property is assessed in excess of the actual benefits. Thus, if land on one side of the street belongs to the county and cannot be assessed, the entire cost of improving such portion of the street cannot be assessed upon the land on the opposite side of the street.¹⁵ With reference to one particular form of improvement the courts seem to be in practical harmony. It is held in many jurisdictions that an assessment of the entire cost of appropriating land for a public use cannot be levied upon the property in the assessment district without reference to the existence and amount of the benefits conferred by such appropriation.¹⁶ In cases in which this point has been decided there have, however, been found *obiter* denying in general terms the right of the legislature to determine the existence and amount of benefits.¹⁷ In Ohio an assessment cannot now be constitutionally authorized by the legislature for an improvement of this type.¹⁸

§ 710. Apportionment by squares or blocks.

Under a statute providing for assessing property according to frontage the entire assessment should be apportioned upon all the property in the assessment district according to the frontage thereof. Each separate block or square cannot be regarded under such statutes as an assessment district and the cost of constructing a street along such block cannot be apportioned by frontage upon the land abutting upon such block.¹ By special statute each block or part of each block may be treated for some purposes as a separate assessment district. Thus, a statute which provides for assessing the cost of paving a street upon the respective quarter squares adjacent thereto and apportioning it upon the different tracts of land in each quarter square according to the area of each tract, has been held to be valid.²

¹⁵ Thornton v. City of Clinton, 148 Mo. 648, 59 S. W. 295 [1898].

¹⁶ Berdel v. City of Chicago, 217 Ill. 429, 75 N. E. 386 [1905]; City of Detroit v. Judoe of Recorder's Court, 112 Mich. 588, 42 L. R. A. 638, 71 N. W. 149 [1897]; City of Detroit v. Daly, 68 Mich. 503, 37 N. W. 11 [1888]; Tyler v. City of St. Louis, 56 Mo. 60 [1874].

¹⁷ Village of Norwood v. Baker, 172 U. S. 269, 19 S. 187.

¹⁸ See § 308.

¹ Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70 [1899].

² Walston v. Nevin, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (affirming Nevin v. Roach, 86 Ky. 492, 5 S. W. 546 [1887]); Zehnder v. Bar-

Gross inequality in apportionment, due to the fact that the land to be assessed is divided by streets into squares on one side of the street improved, while on the other side it is not so divided, will not be permitted by the courts.³ If, however, such inequality is due to the fact that while the land on both sides of the improvement is divided by principal streets into squares, the squares are of different sizes, relief will not be given,⁴ unless it appears that the size of the square is such that the city does not intend to leave it a square in its present form.⁵ The construction of such statutes with reference to the assessment districts to be laid out thereunder has been considered elsewhere.⁶

§ 711. Apportionment according to area.

By some statutes it is provided that an assessment is to be apportioned upon the property benefited according to the area

ber Asphalt Paving Co., 108 Fed. 570 [1901]; (reversing *Zehnder v. Barber Asphalt Paving Co.* 106 Fed. 103 [1901]); *City of Louisville v. American Standard Asphalt Co.*, 31 Ky. L. R. 133, 102 S. W. 806 [1907]; *German Protestant Orphan Asylum v. Figg*, 26 Ky. Law Rep. 805, 82 S. W. 632 [1904]; *Specht v. Barber Asphalt Paving Co.* — Ky. —, 26 Ky. Law Rep. 193, 80 S. W. 1106 [1904]; *Louisville Ry. Co. v. Southwestern Alcatraz Asphalt & Construction Co.*, — Ky. —, 24 Ky. Law Rep. 2380, 74 S. W. 237 [1903]; *Zehnder v. Barber Asphalt Paving Co.*, — Ky. —, 74 S. W. 201, 24 Ky. L. R. 2279 [1903]; *R. B. Park & Co. v. Cane*, — Ky. —, 73 S. W. 1121, 24 Ky. Law Rep. 2294 [1903]; *Wagner v. Gast*, 24 Ky. L. Rep. 1401, 71 S. W. 533 [1903]; *City of Louisville v. Salvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899]; *Fox v. Middlesborough Town Co.*, 96 Ky. 262, 20 S. W. 776 [1894]; *Boone v. Nevine*, (Ky.), 23 S. W. 512, 15 Ky. L. Rep. 547 [1893]; *Joyes v. Shadburn*, — Kv. —, 11 Ky. L. Rep. 892, 13 S. W. 361 [1890]; *Preston v. Roberts*, 75 Ky.

(12 Bush.) 570 [1877]; *Beck v. Obst*, 75 Ky. (12 Bush.) 268 [1876]; *Broadway Baptist Church v. McAtee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871]. Compare early views as to apportionment in *City of Lexington v. McQuillan's Heirs*, 9 Dana (39 Ky.) 513, 35 Am. Dec. 159 [1840]; *Sutton's Heirs v. City of Louisville*, 5 Dana (Ky.), 28.

³ *City of Louisville v. American Standard Asphalt Co.*, — Ky. —, 102 S. W. 806, 31 Ky. L. R. 133 [1907]; *City of Louisville v. Salvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899]; *Preston v. Roberts*, 12 Bush. (75 Ky.) 570 [1877];

⁴ *German Protestant Orphan Asylum v. Barber Asphalt Paving Co.* (Ky.), 82 S. W. 632, 26 Ky. L. R. 805 [1904]; *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841, *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]; *Baker v. Salvage*, 7 Ky. L. R. 838.

⁵ *Specht v. Barber Asphalt Paving Co.*, (Ky.), 80 S. W. 1106, 26 Ky. Law Rep. 193 [1904]; (a case where unopened streets were regarded as being extended so as to form squares.)

⁶ See § 628.

of each tract. Assessments which are apportioned in this manner are very generally upheld. Some of the improvements in which such apportionment has been held to be invalid are improvements in which the benefit conferred naturally depends upon the area of the land benefited.¹ Thus, such an apportionment has been held to be valid in assessments for drainage,² sewers,³ cleaning out water courses⁴ and the construction of levees.⁵ Apportionments of this sort have, furthermore, been

¹ *McGehee v. Mathis*, 21 Ark. 40 [1860]; *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *District of Columbia v. Burgdorf*, 6 App. D. C. 465 [1895]; *The People ex rel. Davidson v. Cole*, 125 Ill. 158, 21 N. E. 6 [1890]; *Minneapolis & St. Louis Railroad Co. v. Lindquist*, 119 Ia. 144, 93 N. W. 103 [1903]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *Hines v. City of Leavenworth*, 3 Kan. 180 [1865]; *Pfaffinger v. Kramer*, 115 Ky. 498, 74 S. W. 238, 24 Ky. Law Rep. 2368 [1903]; *Malchus v. District of Highlands*, 4 Bush. (Ky.) 547 [1869]; *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *State ex rel. Hill v. Judges*, 46 La. Ann. 1292, 16 So. 219 [1894]; *Gillespie v. Police Jury of Concordia*, 5 La. Ann. 403 [1850]; *Alcorn v. Hamer*, 38 Miss. 652 [1860]; *Collier Estate v. Western Paving & Supply Co.*, 180 Mo. 362, 79 S. W. 947 [1904]; *Prior v. Buehler & Cooney Construction Company*, 170 Mo. 439, 71 S. W. 205 [1902]; *Mound City Land and Stock Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1892]; *The City of St. Joseph to use of Gibson v. Farrel*, 106 Mo. 437, 17 S. W. 497 [1891]; *Egyptian Levee Company v. Hardin*, 27 Mo. 495 [1858]; *Creamer v. Allen*, 3 Mo. App. 545 [1877]; *McMillan v.*

City of Butte, 30 Mont. 220, 76 Pac. 203 [1904]; *McCarty v. Brick*, 11 N. J. L. (6 Hals.) 27 [1829]; *Brown v. Keener*, 74 N. C. 714 [1876]; *Foster v. Commissioners of Wood Co.*, 9 O. S. 540 [1859].

² *The People ex rel. Davidson v. Cole*, 128 Ill. 158, 21 N. E. 6 [1890]; *Mound City Land and Stock Co. v. Miller*, 170 Mo. 240, 94 Am. St. Rep. 727, 60 L. R. A. 190, 70 S. W. 721 [1902]; *McCarty v. Brick*, 11 N. J. L. (6 Hals.) 27 [1829].

³ *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *Minneapolis & St. Louis Railroad Co. v. Lindquist*, 119 Iowa 144, 93 N. W. 103 [1903]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *Prior v. Buehler & Cooney Construction Company*, 170 Mo. 439, 71 S. W. 205 [1902]; *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1892]; *The City of St. Joseph to use of Gibson v. Farrel*, 106 Mo. 437, 17 S. W. 497 [1891]; *Creamer v. Allen*, 3 Mo. App. 545 [1877].

⁴ *Brown v. Keener*, 74 N. C. 714 [1876].

⁵ *McGehee v. Mathis*, 21 Ark. 40 [1860]; (not affected on this point by reversal in *McGee v. Mathis*. 71 U. S. (4 Wall.) 143 [1866]); *Hill v. Fontenot*, 46 La. Ann. 1563, 16 So. 475 [1894]; *State ex rel. Hill v. Judges*, 46 La. Ann. 1292, 16 So. 219 [1894]; *George v. Young*, 45 La. Ann. 1232, 14 So. 137 [1893]; *Hollingsworth v. Thompson*, 45 La.

upheld in cases of improvements the benefits from which do not seem to depend to so marked an extent upon the area of the land benefited. Thus, apportionments of this sort have been upheld in assessments for the improvement of streets,⁶ the construction of public roads⁷ and water pipes.⁸ In making such apportionment, it is not necessary that any regard be paid to the value of the land assessed.⁹ If an assessment levied upon an entire tract is to be apportioned upon respective parts thereof, it has been held proper to make such apportionment in accordance with the area of each part.¹⁰ In some cases the method of apportionment in accordance with area has been held to be improper.¹¹ Thus, an assessment upon a drainage district to pay the expense of running and maintaining engines which are part of a sewerage system, apportioned at a certain amount to each lot of twenty-five feet by one hundred feet has been held to be invalid, even if expressly authorized by statute.¹² A statute authorizing a sewer assessment to be apportioned according to area has been held to be unconstitutional, as laying down a rule of apportionment which has no necessary relation to benefits.¹³ Under a statute requiring an apportionment according to benefits, an apportionment according to area has been held to be improper.¹⁴

Ann. 222, 40 Am. St. Rep. 220, 12 So. 116 [1893]; *Minor v. Sheriff*, 43 La. Ann. 337, 9 So. 49 [1891]; *Munson v. Board of Commissioners of the Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Excelsior Planting and Manufacturing Co. v. Green*, 39 La. Ann. 455, 1 So. 873 [1887]; *Charnock v. Fordoche and Grosse Tête Special Levee District Company*, 38 La. Ann. 323 [1886]; *Gillespie v. Police Jury of Concordia*, 5 La. Ann. 403 [1850]; *Alcorn v. Hamer*, 38 Miss. 652 [1860]; *Egyptian Levee Company v. Hardin*, 27 Mo. 495 [1858].

⁶ *Hines v. City of Leavenworth*, 3 Kan. 180 [1865]; *Malchus v. District of Highland*, 4 Bush. (Ky.) 547 [1869]; *Collier Estate v. Western Paving & Supply Co.*, 180 Mo. 362, 79 S. W. 947 [1904]; *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203 [1904].

⁷ *Foster v. Commissioners of Wood Co.*, 9 O. S. 540 [1859].

⁸ *District of Columbia v. Burgdorf*, 6 App. D. C. 465 [1895].

⁹ *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1892].

¹⁰ *People ex rel. Rector, etc., of St. Ann's v. Fitch*, 87 Hun (N. Y.) 391, 34 N. Y. S. 368 [1895]; *Bloch v. Godfrey*, 26 Ohio Cir. Ct. R. 781 [1904].

¹¹ *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876]; *State, M'Closkey, Pros. v. Chamberlin*, 37 N. J. L. (8 Vr.) 388 [1875].

¹² *State, M'Closkey, Pros. v. Chamberlin*, 37 N. J. L. (8 Vr.) 388 [1875].

¹³ *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876].

¹⁴ *People ex rel. Parker v. Jefferson County Court*, 55 N. Y. 604 [1874].

§ 712. Apportionment by combination of frontage and area.

Under some statutes provision is made for apportioning assessments by a combination of frontage and area. Where assessments according to frontage and area are each held valid when made separately, a combination method like this is held to be proper;¹ at least where, in the specific instance, such a rule of apportionment does not differ substantially from an apportionment on the basis of benefits.

§ 713. Apportionment according to work done in front of each lot.

The question is frequently presented whether the legislature or the public corporation may assess each separate lot or tract of land with the cost of the work done in front thereof. This is, in effect, to make each separate lot a taxing district and to assess it with the entire cost of the improvement within such minute district. It is perfectly possible that the most expensive part of an improvement may confer a greater benefit upon property some distance away than it does upon property immediately abutting upon that part of the improvement. On the other hand, if the cost of the improvement is substantially the same throughout its entire length and if the benefits conferred by it are substantially the same upon all the land in the taxing district, this method of apportionment gives in many cases substantially the same result as that obtained by application of the front foot rule, or by the application of the rule apportioning assessments according to benefits. Upon the question of the validity of such a method of apportionment the authorities are in conflict. In some jurisdictions it is held that statutes providing for such a method of apportionment and assessments levied under such statutes are valid, at least in the absence of showing that in the particular case any substantial injustice has resulted.¹ Many of the improvements in which apportion-

¹ *English v. Mayor & Council of Wilmington*, 2 Marvel (Del.) 63, 37 Atl. 158 [1896]; *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692 [1887]; *Cleveland v. Tripp*, 13 R. I. 50 [1880].

¹ *Finer v. City of Portland*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming *King v. City of Portland*,

38 Or. 402, 55 L. R. A. 812; 63 Pac. 2 [1900]); *Bruning v. Chadwick*, 109 La. 1067, 34 So. 90 [1903]; *City of New Orleans v. Elliott*, 10 La. Ann. 59 [1855]; *Oakey v. Mayor*, 1 La. 1 [1830]; *Inhabitants of Palmyra v. Morton*, 25 Mo. 593 [1857]; *Lansing v. City of Lincoln*, 32 Neb. 457, 49 N. W. 650 [1891]; *Phila-*

ments of this type have been made are improvements which may be regarded as falling within the class of those which the abutting owner is legally bound to construct, irrespective of any question of benefits to himself. They are, accordingly, to be referred to the police power rather than to the power of taxation. Thus, this method of apportionment has been upheld in assessments for the construction of sidewalks,² and for curbing,³ which in some jurisdictions is regarded as a part of the sidewalk.⁴ This method of apportionment has, furthermore, been upheld in the case of improvements which cannot be explained on this theory, such as assessments for the construction of streets.⁵ The validity of such statutes has been recognized when applying alike to streets and sidewalks.⁶ The cost of making connections for each lot for water pipes,⁷ and sewers,⁸ has been held to be properly charged upon the lots with which such connections were respectively made, although it has been held that one lot as platted cannot be charged with the cost of more than one connection. Improvements of this sort can also be referred to the police power as distinguished from the power of taxation. Under statutes authorizing a city to require property owners to construct sidewalks in front of their lots, they cannot be required to pay for the cost of substantial grading therefor.⁹

delphia to use *v. Meighan*, 159 Pa. St. 495, 28 Atl. 304 [1894]; *The Borough of Greensburg v. Young*, 53 Pa. St. (3 P. F. Smith) 280 [1866]; *McGonigle v. City of Allegheny*, 44 Pa. St. (8 Wright) 118 [1862]; *Pennel's App.*, 2 Pa. St. (2 Barr.) 216 [1845]; *Deblois v. Barker*, 4 R. I. 445 [1857]; *Mayor and Aldermen v. Maberry*, 6 Humph. (25 Tenn.) 368, 44 Am. Dec. 315 [1845]; *Green v. Ward*, 82 Va. 324 [1886].

² *Bruning v. Chadwick*, 109 La. 1067, 34 So. 90 [1903]; *Inhabitants of Palmyra v. Morton*, 25 Mo. 593 [1857]; *The Borough of Greensburg v. Young*, 53 Pa. St. (3 P. F. Smith) 280 [1866]; *Mayor and Aldermen v. Maberry*, 6 Humph. (25 Tenn.) 369, 44 Am. Dec. 315 [1845].

³ *Philadelphia to use v. Meighan*, 159 Pa. St. 495, 28 Atl. 304 [1894]; *Pennel's App.*, 2 Pa. St. (2 Barr.)

216 [1845]; *Deblois v. Barker*, 4 R. I. 445 [1857].

⁴ See §§ 315, 439, 441.

⁵ *King v. City of Portland*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming *King v. City of Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); *City of New Orleans v. Elliott*, 10 La. Ann. 59 [1853]; *Lansing v. City of Lincoln*, 32 Neb. 457, 49 N. W. 650 [1891]; *McGonigle v. City of Allegheny*, 44 Pa. St. (8 Wright) 118 [1862].

⁶ *Oakey v. Mayor*, 1 La. 1 [1830]; *Green v. Ward*, 82 Va. 324 [1886].

⁷ *Warren v. Chicago*, 118 Ill. 329, 11 N. E. 218 [1888].

⁸ *Palmer v. City of Danville*, 154 Ill. 156, 38 N. E. 1067 [1894].

⁹ *Little Rock v. Fitzgerald*, 59 Ark. 494, 28 L. R. A. 496, 28 S. W. 32 [1894].

In many jurisdictions, on the other hand, it has been held that this method of apportionment need not necessarily bear any relation whatever to the actual benefits conferred, that it does not bear any such relation except accidentally, and that accordingly statutes authorizing such method of apportionment are invalid, and that assessments cannot be apportioned upon such a basis.¹⁰ In Texas such apportionment was originally held to be valid,¹¹ but since the decision of *Norwood v. Baker*,¹² the Supreme Court of Texas, following what it supposed to be the principle involved in that decision, has held such apportionment invalid.¹³ If the statute requires the city to pay one-third of the cost of an improvement, the rest to be apportioned on abutting property, treating the city as the owner of intersecting streets, the city cannot by ordinance provide that the cost of intersections and the frontage thereof shall both be deducted.¹⁴ An assessment for the cost of building a public dock on private property, levied on the property on which such dock was built has been held to be invalid, but in part because the improvement was not one for which an assessment could be levied.¹⁵ Under a statute which provides for charging each lot with the cost of the work done in front of it, the cost of an entire block cannot be apportioned upon the land abutting on such block, according to the frontage of each tract.¹⁶ A lot owner may be charged with the cost of the entire street in front of his lot and not the cost of half its width

¹⁰ *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *Woodbridge v. City of Detroit*, 8 Mich. 274 [1860]; (decided by an evenly divided court); *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City*, 37 N. J. L. [8 Vr.] 128 [1874]; *Jones v. Holzappel*, 11 Okla. 405, 68 Pac. 511 [1902]. For reasoning which leads to a similar result, see *Reclamation Dist., No. 537 of Yolo County v. Burger*, 122 Cal. 442, 55 Pac. 156 [1898]. Such a method of apportionment was said to be "if anything a more odious method of assessing the cost of street work than that of frontage which was recently condemned in *Town of Elma v. Car-*

ney (9 Wash. 406), and finds less justification under the statute." *City of New Whatcom v. Bellingham Bay Improvement Company*, 9 Wash. 639, 38 Pac. 163 [1894]

¹¹ *Adams v. Fisher*, 63 Tex. 651 [1885]; *Taylor v. Boyd*, 63 Tex. 533 [1885]; *Roundtree v. City of Galveston*, 42 Tex. 612 [1875].

¹² 172 U. S. 269, 19 S. 187 [1898].

¹³ *Hutcheson v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 846 [1899].

¹⁴ *Bacon v. Mayor & Aldermen of Savannah*, 91 Ga. 500, 17 S. E. 749 [1893].

¹⁵ *Lathrop v. City of Racine*, 119 Wis. 461, 97 N. W. 192 [1903].

¹⁶ *Allen v. City of Galveston*, 51 Tex. 302 [1879].

only, where a public common, not subject to assessment, is situated on the opposite side of such street.¹⁷

§ 714. Effect of statutes requiring other form of apportionment.

If by statute it is provided that assessments are to be apportioned according to benefits, the public corporation or officials who are to apportion the assessment cannot omit all consideration of the question of actual benefits and levy an assessment upon each tract of land for the cost of the work done on the front thereof.¹ On the other hand, it seems to be held that if the public corporation decides that benefits are apportioned in this ratio it may apportion the assessment in the same ratio and unless such apportionment is clearly an injustice, it will not be disturbed.² Under a statute providing for "special assessment or special taxation," it is improper to charge each lot with the cost of the work done in front of it.³ A statute which provides for apportioning an assessment according to frontage, means apportioning the entire amount to be raised by assessment upon all the property assessed in accordance with the frontage of each tract and does not mean that each tract is to be assessed for the cost of the work done in front of it.⁴ Under statutes providing for apportioning assessment according to benefits, or according to frontage,⁵ it is not therefore necessary

¹⁷ *McGonigle v. City of Allegheny*, 44 Pa. St. (8 Wright) 118 [1862].

¹ *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *City of Duluth v. Davidson*, 97 Minn. 378, 107 N. W. 151 [1906]; *State, Baxter, Pros. v. Mayor and Aldermen of Jersey City*, 36 N. J. L. (7 Vr.) 188 [1873]; *City of New Whatcom v. Bellingham Bay Improvement Company*, 9 Wash. 639, 38 Pac. 163 [1894]. Under such statutes an assessment for the estimated cost of work done in front of each lot plus fifteen per cent. was held invalid. *Watkins v. Zwietusch*, 47 Wis. 513, 3 N. W. 35 [1879].

² *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906]; *Howe v. City of Cambridge*, 114 Mass. 388 [1874].

³ *Farrel v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E.

325 [1899]; *Holt v. City of East St. Louis*, 150 Ill. 530, 37 N. E. 927 [1894]; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

⁴ *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *People ex rel. Raymond v. Grover*, 203 Ill. 24, 67 N. E. 165 [1903]; *Holt v. City of East St. Louis*, 150 Ill. 530, 37 N. E. 927 [1894]; *Moody v. Chadwick*, 52 La. Ann. 1888, 28 So. 361 [1900]; *Neenan v. Smith*, 50 Mo. 525 [1872]; *Creamer v. Bates*, 49 Mo. 523 [1872]; *Fowler v. City of St. Joseph*, 37 Mo. 228 [1866]; *Childers v. Holmes*, 95 Mo. App. 154, 68 S. W. 1046 [1902]; *Eyerman v. Hardy*, 8 Mo. App. 311 [1880]; *State ex rel. Christopher v. City of Portage*, 12 Wis. 562 [1860].

⁵ *Adams v. Green*, 74 Mo. App. 125 [1898].

to consider the cost of the work done in front of each separate tract of property.⁶ Under such statutes it is improper to assess each lot with the cost of the work done in front thereof.⁷ It has, on the other hand, been suggested that the amount of the assessment should not exceed the cost of the work done in front of each lot, even if levied on the basis of benefits.⁸ The fact that much more paving is done in front of some lots than in front of others by reason of the existence of street car tracks upon part of the street,⁹ or because part of the street is narrower than the rest,¹⁰ does not make it necessary to charge each lot with the cost of the work done in front thereof.

§ 715. Apportionment of special assessment or special taxation in Illinois.

The constitution of Illinois provides: "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise."¹ Under this provision it is held that assessments must be limited to, and in proportion to the amount of the benefits conferred by the improvement for which the assessment is levied.² Special taxation, within the meaning of this constitutional provision, has, however, been regarded as of a different nature and character. It has been said that the power of special taxation is

⁶Barber Asphalt Paving Company v. Munn, 185 Mo. 552, 83 S. W. 1062 [1904]; City of Marionville to the use of Ginbaugh v. Henson, 65 Mo. App. 397 [1895]; Dunker v. Stiefel, 57 Mo. App. 379 [1894]; Gibsons v. Kayers, Executor, 16 Mo. App. 404 [1885]; In the Matter of Gardner, 41 Howard 255 [1871]; In the Matter of Anderson, 60 Barb. 375 [1871]; Scranton v. Koehler, 200 Pa. St. 126, 49 Atl. 792 [1901]; Town of Tumwater v. Pix, 18 Wash. 153, 51 Pac. 353 [1897].

⁷Thornton v. City of Clinton, 148 Mo. 648, 50 S. W. 295 [1898]; Adams v. Green, 74 Mo. App. 125 [1896].

⁸People of the State of New York ex rel. Scott v. Pitt, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662 [1902];

Witman v City of Reading, 169 Pa. St. 375, 32 Atl. 576 [1895].

⁹Barber Asphalt Paving Company v. Munn, 185 Mo. 552, 83 S. W. 1062 [1904]; Scranton v. Koehler, 200 Pa. St. 126, 49 Atl. 792 [1901].

¹⁰Dunker v. Stiefel, 57 Mo. App. 379 [1894].

¹Art. IX, § 9, Constitution of Illinois [1870].

²Job v. City of Alton, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; Pfeiffer v. People, 170 Ill. 347, 48 N. E. 979; Hull v. People, 170 Ill. 246, 48 N. E. 984; Pike v. City of Chicago, 155 Ill. 656, 40 N. E. 567 [1895]; Greeley v. People of the State of Illinois, 60 Ill. 19 [1871]; St. John v. City of East St. Louis, 50 Ill. 92 [1869].

not restricted to the amount of benefits conferred and does not depend upon the fact of an equivalent benefit to the property taxed.³ Special taxation was based entirely on the theory of the presumed equivalent⁴ found in the determination of the corporate authorities that the property benefited by the improvement is benefited to the full extent of the cost thereof and that such benefit is apportioned according to frontage.⁵ As far as the rights of the property owners are protected at all, it is by the doctrine that special taxation must be reasonable and just, and that an assessment ordinance which is unreasonable, unjust and oppressive will be held to be void.⁶ It must, however, be noted

³ *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; *City of Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]; *City of Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686 [1886]; *White v. The People ex rel. City of Bloomington*, 94 Ill. 604 [1880]. "The supposition that contiguous property would be benefited by a local improvement may have operated with those who granted the power of special taxation of such property, in the granting of the power, but they left the exercise of the power without condition in this respect." *City of Galesburg v. Searles*, 114 Ill. 217, 220, 29 N. E. 686 [1886].

⁴ *White v. The People ex rel. City of Bloomington*, 94 Ill. 604 [1880].

⁵ *Illinois Central Railroad Company v. Decatur*, 147 U. S. 190, 37 L. 132, 13 S. 293 [1893]; *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042 [1901]; *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; *Birket v. City of Peoria*, 185 Ill. 369, 57 N. E. 30 [1900]; *Cramer v. City of Charleston*, 176 Ill. 507, 52 N. E. 73 [1898]; *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898]; *Bass v. South Park Commissioners*, 171 Ill. 370, 49 N. E. 549 [1898]; *Chicago & Northwestern Railway Co. v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Payne v. Village*

of South Springfield, 161 Ill. 285, 44 N. E. 105 [1896]; *The Chicago and Alton R. R. Co. v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077 [1894]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893]; *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, 32 N. E. 506 [1893]; *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *Green v. City of Springfield*, 130 Ill. 515, 23 N. E. 602 [1890]; *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889]; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471 [1887]; *Enos v. City of Springfield*, 113 Ill. 65 [1886]; *Falch v. The People ex rel. Johnson*, 99 Ill. 137 [1881]; *White v. The People ex rel. City of Bloomington*, 94 Ill. 604 [1880].

⁶ *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906]; *The Chicago Union Traction Co. v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904]; (*distinguishing Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899]); *Job v. City of Alton*, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; *Chicago & Northwestern Railway Co. v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

that in some cases special taxation is explained as resting ultimately on the same basis as local assessment; namely, that the property assessed receives a benefit from the improvement for which the assessment is levied at least to the amount of such assessment.⁷ The Supreme Court of the United States has been urged to hold that the system of special taxation in force in Illinois was unconstitutional as in violation of that clause of the Fourteenth Amendment to the Constitution of the United States forbidding the taking of property without due process of law.⁸ The proceeding was in error to the judgment of the Supreme Court of Illinois.⁹ This question was not raised in the Supreme Court of Illinois, was not passed upon by that court,¹⁰ and under the practice of the Supreme Court of the United States, could not, therefore, be considered by the latter court.¹¹

⁷ Chicago and Alton R. R. Co. v. City of Joliet, 153 Ill. 649, 39 N. E. 1077 [1894]; Lightner v. City of Peoria, 150 Ill. 80, 37 N. E. 69 [1894]; City of Chicago v. Blair, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829 [1894]. "The only basis upon which either special assessment or special taxation can be sustained is, that from the proposed local improvement the property subjected to the tax or assessment will be enhanced in value to the extent of the burthen imposed." City of Chicago v. Blair, 149 Ill. 310, 315, 24 L. R. A. 412, 36 N. E. 829 [1894].

⁸ Lombard v. West Chicago Park Commissioners, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901].

⁹ Cummings v. West Chicago Park Commissioners, 181 Ill. 136, 54 N. E. 941 [1899].

¹⁰ "It is suggested, although under the statutes of Illinois a special assessment can only be made for the amount of the benefit shown to exist, this is of no concern in this case since this levy is not a special assessment, but is a special tax. Where a special tax is imposed under the law of Illinois, it is asserted, no inquiry into the benefits can be had, and, therefore, there arises no question whether the levy was in-

valid as exceeding the benefits to be derived, since all investigation into the amount of the benefits was, as a matter of law, excluded. But this proposition is plainly an afterthought. From the statement of the case which precedes, it is apparent that the objectors to the assessment considered that their defence raised the issue of benefit, that they tendered proof, submitted the question to the trial court without a jury and had an award against them. It is plain that this contention was not raised by the assignment of errors in the Supreme Court of Illinois, and such question was not by that court in any way considered." Lombard v. West Chicago Park Commissioners, 181 U. S. 33, 40, 41, 45 L. 731, 21 S. 507 [1901].

¹¹ Dewey v. Des Moines, 173 U. S. 193, 19 S. 379 [1899]; Kipley v. People of State of Illinois, 170 U. S. 182, 18 S. 550, Levy v. Superior Court of San Francisco, 167 U. S. 175, 17 S. 769, Oxley Stave Co. v. Butler County, 166 U. S. 648, 17 S. 709, Hamilton Company v. Massachusetts, 6 Wall. (U. S.) 632 [1867]; Bridge Proprietors v. Hoboken Company, 1 Wall. (U. S.) 116 [1863]. If, however, the record

We have, therefore, no clear intimation of the view of the Supreme Court of the United States as to the validity of special taxation in Illinois as a taking without due process of law. Inferior Federal courts have held that special taxation was unconstitutional as in violation of the Fourteenth Amendment,¹² but this holding was based upon the supposed effect of *Norwood v. Baker*,¹³ and also on the ground that no notice or hearing was given upon the question of benefits or upon the correctness of the apportionment. Under the strong tendency of modern law to limit assessments to the benefits conferred, the legislature of Illinois has modified the statutes controlling special taxation so as to require consideration of benefits.¹⁴ It is not necessary, even under the present statutes, that the special tax be apportioned to the amount of benefit received by each lot. It is sufficient if no lot is taxed more than it is benefited.¹⁵ The word "or" in the clause of the constitution already quoted has its usual disjunctive meaning.¹⁶ Special assessment and special taxation cannot be combined in one proceeding.¹⁷ However, on petition of the property owners in one block, a sidewalk along such block may be paid for by special assessment, while the rest of such sidewalk may be paid for by special taxation.¹⁸ A special tax must be apportioned by distributing the entire tax among contiguous lots according to their respective frontage.¹⁹ Each lot cannot be charged with the cost of work done in front of it.²⁰

shows by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, the question is sufficiently presented, and the Supreme Court of the United States will pass upon it. *Capitol National Bank of Lincoln v. First National Bank of Cadiz*, 172 U. S. 425, 19 S. 202; *Green Bay and Mississippi Canal Co. v. Patten Paper Co.* 172 U. S. 58, 19 S. 97; *Chicago, Burlington & Quincy Co. v. City of Chicago*, 166 U. S. 226, 17 S. 581, *Sayward v. Denny*, 158 U. S. 180, 15 S. 777; *Powell v. Brunswick County*, 150 U. S. 433, 14 S. 166; *Roby v. Colehour*, 146 U. S. 153, 13 S. 47.

¹² *Fay v. City of Springfield*, 94 Fed. 409 [1899].

¹³ *Norwood v. Baker*, 172 U. S. 269, 19 S. 187 [1898].

¹⁴ *City of Peru v. Bartels*, 214 Ill. 515; 73 N. E. 755 [1905].

¹⁵ *City of Peru v. Bartels*, 214 Ill. 515, 73 N. E. 755 [1905].

¹⁶ *Kuehner v. City of Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893].

¹⁷ *Kuehner v. City of Freeport*, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893].

¹⁸ *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042 [1901].

¹⁹ *People ex rel. Raymond v. Latham*, 203 Ill. 9; 67 N. E. 403 [1903]; *Ware v. City of Jerseyville*, 158 Ill. 234, 41 N. E. 736 [1895].

²⁰ *Farrel v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E. 325 [1899]; *Holt v. East St. Louis*, 150 Ill. 530, 37 N. E. 927

Special taxation is limited to contiguous property, but special assessment is not.²¹

§ 716. Apportionment of cost of street intersections.

In some states special provisions are found for assessing and apportioning the cost of street intersections. Under a statute authorizing a city to levy a special tax upon the parcels of ground or any part thereof fronting on or lying along the street, avenue or alley which is to be improved, it has been held that a city may charge one-fourth of the cost of paving a street intersection upon each of the corner lots at such intersection.¹ The cost of paving a street intersection may be charged upon the lots in the quarter block adjoining and cornering on the crossing.² The cost of paving a street intersection may be apportioned so as to charge one-fourth of the cost thereof upon the entire block at the corner of which such quarter of the street intersection is situated,³ according to the frontage of each lot.⁴

§ 717. Apportionment of assessment for performance of legal duty.

If the assessment is one of the class of assessments not based upon the theory of benefits, but upon the theory that the property owner owes a duty to the public which he has omitted or neglected to discharge, and that the public has accordingly done such work for him and has charged him with the expense thereof, an assessment may be sustained, though it is in excess of the benefits conferred by such improvement.¹ Such assessment is not based upon any theory of benefits and its validity does not de-

[1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. 888 [1893].

²¹ *Guild v. Chicago*, 82 Ill. 472 [1876].

¹ *Wolf v. City of Keokuk*, 48 Ia. 129 [1878].

² *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124 [1888].

³ *City of Sedalia v. Coleman*, 82 Mo. App. 560 [1899].

⁴ *The Mayor, etc., of City of Lexington v. Long*, 31 Mo. 369 [1861];

¹ *Chicago, Burlington & Quincy Railroad Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. 948, 18 S. 513 [1898]; (affirming *Chicago,*

Burlington & Quincy Railroad Co. v. State of Nebraska ex rel. Omaha, 47 Neb. 549, 66 N. W. 624 [1896]); *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887]; *State, Agents, Pros. v. Mayor and Common Council of Newark*, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; *Village of St. Marys v. Lake Erie & Western R. R. Co.*, 60 O. S. 136, 53 N. E. 795 [1899]; *Westenhaver v. Village of Hoytsville*, 28 Ohio C. C. 357 [1905]; *Lisbon Avenue Land Co. v. Town of Lake*, — Wis. —, 113 N. W. 1099 [1907]; *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904].

pend upon the taxing power.² It is an exercise of the police power of the city and the only limitation upon the amount which may be imposed is the cost of doing the work which the property owner should have done, but which he omitted or neglected to do.³ Thus, a land owner may be compelled to pay the cost of constructing a sidewalk in front of his property,⁴ even in jurisdictions in which this method of apportionment is held to be invalid for assessments based on benefits,⁵ or in which the validity of local assessments was at that time denied.⁶ This principle, however, cannot be extended to improvements connected with sidewalks but not incidents thereof. Thus, if a curbstone and gutter is regarded as a part of a sidewalk, an assessment therefor cannot be upheld on this theory.⁷ Where an assessment according to frontage is regarded as invalid in the case of

² "It would seem to be most reasonable that the owner of the lands drained and reclaimed should be assessed to the full extent at least of his special benefits, for he has received an exact equivalent and full pecuniary consideration therefor, and for that which is in excess of such benefits should be paid on the ground that it was his duty to remove such an obvious cause of malarial disease and prevent a public nuisance. The duty of one owner of such lands is the duty of all, and in order to effectually enter upon and carry out any feasible system of drainage through the infected district, all such owners may be properly grouped together to bear the general assessment for the entire cost proportionably." *Donnelly v. Decker*, 58 Wis. 461, 473, 17 N. W. 389 [1883]; quoted and approved in *Zigler v. Menges*, 121 Ind. 99, 104, 16 Am. St. Rep. 357, 22 N. E. 782 [1899].

³ *Lisbon Avenue Land Co. v. Town of Lake*, — Wis. —, 113 N. W. 1099 [1907].

⁴ *White v. The People ex rel. City of Bloomington*, 94 Ill. 604 [1880]; *Town of Greendale v. Suit*, 163 Ind. 282; 71 N. E. 668 [1904]; *Town of Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451 [1879]; *Skinker v.*

Heman, 148 Mo. 349, 49 S. W. 1026 [1898]; (reversing *Skinker v. Heman*, 64 Mo. App. 441 [1895]); *Heman Construction Company v. McManus*, 102 Mo. App. 649, 77 S. W. 310 [1903]; *State, Agens, Pros. v. Mayor and Common Council of City of Newark*, 37 N. J. L. (8 Vr.) 415, 18 Am. Rep. 729 [1874]; *State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City*, 37 N. J. L. (8 Vr.) 128 [1874]; *Wilmington v. Yopp*, 71 N. C. 76; *Smith v. Kingston Borough*, 120 Pa. St. 357, 14 Atl. 170 [1888]; *Washington v. Mayor and Aldermen of Nashville*, 31 Tenn. (1 Swan.) 177 [1851]; *Mayor and Aldermen v. Maberry*, 25 Tenn. (6 Humph.) 368, 44 Am. Dec. 315 [1845]; *Whyte v. Mayor and Aldermen of Nashville*, 32 Tenn. (2 Swann) 364 [1852]; *Nashville v. Berry*, 2 Shan. Cas. (Tenn.) 561; *Lentz v. City of Dallas*, 96 Tex. 258, 72 S. W. 59 [1903]; *Lisbon Avenue Land Co. v. Town of Lake*, — Wis. —, 113 N. W. 1099 [1907].

⁵ See § 713.

⁶ For the doctrine in Colorado and Tennessee at that time see §§ 152, 160.

⁷ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 901 [1899].

assessments based on the theory of benefits, the cost of filling that portion of the street which is to be occupied by a sidewalk cannot be assessed upon this basis.⁸ Hence, in jurisdictions in which assessments levied under the police power were upheld, an assessment for curbing and gutters was held to be invalid.⁹ The construction of sewers,¹⁰ and of house connections extending from different lots to a sewer,¹¹ has been referred in some jurisdictions to the police power, and can accordingly be charged upon property in front of which such improvements are constructed. It has been suggested that assessments for drainage are to be justified under the theory of eminent domain and not as based upon the theory of benefits, and hence that such assessments need not be necessarily limited to the amount of benefits.¹² The cost of constructing a levee has been said to be in the same class with exactions for the abatement of nuisances.¹³ This remark was in the nature of an *obiter*, however, since the assessment in this case was based upon the theory of benefits. The repair of roads seems to have been referred to the police power and accordingly it has been held proper to require each land owner to repair the road in front of his own land.¹⁴ On this principle a statute authorizing a city to assess the cost of repairs of a viaduct on the railroad over which it passes has been upheld.¹⁵

⁸ *Wilson v. Chilcott*, 12 Colo. 600, 21 Pac. 991 [1899].

⁹ *State, Cronin, Pros. v. Mayor and Aldermen of Jersey City*, 38 N. J. L. (9 Vr.) 410 [1876]; *State, Van Tassel, Pros. v. Mayor and Aldermen of Jersey City*, 37 N. J. L. (8 Vr.) 128 [1874].

¹⁰ *Gatch v. City of Des Moines*, 63 Ia. 718, 18 N. W. 310.

¹¹ *Washington Park Club v. City of Chicago*, 219 Ill. 323, 76 N. E. 383 [1906]; *Van Wagoner, Pros. v. Mayor and Aldermen of City of Paterson*, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

¹² *Zigler v. Menges*, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782 [1899]; *Matter of Drainage of Great Meadows on Pecquest River*, 42 N. J. L. (13 Vr.) 553 [1880]; (affirmed without opinion as *Hoagland v. State, Simonton, Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]; affirmed *Wurts*

v. Hoagland, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]); *Donnelly v. Decker*, 58 Wis. 461, 99 N. W. 460 [1904]; (apparently disapproved on this point in *Rude v. Town of St. Marie*, 121 Wis. 634, 99 N. W. 460 [1904]).

¹³ *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898];

¹⁴ *Barrows v. Helper*, 34 La. Ann. 362 [1882].

¹⁵ *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583 [1908]; (affirming *State ex rel. City of Duluth v. Northern Pacific Ry. Co.*, 98 Minn. 429, 108 N. W. 269); *Chicago, Burlington & Quincy Railroad Co. v. Nebraska ex rel. Omaha*, 170 U. S. 57, 42 L. 948, 18 S. 513 [1898]; (affirming *Chicago, Burlington and Quincy Railroad Co. v. State of Nebraska ex rel. Omaha*, 47 Neb. 549, 66 N. W. 624 [1896]).

So a municipal corporation may require railroads to maintain lights where such railroads cross streets.¹⁶ The cost of removing obstructions from a stream to improve navigation may be assessed upon adjoining owners under the theory of abating a nuisance, even though such obstructions are due to the negligence of the city.¹⁷ This doctrine, however, cannot be applied where the improvement for which it is sought to levy the assessment is not one which the owner of adjoining land is legally bound to construct.¹⁸ Thus, a land-owner cannot be compelled to pay the cost of building a public dock upon his own land.¹⁹ So the owner of an irrigating ditch cannot be compelled to pay the cost of a covered flume for conducting such irrigation ditch across a city street.²⁰ Charges for water rents without reference to the amount used upon the property assessed cannot be upheld on this theory.²¹ In the absence of statutory authority therefor a city cannot compel a property owner to pay the cost of removing garbage from his property.²² Under a statute authorizing a city to compel the making of proper connections between premises abutting on any street and any water main therein and to regulate by ordinance the making of such connections a public corporation cannot levy an assessment therefor.²³

§ 718. Apportionment of charges for voluntary use of public improvements or for goods furnished.

Provision is sometimes made for fixed charges for making use of public improvements, of which land-owners may make use or not at their option. Such charges are not assessments levied on the theory of benefits, since they are not involuntary exactions and are not necessarily based on any theory of benefits. If the

¹⁶ *Village of St. Marys v. Lake Erie and Western R. R. Co.*, 60 O. S. 136, 53 N. E. 795 [1899]; *Cincinnati, Hamilton and Dayton Railroad v. Sullivan*, 32 O. S. 152 [1877].

¹⁷ *Buffalo Union Iron Works v. The City of Buffalo*, 13 Abb. Pr. 141 [1870].

¹⁸ *Bountiful City v. Lee*, 27 Utah, 183, 75 Pac. 368 [1904]; *Lathrop v. City of Racine*, 119 Wis. 461, 97 N. W. 192 [1903].

¹⁹ *Lathrop v. City of Racine*, 119 Wis. 461, 97 N. W. 192 [1903].

²⁰ *Bountiful City v. Lee*, 27 Utah, 183, 75 Pac. 368 [1904].

²¹ *Village of Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. 172, 64 N. E. 362 [1902]; *State, Culver, Pros. v. Mayor and Aldermen of Jersey City*, 45 N. J. L. (16 Vr.) 256 [1883]; *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 36 [1883].

²² *Trenphagen v. City of South Omaha*, 69 Neb. 577, 96 N. W. 248 [1903].

²³ *Alvord v. City of Syracuse*, 163 N. Y. 158, 57 N. E. 310 [1900].

obligation is incurred by the property owner, it is incurred voluntarily and is contractual in its nature. Such charges are, accordingly, upheld.¹ Thus, an annual charge for the privilege of connecting certain land with the sewer has been held to be valid, even if the owner of such land was assessed for the cost of constructing such sewer originally, since the constructing of the sewer does not bind the city to maintain it forever and keeping it in condition is a benefit to the property which is thus afforded drainage.² Charges are frequently imposed upon land for goods furnished for use upon such land, the amount of the charge being based upon the amount of goods used. Charges of this sort are most frequently found in the case of water or gas furnished by a public corporation. Charges of this sort are not taxes, since they are incurred by the voluntary act of the landowner and, accordingly, if authorized by statute, they are valid.³ On the same principle a charge for metered sewage, based on a certain quantity per thousand gallons, is valid.⁴ Conversely, it may be provided that goods furnished for use on real property shall be distributed in proportion to the amount assessed upon such real property for the improvement whereby such goods are furnished. Thus, it may be provided that water furnished by a system of irrigation shall be distributed to the different tracts of land in proportion to the assessments levied upon each tract for such system of irrigation.⁵ If, however, an attempt is made to levy an arbitrary charge upon property owners for water, the amount not depending upon the act of the owner in making use of water or upon the quantity of water used, such charge is a form of taxation, and must fairly bear some relation to the benefits conferred. If clearly exceeding such benefits, it is invalid.⁶

¹ *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 45 L. 1115, 21 S. 860 [1901]; (affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]).

² *Carson v. Brockton Sewerage Commissioners*, 182 U. S. 398, 45 L. 1115, 21 S. 860 [1901]; (affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]).

³ See §§ 10, 353, 421.

⁴ *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 45 L.

1115, 21 S. 860 [1901]; (affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]).

⁵ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing *Bradley v. Fallbrook Irrigation District*, 68 Fed. 948 [1895]).

⁶ *State, Culver, Pros. v. Mayor and Aldermen of Jersey City*, 45 N. J. L. (16 Vr.) 256 [1883]; *In Matter of Trustees of Union College*, 129 N. Y. 308, 29 N. E. 460 [1891].

§719. Duplication of assessment.

Since the amount of the assessment cannot, in theory, at least, exceed the amount of benefits conferred by the improvement for which the assessment is levied, two different assessments, one of which is not intended as a substitute for the other, cannot be levied for the same improvement.¹ A double assessment upon the same land for the same improvement is not an "informality, irregularity or omission" within the meaning of a statute providing that an assessment should not be rendered invalid for an informality, irregularity or omission.² This does not mean that a supplemental assessment cannot be levied after the original assessment has been levied under a statute authorizing such procedure as long as the combined assessments do not exceed the benefits.³ On the contrary, if statutes authorize such procedure, it is a reasonable and proper method of levying an assessment.⁴ What is forbidden by this rule is the levying of an assessment for the full value of the benefits conferred by the improvement in question, and the subsequent levy of another assessment also for the full benefits conferred by such improvement. It has, on the other hand, been said that relief from a double assessment must be sought in the legislature and not in the courts. This view was advanced, however, in an assessment for local sewers levied according to frontage, thus causing what, by reason of the shape of the lot assessed, amounted to a double assessment.⁵ Such assessments have, however, been held valid in cases in which it was denied that such assessments was in legal effect a double assessment. The same principle which forbids a double assessment prevents the deduction of benefits from damages when land is appropriated or injured by a public improvement, followed by a subsequent assessment for the same benefits for which deduction has already been made.⁶ Hence, if the change in the form and size of the lot, caused by taking a part of it for

¹ *Kenny v. Kelly*, 113 Cal. 364, 45 Pac. 699 [1896]; *The Chicago Union Traction Company v. City of Chicago*, 208 Ill. 187, 70 N. E. 234 [1904]; (distinguishing *Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899]); *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872].

² *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872].

³ *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877].

⁴ See § 952 *et seq.*

⁵ *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281 [1895].

⁶ *State ex rel. Merchant v. District Court*, 66 Minn. 161, 68 N. W. 860 [1896]; *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730 [1892].

a street, has increased its value per foot, and such increase is considered in determining the amount of damages to be paid by the owner, a subsequent assessment for such benefit cannot be levied.⁷ This principle does not mean that a deduction cannot be made for some benefits and an assessment levied for others.⁸ What it forbids is the levying of an assessment for the same benefits for which a deduction has already been made. It is proper to provide by statute that benefits may be set off against damages and an assessment levied for any excess of benefits over damages.⁹ The same principle which forbids a double assessment forbids a double allowance to the property owner of damages suffered by him in taking his land for a public improvement.¹⁰ Assessments are frequently attacked as amounting to double taxation, when they are not really subject to such objection. Thus, if an assessment is levied for a part of the cost of the improvement and the rest of the cost of such improvement is to be paid for by general taxation, such general tax may be levied upon all the property in the public corporation, including that property which has already been assessed. An assessment of this sort is not invalid as amounting to double taxation.¹¹ If an improvement has been constructed upon the assessment plan, and the cost thereof has been paid in whole or in part out of funds raised by general taxation, the subsequent levy of an assessment to reimburse the city for the amount thus paid out does not amount to double taxation.¹² If property which is subject to a special assessment has been assessed under a description of another tract, which has also been assessed under its own correct description, and the owner of the tract erroneously described has paid his assessment, the owner of the other tract cannot resist payment on the ground that his property has been

⁷ *Bancroft v. City of Boston*, 115 Mass. 377 [1874].

⁸ See §§ 67, 76.

⁹ *Holton v. Milwaukee*, 31 Wis. 27 [1872].

¹⁰ *Bancroft v. City of Boston*, 115 Mass. 377 [1874].

¹¹ *Corey v. City of Ft. Dodge*, 133 Ia. 666, 111 N. W. 6 [1907]; *Grunewald v. City of Cedar Rapids*, 118 Ia. 222, 91 N. W. 1059 [1902]; *State, Jelliff, Pros. v. Mayor and Common*

Council of the City of Newark, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886]; *In re Beechwood Avenue*, Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899].

¹² *Burns v. City of Duluth*, 96 Minn. 104, 104 N. W. 714 [1905]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]. See also *Elwood v. City of Rochester*, 43 Hun (N. Y.) 102 [1887]; and see § 416.

assessed twice.¹³ If an ordinance contemplates that a part of an improvement is to be paid for by some other public corporation, and this is not, in fact, done, a subsequent ordinance for completing such improvement at the cost of the property owners benefited is not a double assessment.¹⁴ A property owner, who complains of a double assessment, must pay the valid assessment before he can obtain relief in equity against the additional and invalid assessment.¹⁵

§720. Credit for work done.

In some jurisdictions statutes are found which provide that if a property owner has done work in front of his property substantially conforming to the plan of such improvement adopted by the public corporation, credit shall be given to such property owner for the amount of work so done by him. Such statutes are valid and credit may be given thereunder without doing any injustice to the remaining property owners.¹ Such credit can be given, however, only in case the statute provides therefor. If the statute provides for giving credit only for certain kinds of improvement, credit cannot be given for work done by the property owner of a kind not provided for by the statute.² Where an old levee was used by a reclamation district as a part of its plan of reclamation, it has been held that a credit given to the owners of land on which such old levee was situated, at the rate of twelve and one-half cents per cubic yard, was unfair to the other property owners, since the levee was so constructed that a break in any part thereof would flood the entire district, and accordingly the owner of land on which the levee was situated

¹³ *Gregory v. City of Ann Arbor*, 127 Mich. 454, 86 N. W. 1013 [1901].

¹⁴ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901].

¹⁵ *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432. See § 1435.

¹ *Holloran v. Morman*, 27 Ind. App. 309, 59 N. E. 869 [1901]; *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112 [1895]; *Spades v. Phillips*, 9 Ind. App. 487, 37 N. E. 297 [1893]; *Town of Bergen in County of Hudson v. State*, Van Horne, Pros., 32 N. J. L. (3 Vr.) 490 [1895]; *State, Mann, Pros. v.*

Mayor, etc., of Jersey City, 24 N. J. L. (4 Zab.) 662 [1855]; *Sanford v. Village of Warwick*, 181 N. Y. 20, 73 N. E. 490 [1905]; (reversing *Sanford v. Village of Warwick*, 82 N. Y. S. 466, 83 App. Div. 120 [1903]); *In the Matter of East Eighteenth Street*, 75 Hun, 603, 27 N. Y. Supp. 591 [1894]; *City of Erie v. Griswold*, 184 Pa. St. 435, 39 Atl. 231 [1898]; *Johnson v. City of Tacoma*, 41 Wash. 51, 82 Pac. 1092 [1905].

² *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901].

was benefited by work on every part thereof.³ A connection between private property and a public sewer is not a part of the general improvement, and the property owner who has constructed such connection cannot accordingly be allowed credit therefor.⁴ A property owner cannot claim credit for work already done by him which is not shown to be in accordance with the general plan of the improvement which is subsequently adopted by the public corporation.⁵ A city cannot adopt work already done by a property owner and levy an assessment therefor.⁶ It has been held that the legislature cannot give to a city power to enter into a contract with a property owner, whereby in consideration of his contributing towards the expense of the improvements, he should be exempted from a portion of the assessment.⁷ If the statute provides the method for obtaining credit for past work, credit can be given only in the manner pointed out by statute.⁸ Thus, if the statute provides that the commissioners in apportioning the assessment may allow a credit for such work, such credit cannot be given by their public officials after the commissioners have made their assessment and filed their report.⁹

Under other statutes the same result is reached by excluding property in front of which the work has been done by the property owner from the assessment. Such statutes are valid.¹⁰ Under a statute providing that land in front of which work has been done shall be excluded from the computation and assessment of the expense, it has been held proper to include the cost of work already done and then credit the owner who has done

³ Reclamation District No. 537 of Yolo County v. Berger, 122 Cal. 442, 55 Pac. 156 [1898].

⁴ Board of Improvement District Number Five of Texarkana v. Offenhauser, 84 Ark. 257, 105 S. W. 265 [1907].

⁵ Lux & Talbot Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903].

⁶ Dorathy v. City of Chicago, 53 Ill. 79 [1869]; Park v. City of Chicago, 22 Ill. 578 [1859]; Pease v. Chicago, 21 Ill. 500 [1859].

⁷ City of Chicago v. Baer, 41 Ill. 306 [1866].

⁸ Board of Improvement District Number Five of Texarkana v. Offenhauser, 84 Ark. 257, 105 S. W. 265 [1907].

⁹ People ex rel. Barber v. Chapman, 128 Ill. 496, 21 N. E. 507 [1890]; Tolin v. Jones, 33 Ind. App. 423, 71 N. E. 678 [1904]. See to the same effect Lux & Talbot Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903].

¹⁰ McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010 [1894]; McDonald v. Conniff, 99 Cal. 386, 34 Pac. 71 [1893]. See § 646.

such work with the cost thereof.¹¹ If the property owner has done the work in front of his lot, and such part can be measured and the amount ascertained, it has been held that he is not thereby relieved from all assessment, but that he should be relieved from the *pro rata* portion thereof.¹²

§721. Credit for land donated.

In the absence of an express statute a property owner who has donated land for public purposes, such as a street, is not exempt from assessment on the rest of his land for improvement of such street,¹ nor can he be credited with the value of the land donated by imposing a nominal assessment upon the rest of his land.² Whether a contract for exempting property owners who shall donate land is valid in the absence of statute is a question upon which there has been a difference of judicial opinion. In some jurisdictions such contracts are held to be invalid.³ In other jurisdictions such contracts are upheld.⁴ It is provided by some statutes that a property owner who donates land for a public use, such as a street, shall be credited with the value thereof,⁵ or that the rest of his property upon the same block shall be exempt.⁶ Such statutes are held to be valid.

§722. Credit for payment of prior assessment.

If provision is made for crediting the property owner with a voluntary payment of a prior void assessment, such credit may be given.¹ Whether such credit is valid or not, other property owners cannot complain, since such credit does not affect the amount which they are bound to pay, but operates only as a prejudice to the city.² Provision may be made for crediting a

¹¹ Blount v. City of Janesville, 31 Wis. 648 [1872].

¹² State ex rel. Christopher v. City of Portage, 14 Wis. 550 [1861].

¹ State v. Dean et al., 23 N. J. L. (3 Zab.) 335 [1852]. See §§ 616-618.

² City of St. Joseph v. Crowther, 142 Mo. 155, 43 S. W. 786 [1897].

³ State, Gregory, Pros. v. Mayor, etc., of Jersey City, 34 N. J. L. (5 Vr.) 390 [1871].

⁴ Shelby v. City of Burlington, 125 Iowa 343, 101 N. W. 101 [1904]. See as to contract for deducting the as-

essment from the price to be paid for the land under special contract therefor, Little v. City of Rochester, 87 Hun, 493, 34 N. Y. S. 1010 [1895].

⁵ Espert v. City of Chicago, 201 Ill. 264, 66 N. E. 212 [1903].

⁶ In re City of New York, 93 N. Y. S. 84, 103 App. Div. 496 [1905]. See § 618.

¹ Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889 [1891]. See § 647.

² Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. 354 [1895].

property owner with a prior valid assessment paid in by him for an improvement which is a part of the new improvement for which the assessment is now levied.³ If overcharges should be credited to a property owner, the presumption is, in the absence of a showing to the contrary, that they were so credited.⁴ The fact that an assessment has been levied for a street improvement under a contract which contained a provision to the effect that the contractor should keep the improvement in repair for ten years, and the fact that the contractor has since become insolvent and unable to perform, do not preclude the city from levying an assessment for such repairs.⁵

§723. Who can complain of defective apportionment.

A property owner cannot complain of an irregularity in apportioning an assessment, if it is not shown that by reason of such irregularity the assessment against his property is larger than it would have been if the assessment had been made properly.¹ Unless he can show that some injury to himself has followed from an error in the assessment against another property owner, he cannot attack the assessment for such error.² A

³ Bassett v. City of New Haven, 76 Conn. 70, 55 Atl. 579 [1903]; Beck v. -Obst, 12 Bush. (75 Ky.) 268 [1876]; Corliss v. Village of Highland Park, 132 Mich. 152, 93 N. W. 254, 93 N. W. 610, 95 N. W. 416 [1903]; Mayor and Council of the City of Bayonne v. Morris, 61 N. J. L. (31 Vr.) 127, 38 Atl. 819 [1897].

⁴ State ex rel. Youngster Pros. v. Mayor and Aldermen of Paterson, 40 N. J. L. (11 Vr.) 244 [1878].

⁵ State ex rel. Woulfe v. St. Paul, Judge, 107 La. 777, 32 So. 88 [1901-1902].

¹ The Chicago, Rock Island & Pacific R. R. C. v. Chicago, 139 Ill. 573, 28 N. E. 1108 [1893]; State on the relation of Lingenfelter v. Danville and North Salem Gravel Road Co., 33 Ind. 133 [1870]; Farrel v. West Chicago Park Commissioners, 182 Ill. 250, 55 N. E. 325 [1899]; Huesman v. Dersch, — Ky. —, 109 S. W. 319 [1908]; Zehnder v. Barber As-

phalt Paving Company, — Ky. —, 74 S. W. 201, 24 Ky. L. R. 2279 [1903]; Barber Asphalt Paving Co. v. Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. Law Rep. 2227; Dumesnil v. Louisville Artificial Stone Co., 109 Ky. 1, 58 S. W. 371 [1900]; McHenry v. Selva, 99 Ky. 232, 35 S. W. 645; Gardiner v. Street Commissioners of City of Boston, 188 Mass. 223, 74 N. E. 341 [1905]; Whiting v. Mayor and Aldermen of the City of Boston, 106 Mass. 89 [1870]; City of Marionville to the use of Grubaugh v. Henson, 65 Mo. App. 397 [1895]; Davis v. City of Newark, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; Morse v. City of Buffalo, 35 Hun, 613 [1885]; Owens v. City of Milwaukee, 47 Wis. 461, 3 N. W. 3 [1879].

² Watson v. City of Chicago, 115 Ill. 78, 3 N. E. 430 [1886]; Bigelow v. City of Chicago, 90 Ill. 49 [1878]; Fagan v. City of Chicago, 84 Ill. 227 [1876]; Goodwine v. Leak, 127 Ind.

property owner cannot object because the land of others is assessed for a larger amount than it should have been.³ Thus, he cannot show that the land of another property owner which has been assessed receives no benefit.⁴ He cannot complain that property belonging to other owners has been assessed for too small an amount,⁵ or has been omitted altogether,⁶ unless it appears that by reason thereof his own assessment has been increased beyond the amount which would have been assessed if the assessment had been apportioned in a proper manner. A property owner cannot object to his assessment on the ground that assessments against other lots are void.⁷ A property owner cannot object that a part of the assessment has been assessed against a town when it should not have been so assessed;⁸ especially if he is not a tax payer in such town.⁹ He cannot object because the city pays a larger proportion of the expense than was specified in the original resolution.¹⁰ A property owner cannot complain because less of his property is assessed than should have been assessed.¹¹ If, however, certain property has been omitted from assessment when it should have been included, it has been said that in the absence of any evidence the presumption will be that the assessment against other property was thereby increased.¹² If property benefited by the improvement and included within the assessment

569, 27 N. E. 161 [1890]; *Hawley v. Mayor and City Council of Baltimore*, 33 Md. 270 [1870]; *State, Righter, Pros. v. Mayor and Common Council of the City of Newark*, 45 N. J. L. (16 Vr.) 104 [1883].

³ *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *Ferrell v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E. 325 [1899]; *Corliss v. Village of Highland Park*, 132 Mich. 152, 93 N. W. 254, 93 N. W. 610, 95 N. W. 416 [1903]; *Reuting v. City of Titusville*, 175 Pa. St. 512, 34 Atl. 916 [1896].

⁴ *White v. City of Alton*, 149 Ill. 626, 37 N. E. 96 [1894]; *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1892].

⁵ *Bowditch v. City of New Haven*, 40 Conn. 503 [1873].

⁶ *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. 354 [1895]; *Balfé*

v. Bell, 40 Ind. 337 [1872]; *Forgey v. Northern Gravel Co.*, 37 Ind. 118 [1871]; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281 [1893]; *State, Humphries v. Mayor and Common Council of the City of Bayonne*, 60 N. J. L. (31 Vr.) 406, 38 Atl. 761 [1897]; *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

⁷ *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891].

⁸ *Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735 [1885]; *Seanor v. Board of County Commissioners*, 13 Wash. 48, 42 Pac. 552 [1895].

⁹ *Seanor v. Board of County Commissioners*, 13 Wash. 48, 42 Pac. 552 [1895].

¹⁰ *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895].

¹¹ *Barber v. City of Chicago*, 152 Ill. 37, 38 N. E. 253 [1894].

¹² *Hassan v. City of Rochester*, 67 N. Y. 528 [1876].

district is omitted, and the apportionment is such that the assessment upon the remaining property is increased by reason of such omission, such omission renders the apportionment invalid.¹³ This is true, especially if such omission is fraudulent or arbitrary.¹⁴ In some jurisdictions this rule is applied in so extreme a way that the report of the commissioners who have apportioned the assessment, is defective unless it shows affirmatively that the commissioners assessed all the land which was benefited by the improvement.¹⁵ If a public corporation or public officials authorized by law to determine what land shall be included in an assessment district omit, in the exercise of a reasonable discretion, land which is as a matter of fact benefited by the improvement, such omission does not, of course, invalidate the apportionment.¹⁶ The omission from the assessment of property which is not shown

¹³ *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890]; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *Dyer v. Harrison*, 63 Cal. 447 [1883]; *Hendricks v. Gilchrist*, 76 Ind. 369 [1881]; *Nevins and Otter Creek Townships Draining Co. v. Alkire*, 36 Ind. 189 [1871]; *City of Columbus v. Story*, 35 Ind. 97 [1871]; *Robbins v. Sand Creek Turnpike Co.*, 34 Ind. 461 [1870]; *New Haven and Fort Wayne Turnpike Co. v. Bird*, 33 Ind. 325 [1870]; *Hardwick v. Danville and North Salem Gravel Road Co.*, 33 Ind. 321 [1870]; *Drake v. Grout* 21 Ind. App. 534, 52 N. E. 775 [1898]; *Childers v. Holmes*, 95 Mo. App. 154, 68 S. W. 1046 [1902]; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903]; *State, Buess, Pros. v. Town of West Hoboken*, 51 N. J. L. (22 Vr.) 267, 17 Atl. 110 [1889]; *State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City*, 29 N. J. L. (5 Dutcher) 441 [1861]; *State, Van Horne, Pros. v. Town of Bergen*, 30 N. J. L. (1 Vr.) 307 [1863]; *State, Culver, Pros. v. Town of Bergen*, in the County of Hudson, 29 N. J. L. (5 Dutch.) 266 [1861]; *Ellwood v. City of Rochester*, 122 N. Y. 229, 25 N. E. 238 [1890]; *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; *Hassen v. City of*

Rochester, 65 N. Y. 516 [1875]; *Copeutt v. City of Yonkers*, 83 Hun, 178, 31 N. Y. S. 659 [1894]; *Bell v. City of Yonkers*, 78 Hun, 196, 28 N. Y. S. 947 [1894]; *In the Matter of the Application of the Board of Street Opening and Improvement of the City of New York, Relative to Acquiring Title to Forest Avenue in the Twenty-third Ward of the City of New York*, 74 Hun, 561, 26 N. Y. S. 855 [1893]; *Webber v. Common Council of the City of Lockport*, 43 Howard, 368 [1872]; *In re Cedar Park*, 1 How. Pr. N. S. 257 [1885]; *Upington v. Oviatt*, 24 O. S. 232 [1873]; *Masters v. City of Portland*, 24 Or. 161, 33 Pac. 540 [1893]; *City of Scranton v. Levers*, 200 Pa. St. 56, 49 Atl. 980 [1901].

¹⁴ *Fraser v. Mulany*, 129 Wis. 377, 109 N. W. 139 [1906].

¹⁵ *State, Kilburn, Pros. v. Essex Public Road Board*, 37 N. J. L. (8 Vr.) 273 [1874]; *State, Van Horne, Pros. v. Town of Bergen*, 30 N. J. L. (1 Vr.) 307 [1863].

¹⁶ *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020 [1904]; *Bacon v. Mayor and Aldermen of Savannah*, 105 Ga. 62, 31 S. E. 127 [1898]; *Lake v. City of Decatur*, 91 Ill. 596 [1879]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Wright v. City of Chicago*,

to be benefited affords no just ground of complaint.¹⁷ If property which is exempt from assessment,¹⁸ such as public land,¹⁹ or public streets,²⁰ is omitted from the assessment, such omission is proper and the apportionment is not thereby affected. If the statute provides for assessing land upon the basis of the lowest valuation for general taxation, the omission of land which has never been valued for general taxation is necessary under such statute and does not invalidate the apportionment.²¹ Since the law does not regard trifles, the omission of a small tract which should have been included, if so slight as to produce no material effect upon the amount of the assessment against the remaining property, does not invalidate the apportionment.²² An error in the name of the property owner under which land is listed for assessment is not the omission of such land from assessment.²³ If an error in the omission of land may be corrected, and is, in fact, corrected, such omission does not invalidate the apportionment.²⁴ If, by statute, a method is provided for taking advantage of errors in an apportionment, an error in apportionment caused by omitting land which should have been assessed cannot be taken advantage of except in the method pointed out by statute, and the omission to take advantage of such method is a waiver of such defect.²⁵ A property owner who complains of the

48 Ill. 285 [1868]; *Scammon v. City of Chicago*, 42 Ill. 192 [1866]; *Ayer v. Mayor and Aldermen of Somerville*, 143 Mass. 585, 10 N. E. 457 [1887]; *State, Board of Chosen Freeholders of the County of Hudson, Pros. v. Peterson Avenue and Secaucus Road Commissioners*, 41 N. J. L. (12 Vr.) 83 [1879]; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983 [1898].

¹⁷ *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898]; *Holodom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164 [1897].

¹⁸ *Cleneay v. Norwood*, 137 Fed. 962 [1905]; *Toledo v. Potter*, 19 Ohio C. C. 661 [1893].

¹⁹ *Doyle v. Austin*, 47 Cal. 353 [1874].

²⁰ *Cunningham v. City of Peoria*, 157 Ill. 499, 41 N. E. 1014 [1895]; *Holt v. East St. Louis*, 150 Ill. 530, 37 N. E. 927 [1894]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E.

69 [1894]; *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870].

²¹ In the *Matter of the Application of Churchill to Vacate an Assessment*, 82 N. Y. 288 [1880].

²² *Gilbert v. City of New Haven*, 39 Conn. 467 [1872]. A different view of such omission seems to be taken in *State ex rel. Wilson v. Longstreet*, 38 N. J. L. (9 Vr.) 312 [1876].

²³ *Hendricks v. Gilchrist*, 76 Ind. 369 [1881].

²⁴ *Sand Creek Turnpike Co. v. Robbins*, 41 Ind. 79 [1872].

²⁵ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896]; *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *Johnson v. People ex rel. Kochersperger*, 177 Ill. 64, 52 N. E. 308 [1898]; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898].

omission of land as increasing his assessment must pay or tender the amount actually due upon his land in order to obtain relief in equity where such amount can be ascertained definitely.²⁶ The fact that by consent of the property owners affected, the amount of the original assessment has been reduced, is no defense to a property owner in the absence of a showing of collusion or injury caused by such reduction to the property owner affected.²⁷ It is often provided by statute that street railway companies, the tracks of which occupy a portion of a street, must pay a specified portion of the paving of such street. If such street is paved and no charge therefor is made against the street railway company, and the share which the street railway company should have borne is assessed against the abutting property owners, thereby increasing their assessments, such property owners may resist such assessment on the ground of the omission to charge a part of the cost against the street railway company.²⁸ It has been said that if the tracks of a street railway company are laid in a street, there will be a presumption that the street railway company is bound to pay a part of the cost of paving such street in the absence of a showing that the railway company is exempt from such charge.²⁹ On the other hand, it has been said that a property owner must show affirmatively that the assessment against him includes a part of the cost which should have been assessed against a street railway company in order to resist an assessment.³⁰ If the amount assessed against the property owners is, in the aggregate, equal to or less than the amount which would have been assessed if a proper proportion of the cost had been charged against the street railway company, an omission to make

²⁶ *City of Ottawa v. Barney*, 10 Kan. 270 [1872].

²⁷ *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904]; See to the same effect *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898].

²⁸ *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *American Hide & Leather Co. v. City of Chicago*, 203 Ill. 461, 67 N. E. 979 [1903]; *Sawyer v. City of Chicago*, 183 Ill. 57, 55 N. E. 645 [1899]; *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664

[1899]; *Delano v. Mayor, Aldermen and Commonalty of the City of New York*, 32 Hun (N. Y.) 144 [1884]; *In the Matter of Appleby to Vacate an Assessment*, 26 Hun (N. Y.) 427 [1882]; *Philadelphia to use of O'Rourke v. Bowman*, 166 Pa. St. 393, 31 Atl. 142 [1895]; *Philadelphia to use of Nestor v. Spring Garden Farmers' Market Company*, 161 Pa. 522, 29 Atl. 286 [1894].

²⁹ *Page v. City of Chicago*, 60 Ill. 441 [1871].

³⁰ *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891].

such charge against the railway company does not prejudice such property owners and they cannot complain thereof.³¹ If a city or public corporation constructing the improvement provides for omitting to pave a part of the street which the street railway company should pave, the property owner cannot resist an assessment for the expense of paving the rest of such street.³²

§724. Effect of statutory provisions for method of objecting to apportionment.

The legislature frequently provides a specific method for raising questions as to the validity of the apportionment of the assessment.¹ A property owner who wishes to object to an apportionment must take advantage of the method of attack thus provided by the legislature. His failure to do so waives such objection.² An objection to the method of apportionment according to frontage may be waived by failure to take advantage of the remedy, such as appeal, which is provided by statute.³

³¹ *Bowditch v. City of New Haven*, 40 Conn. 503 [1873]; *O'Reilly v. City of Kingston*, 39 Hun (N. Y.) 285 [1886].

³² *Chicago & Northern Pacific R. R. Co. v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898]; *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897]; *City of Springfield to use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896].

¹ See § 1358.

² *English v. Territory*, — Ariz. —, 89 Pac. 501 [1907]; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Wells v. Wood*, 114 Cal. 255, 46 Pac. 96; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687; *Swamp Land District No. 307 v. Glide*, 112 Cal. 85, 44 Pac. 451; *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125; *People v. Hagar*, 52 Cal. 171 [1877]; *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *Dann v. Woodruff*, 51 Conn. 203; *Commissioners of Highways v. Drainage Commissioners*, 127 Ill. 581, 21 N. E. 206; *The People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872; *Jenks v. Chicago*, 48 Ill. 296;

Wray v. Fry, 158 Ind. 92, 62 N. E. 1004; *Chambliss v. Johnson*, 77 Ia. 611, 42 N. W. 427; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900]; *Stark v. City of Boston*, 180 Mass. 293, 62 N. E. 375; *Lincoln v. Board of Street Commissioners of City of Boston*, 176 Mass. 210, 57 N. E. 356 [1900]; *City of St. Louis v. Annex Realty Company*, 175 Mo. 63, 74 S. W. 961; *Kansas City Grading Co. v. Holden*, 107 Mo. 305, 17 S. W. 798; *County of Monroe v. City of Rochester*, 154 N. Y. 570, 49 N. E. 139 [1898]; *President, Managers and Company of the Delaware and Hudson Canal Company v. Atkins, Collector*, 121 N. Y. 246, 24 N. E. 319; *In re Eager*, 46 N. Y. 100; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432; *Northwestern and Pacific Hypotheek Bank v. City of Spokane*, 18 Wash. 456, 51 Pac. 1070; *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353 [1897].

³ *English v. Territory*, — Ariz. —, 89 Pac. 501 [1907].

§725. Change of statute with reference to apportionment.

The legislature has full power to modify rules as to apportionment as long as the method of apportionment provided for in the repealing statute is constitutional, and as long as no vested rights are affected.¹ If a change is made by statute before an improvement and the assessment proceedings based thereon are begun, the new statute, of course, controls.² A more difficult question is presented where the improvement and the assessment proceedings have been begun, but before the assessment becomes a finality the statute on the subject of apportionment is modified. In such cases the presumption will be that the new statute is not to have a retroactive effect, and that, unless it clearly appears to be the intention of the legislature to make it apply to pending proceedings, such proceedings must be carried on under the old law.³ It has been held that if the new law increases the burden of the property owners, it cannot be applied to proceedings which had been commenced when the change of law was made.⁴ If an improvement is constructed under a general ordinance providing for assessment according to the front foot rule, the city cannot change such method to an apportionment according to benefits.⁵ If the new law is so framed as to show the intention of the legislature to make it apply to pending proceedings, pending proceedings must be carried on under the new law,⁶ at least if the burden

¹ *Louisiana Imp. Co. v. Baton Rouge Electric & Gas Co.*, 114 La. 534, 38 So. 444 [1905].

² *Martin v. City of Oskaloosa*, 126 Ia. 680, 102 N. W. 529 [1905]; (opinion in 99 N. W. 557 [1904] withdrawn.)

³ *Pennsylvania Co. v. Cole*, 132 Fed. 668 [1904]; *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339 [1894]; *Houston v. McKenna*, 22 Cal. 550 [1863]; *Palmer v. City of Danville*, 166 Ill. 42, 56 N. E. 629 [1897]; *Reed v. Bates*, 115 Ky. 437, 74 S. W. 234, 24 Ky. L. R. 2312 [1903]; *Williams v. Mayor of Detroit*, 2 Mich. 560 [1853]; *Riseley v. City of St. Louis*, 34 Mo. 404 [1864]; *Kirwan v. Fisher*, 4 Mo. App. 574; *Cincinnati v. Seasongood*, 46 O. S. 296, 21 N. E. 630; *Ardrey v. City of Dallas*, 13 Tex. Civ. App. 442, 35 S. W.

726; *City of Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128; *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

⁴ *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

⁵ *Dick v. City of Toledo*, 11 Ohio C. C. 349 [1896].

⁶ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682); *Hall v. Street Commissioners*, 177 Mass. 434, 59 N. E. 63 [1901]; *Commissioners of Union County v. Greene*, 40 O. S. 318 [1883]; *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902]; *Cline v. Seattle*, 13 Wash. 444, 43 Pac. 367; *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26; *Wilson v. City of Seattle*, 2 Wash. 543, 27 Pac. 474.

of the property owner is not thereby increased.⁷ Examples of the application of this principle are found in the cases of ratification of an irregular pending assessment,⁸ and in cases of re-assessment.⁹

⁷ *Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

⁸ *Mattingly v. District of Columbia*, 97 U. S. 687, 24 L. 1098.

⁹ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682).

CHAPTER XIV.

NOTICE.

§726. Constitutional necessity of notice.

The effect of certain constitutional provisions, such as those forbidding the taking of property without due process of law, upon the right of a property owner to notice of proceedings, which are to result in an assessment of his property on the basis of benefits, has been discussed elsewhere in detail.¹ As has been stated, in discussing the effect of these constitutional provisions, it is generally held that the property owner has a constitutional right to notice and hearing; and that he is entitled to the right to be heard at some stage of the proceedings before the assessment becomes a fixed and established charge against his property as to the facts which affect his liability, except as to those facts which the legislature may determine or which it may leave for legislative determination by the public corporation making the assessment.² If by

¹ See § 119.

² *Turpin v. Lemon*, 187 U. S. 51, 23 S. 20 [1902]; *Anderson v. Messenger*, 158 Fed. 250 [1907]; *Murdock v. City of Cincinnati*, 39 Fed. 891 [1889]; *Hutson v. Woodbridge Protection District No. 1*, 79 Cal. 90, 21 Pac. 435, 16 Pac. 549 [1889]; *Boorman v. City of Santa Barbara*, 65 Cal. 213, 4 Pac. 31 [1884]; *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455 [1884]; *Great Falls Ice Co. v. Dist. of Col.*, 19 D. C. 327 [1890]; *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114; *McEnerey v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540 [1890]; *Johnson v. Lewis*, 115 Ind. 490, 18 N. E. 7 [1888]; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St.

Rep. 637, 16 N. E. 826 [1887]; *Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569 [1886]; *Pickering v. State for use of Dyar*, 106 Ind. 228, 6 N. E. 611 [1885]; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867 [1885]; *Hobbs v. Board, etc., County of Tipton*, 103 Ind. 575, 3 N. E. 263; *Strosser v. City of Fort Wayne*, 100 Ind. 443 [1884]; *Wright v. Wilson*, 95 Ind. 408 [1883]; *Beebe v. Magoun*, 122 Ia. 94, 101 Am. St. Rep. 259, 97 N. W. 986 [1904]; *Yeomans v. Riddle*, 84 Ia. 147, 50 N. W. 886 [1891]; *Gatch v. City of Des Moines*, 63 Ia. 718, 18 N. W. 310 [1886]; *Ulman v. Mayor of Baltimore*, 72 Md. 587, 32 Am. & Eng. Corps. Cas. 228, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709 [1890]; *Mayor and City Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880]; *Sears v. Street*

the provisions of the statute a reasonable notice is to be given to the property owners of the proceedings which are to result in a local assessment, no objection can be raised on this ground to the validity of the statute.³ If sufficient notice is provided for by statute, and is, in fact, given; and as result of such notice a hearing may be had upon the facts material to the existence and amount of the assessment, the assessment cannot be objected to upon the ground of want of notice.⁴ The fact that the statute does not provide for a notice does not deprive the property owner of his right to such notice,⁵ since this is a constitutional right, which the legislature did not confer and the legislature cannot

Commissioners of Boston, 173 Mass. 350, 53 N. E. 876 [1899]; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535 [1876]; City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117 [1895]; City of St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910 [1888]; Barker v. City of Omaha, 16 Neb. 269, 20 N. W. 382 [1884]; State ex rel. Wilkinson, Pros. v. Inhabitants of the City of Trenton, 36 N. J. L. (7 Vr.) 499 [1873]; Jones v. Town of Tonawanda, 158 N. Y. 438, 53 N. E. 280 [1899]; Matter of Trustees of Union College, 129 N. Y. 308, 29 N. E. 460 [1891]; McLaughlin v. Miller, 124 N. Y. 510, 26 N. E. 1104 [1891]; Remsen v. Wheeler, 105 N. Y. 573, 12 N. E. 564 [1887]; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; Stuart v. Palmer, 10 Hun, 23 [1877]; Ireland v. City of Rochester, 52 Barb. 414 [1868]; Jordan v. Hyatt, 3 Barb. 275 [1848]; People of the State of New York ex rel. Spencer v. Village of New Rochelle, 83 Hun, 185, 31 N. Y. S. 592; Chicago & Erie Railroad Company v. Keith, 67 Ohio State 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; Hunter v. Earl, 51 O. S. 573 [1894]; Railroad Company v. Wagner, Treasurer, 43 O. S. 75, 1 N. E. 91 [1885]; Hershberger v. Pittsburg, 115 Pa. St. 78, 8 Atl. 381 [1886]; City Council v. Pinckney, 1 Treadway (S. C.) 42 [1812]; Connor v. City of Paris, 87 Texas 32, 27 S. W.

88 [1894]; Adams v. Fisher, 63 Tex. 651 [1885]; City of Norfolk v. Young, 97 Va. 728, 47 L. R. A. 574 34 S. E. 886 [1900]; Violett v. City Council of Alexandria, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896]; Dietz v. City of Neenah, 91 Wis. 422, 65 N. W. 500, 64 N. W. 299 [1895].

³ City of Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 80 Pac. 467 [1905]; Gage v. City of Chicago, 225 Ill. 135, 80 N. E. 86 [1907]; Citizens' Sav. Bank & Trust Co. v. City of Chicago, 215 Ill. 174, 74 N. E. 115 [1905].

⁴ Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing, Bradley v. Fallbrook Irrigation District, 68 Fed. 948 [1895]); Lent v. Tillson, 72 Cal. 404, 14 Pac. 71 [1887]; Oliver v. Monona County, 117 Iowa 43, 90 N. W. 510 [1902].

⁵ Murdock v. City of Cincinnati, 39 Fed. 891 [1889]; State, Board of Chosen Freeholders of County of Hudson v. Paterson Ave. and Secaucus Road Commissioners, 41 N. J. L. (12 Vr.) 83 [1879]; State ex rel. Wilkinson, Pros. v. Inhabitants of the City of Trenton, 36 N. J. L. (7 Vr.) 499 [1873]; State, Mann, Pros. v. Mayor, etc., of Jersey City, 24 N. J. Law (4 Zabrieskie) 662 [1853]; Ireland v. City of Rochester, 51 Barb. 414 [1868].

take away. Under some constitutions notice must be given of the introduction of a special act.⁶

§ 727. No constitutional right to notice of each step in levy of assessment.

The property owner has no constitutional right to notice and hearing with reference to each step in the levy of the assessment.¹ Thus, if the original statute is void because no notice is given and a curative act is passed providing for notice which takes effect just as the proceedings have reached the stage where notice should be given, that is, before confirmation of the report of the commissioners classifying the lands benefited and apportioning the assessment and notice was thereupon given and a hearing had, it was held that such proceedings were valid, though no notice was given or even provided for when they were instituted.² As long as the rights of the property owner are sufficiently guarded, many things must be left to the discretion of the public officers chosen for the purpose of exercising governmental powers. This is a republic, that is, a representative government, and not a direct government by the people without the intervention of representatives; and the owners of property to be assessed have no more right to complain than have general tax payers, if they are not consulted personally about each separate step to be taken. Property owners cannot complain because they are not given notice and a hearing on the question of the appointment of assessors, and they are not given right to appeal from such appointment.³

§ 728. Notice and hearing in case of legislative determination.

It is not necessary to give notice or provide a hearing as to facts which the legislature may and does determine; or as to

⁶ *Speer v. Mayor and Council of City of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890].

¹ *District of Columbia v. Wormley*, 15 App. D. C. 58 [1899]; *Pleasant Township v. Cook*, 160 Ind. 533, 67 N. E. 262 [1902]; *Swain v. Fulmer*, 135 Ind. 8, 34 N. E. 639 [1893]; *Ross v. Board of Supervisors of Wright County*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905]; *Oliver v. Monona County*, 117 Iowa 43, 90 N. W. 510 [1902]; *Newman v.*

City of Emporia, 41 Kan. 583, 21 Pac. 593 [1889]; *Wilson v. State, Karle, Pros.*, 42 N. J. L. (13 Vr.) 612 [1880]; *In the Matter of Lowden*, 89 N. Y. 548 [1882]. See § 125.

² *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

³ *Kelley v. Minneapolis City*, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 59 N. W. 304 [1894].

which it may authorize the public corporation to make a legislative determination.¹ Thus, if the legislature or the city has determined legislatively that the improvement is necessary, a notice and hearing as to the question of the necessity of such improvement are unnecessary.² In the absence of a statute providing therefor, a city need not give any notice of its intention to pass an improvement ordinance.³ It seems to be assumed in some courts, on the other hand, that notice of the determination to make the improvement must be given to those whose property is to be assessed for the improvement in question. Thus, it seems to be as-

¹ *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 18 S. 621 [1898]; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing, *Bradley v. Fallbrook Irrigation District*, 68 Fed. 948 [1895]); *Walston v. Nevin*, 128 U. S. 578, 9 S. 192 [1888]; *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900] *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900]. "When . . . Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of one dollar and twenty-five cents per linear foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the necessity of the work and of the benefits as against abutting property. To open such questions for review by the courts on the petition of any or every property holder would create endless confusion. Where the legislature has submitted these questions for inquiry to a commission or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hear-

ing or to notice or an opportunity to be heard." *Parsons v. District of Columbia*, 170 U. S. 45, 52, 18 S. 521 [1898].

² *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming, *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]; *Voigt v. Detroit City*, 184 U. S. 115, 22 S. 337 [1902]; *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. 943, 8 S. 521 [1898]; *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; (affirming, *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]); *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887]; *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897]; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899]; *Parsons v. City of Grand Rapids*, 141 Mich. 467, 104 N. W. 730 [1905]; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897]; *City of St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59 [1890]; *Moorewood v. Corporation of New York*, 6 Howard, 386 [1851]; *Caldwell v. Village of Carthage*, 49 Ohio St. 334, 31 N. E. 602 [1892]; *Woodhouse v. City of Burlington*, 47 Vt. 300 [1875].

³ *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908]; *Finnell v. Kates*, 19 O. S. 405 [1869]; *Adams v. Fisher*, 63 Tex. 651 [1885]; *City of Galveston v. Heard*, 54 Tex. 420 [1881].

sumed that notice should be given to the owners of land which is to be assessed in order to pay the cost of appropriating land for a public use, as well as to the owners of the land which it is sought to appropriate.⁴ It is not necessary that notice should be given if the legislature has determined what land is benefited by a public improvement, or has left such determination to be made legislatively by the city.⁵ A legislative determination of the total amount of benefits conferred by the improvement in question has been held to be proper without either hearing or notice.⁶ The determination by the legislature of the total amount to be assessed upon the property benefited is regarded as equivalent to a legislative determination that this amount is equivalent to the aggregate sum of the benefits conferred by the improvement, and no notice or hearing is accordingly necessary.⁷ It is, however, held in some cases that the legislative determination of the fact, amount and apportionment of benefits cannot be made final and conclusive, and that a statute which endeavors so to do is necessarily unconstitutional.⁸ These cases, however, for the most

⁴ *Scott v. City of Toledo*, 36 Fed. 385, 1 L. R. A. 688 [1888]; *Board of Commissioners of Wells County v. Fahlor*, 132 Ind. 426, 31 N. E. 1112; *Paul v. City of Detroit*, 32 Mich. 108 [1875]; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. R. 289 [1878]; *State ex rel. Flint v. City of Fond du Lac*, 42 Wis. 287 [1877].

⁵ *King v. Portland City*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming, *King v. City of Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2, [1900]; *Barfield v. Gleason*, 111 Ky. 63 S. W. 964, 23 Ky. Law Rep. 128 [1901]; *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]; *City of St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59 [1890]; *Collier Estate v. Western Paving and Supply Company*, 180 Mo. 362, 79 S. W. 947 [1904]; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900]; *City of St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910 [1888]; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]; *Works v. City of Lockport*, 28 Hun, 9 [1882]; *King v. Portland*, 38 Ore. 402, 55 L. R. A. 812, 63 Pac. 2 [1900].

⁶ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]).

⁷ *French v. Barber Asphalt Paving Company*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (distinguished in *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891]); *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901]; *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1900]; *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]; *King v. Portland*, 38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900].

⁸ *Bidwell v. Huff*, 103 Fed. 362 [1900]; *Fav v. City of Springfield*, 94 Fed. 409 [1899]; *Hutchison v. Storrie*, 92 Tex. 685, 71 Am. St. Rep. 884, 45 L. R. A. 289, 51 S. W. 848 [1899].

part proceed upon the view entertained by these courts as to the meaning and effect of *Norwood v. Baker*,⁹ a view which differs from that entertained and expressed in later cases by a majority of the Supreme Court of the United States.¹⁰ A notice and hearing are not necessary in case of legislative determination of the proper rule of apportionment of the assessment upon the property assessed.¹¹ If the legislature determines that the assessment should be apportioned according to area,¹² or according to frontage,¹³ or at a certain rate per foot,¹⁴ notice and hearing are unnecessary. If a notice could not have been of any avail to the owner of the property assessed, the want of such notice cannot operate to invalidate the assessment.¹⁵ If a valid legislative determination has settled certain facts and the amount of the assessment is to be determined from the facts already properly ascertained by mere mathematical computation, notice and hearing are not necessary as to such computation, since the rights of the parties could not in such case be affected by evidence adduced at such hearing.¹⁶ If an assessment is to be apportioned according to the number of feet each lot has fronting or abutting on the street for the improvement of which the assessment is levied, it has been held that notice is unnecessary, since the apportionment of the entire cost according to frontage is a mere mathematical computation.¹⁷

⁹ 172 U. S. 269, 19 S. 187 [1898].

¹⁰ *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1900].

¹¹ *French v. Barber Asphalt Paving Company*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901]; *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 53 L. R. A. 372, 62 N. E. 662 [1902]; *Cleveland v. Tripp*, 13 R. I. 50 [1880]; *City of Richmond v. Williams*, 102 Va. 733, 47 S. E. 844 [1904]; *Davis v. City of Lynchburg*, 84 Va. 861, 6 S. E. 230 [1888].

¹² *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. Law Rep. 128 [1901]; *Cleveland v. Tripp*, 13 R. I. 50 [1880].

¹³ See § 698 *et seq.*

¹⁴ *Parsons v. District of Columbia*,

170 U. S. 45, 42 L. 943, 18 S. 521 [1896]; *People of the State of New York ex rel. Scott v. Pitt*, 169 N. Y. 521, 53 L. R. A. 372, 62 N. E. 662 [1902].

¹⁵ *Dittoe v. City of Davenport*, 74 Iowa, 66, 36 N. W. 895 [1887].

¹⁶ *Shumate v. Heman*, 181 U. S. 402, 21 S. 645 [1901]; *Clapp v. City of Hartford*, 35 Conn. 66 [1868]; *Ray v. Jeffersonville*, 90 Ind. 567 [1883]; *Ford v. Town of North Des Moines*, 80 Ia. 626, 45 N. W. 1031 [1890]; *Amery v. City of Keokuk*, 72 Ia. 701, 30 N. W. 780 [1887]; *Collins v. Holyoke*, 146 Mass. 298, 15 N. E. 908 [1888]; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900]; *City of Richmond v. Williams*, 102 Va. 733, 47 S. E. 844 [1904].

¹⁷ *Amery v. City of Keokuk*, 72 Ia. 701, 30 N. W. 780 [1887].

§ 729. Notice and hearing if question not one for legislative determination.

The owner of land which is to be assessed is constitutionally entitled to notice and a hearing as to the facts which involve his liability to assessment which are not determined as facts legislatively, and which are not ascertained by mere mathematical calculation.¹ If notice of this sort is given in compliance with the provisions of the statute, the property owners cannot complain on the alleged ground of want of notice.² If the assess-

¹ *Hutson v. Woodbridge Protection District No. 1*, 79 Cal. 90, 21 Pac. 435, 16 Pac. 549 [1889]; *Boorman v. City of Santa Barbara*, 65 Cal. 313, 4 Pac. 31 [1884]; *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455 [1884]; *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Guckien v. Rothrock*, 137 Ind. 355, 37 N. E. 17 [1893]; *City of Logansport v. Shirk*, 129 Ind. 352, 28 N. E. 538 [1891]; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436 [1890]; *Beebe v. Magoun*, 122 Iowa, 94, 101 Am. St. Rep. 259, 97 N. W. 936 [1904]; *Ford v. Town of North Des Moines*, 80 Ia. 626, 45 N. W. 1031 [1890]; *Gatch v. City of Des Moines*, 63 Ia. 718, 18 N. W. 310; *Pierce v. County Commissioners of Franklin County*, 63 Me. 252 [1872]; *Ulman v. Mayor and City Council of Baltimore*, 72 Md. 587, 11 L. R. A. 224, 32 Am. & Eng. Corp. Cas. 228, 20 Atl. 141, 21 Atl. 709 [1890]; *Sears v. Street Commissioners of Boston*, 173 Mass. 350, 53 N. E. 876 [1899]; *Parsons v. City of Grand Rapids*, 141 Mich. 467, 104 N. W. 730 [1905]; *People on the Petition of Butler v Supervisors of Saginaw Co.*, 26 Mich. 22 [1872]; *City of St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910 [1888]; *Neal v. Vansickel*, 72 Neb. 200, 100 N. W. 200 [1904]; *Smith v. City of Omaha*, 49 Neb. 883, 69 N. W. 402 [1896]; *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368 [1894]; *Hanscom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739 [1881]; *Beach v. Mayor, etc., of*

Jersey City, 71 N. J. L. (42 Vr.) 87, 58 Atl. 81 [1904]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zabrieskie) 662, [1855]; *In the Matter of the Trustees of Union College*, 129 N. Y. 308, 29 N. E. 460 [1891]; *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564 [1887]; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; *Bennett v. City of Buffalo*, 17 N. Y. 383 [1858]; *Ireland v. City of Rochester*, 51 Barb. 414 [1868]; *In re Mayor, etc., of New York*, 89 N. Y. S. 6, 95 App. Div. 552 [1904]; *In the Matter of the Common Council of the City of Amsterdam*, 55 Hun, 270, 8 N. Y. Supp. 234 [1889]; *Chicago & Erie Railroad Company v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902]; *City of Norfolk v. Young*, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886 [1900]; *Dietz v. City of Neenah*, 91 Wis. 422, 65 N. W. 500, 64 N. W. 299 [1895].

² *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming, *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]); *Minnesota & M. Land & Improvement Company v. City of Billings*, 111 Fed. Rep. 972, 50 C. C. A. 70 [1901]; *District of Columbia v. Wormlev*, 15 App. D. C. 58 [1899]; *Pleasant Township v. Cook*, 160 Ind. 533, 67 N. E. 262 [1902]; *Swain v. Fulmer*, 135 Ind. 8, 34 N. E. 639 [1893]; *Ross v. Board of Supervisors of Wright County*, 128 Ia. 407, 1 L. R. A. (N. S.) 431, 104 N. W.

ment is to be apportioned by certain designated public officers upon the basis of actual benefits, a notice and hearing must be given.³

§730. What constitutes sufficient notice.

The courts have usually avoided attempting to state general rules for determining in advance what notice is necessary to comply with the constitutional rights of the property owner.¹ It has been said that the test of the sufficiency of the notice is whether it furnishes an effective opportunity to be heard and gives a reasonable notice thereof.² A statute which provides for giving notice that the special assessment roll has been completed in two weekly publications of the official newspaper of the city, and allows two weeks from the time of the first publication for filing objections, has been held to provide a reasonable notice.³

§731. Necessity of hearing upon amount of assessment.

The mere giving of notice is ineffectual unless the notice is given at a serviceable stage; that is, unless the notice is so given that the property owner has an opportunity to have a hearing before a tribunal which has power to modify the assessment in case the evidence adduced at such hearing may show that the as-

506 [1905]; *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. 593 [1889]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *In the Matter of Lowden*, 89 N. Y. 548 [1882]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

¹*Gatch v. City of Des Moines*, 63 Ia. 718, 18 N. W. 310; *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891]; *King v. Portland*, 38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900].

²"Due process of law is not violated and the equal protection of the laws is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who may be subsequently charged in his property has had a hearing or an opportunity for one

provided by the statute." *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 S. 56 [1896]; quoted in *Hibben v. Smith*, 191 U. S. 310, 24 S. 88 [1903]; (affirming *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]). "It would not be a simple matter to state in a succinct proposition any rule as to when a notice of assessment is and when it is not due process of law." *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902].

³In *The Matter of the Common Council of Amsterdam*, 126 N. Y. 158, 27 N. E. 272 [1891]. See also *Williams v. Eggleston*, 170 U. S. 304, 42 L. 1047, 18 S. 617 [1898]; (affirming *State ex rel. Bulkeley v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 241 [1896]).

⁴*Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259 [1903].

assessment, as contemplated, or as actually made, is excessive.¹ A statute which provides that notice shall be given to the property owners but does not provide for a hearing of any sort is invalid.² If a notice is given which advises the property owner of a hearing, and the hearing is, in fact, given, if given at all, at such a time and place that one who had acted in reliance upon the notice given would have no opportunity of being heard, such notice is ineffectual and the rights of the property owners are not protected.³ An effective opportunity to be heard must be given.⁴ If the notice fixes a time for the hearing, and before such time the assessing body adjourns over to a future time without giving notice of such adjournment to the property owners,⁵ or, if it adjourns before the time fixed for the termination of the hearing without notice to the property owners of the time to which it adjourns,⁶ or if the assessing body does not hold a meeting at the time and place specified in the notice,⁷ or if the assessing body acts so soon after the notice is given that no opportunity for making objections is given,⁸ or if the report is referred to the commissioners for correction and is subsequently approved by the assessing body as originally filed without correction,⁹ or if a report is accepted after the time fixed for filing it and is approved by the court without notice,¹⁰ notice given to the property owner

¹ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899]; *Jones v. District of Columbia*, 3 App. D. C. 26 [1894]; *Wheeler v. City of Chicago*, 57 Ill. 415 [1870]; *Burton v. City of Chicago*, 53 Ill. 87 [1869]; *John v. Connell*, 64 Neb. 233, 89 N. W. 806 [1902]; (modifying opinion in *John v. Connell*, 61 Neb. 267, 85 N. W. 82).

² *Londoner v. City and County of Denver*, 210 U. S. 373, 28 S. 708 [1908]; (reversing *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]); *Heinz v. Buckham*, — Mich. —, 116 N. W. 736 [1908]; *City of Norfolk v. Young*, 97 Va. 728, 47 L. R. A. 574, 34 S. E. 886 [1900]. See § 128.

³ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899]; *Wheeler v. City of Chicago*, 57 Ill. 415 [1870]; *Burton v. City of Chicago*, 53 Ill. 87 [1869]; *Johns v. Connell*, 64 Neb.

233, 89 N. W. 806 [1902]; (modifying opinion in *Johns v. Connell*, 61 Neb. 267, 85 N. W. 82).

⁴ In the Matter of the Common Council of Amsterdam, 126 N. Y. 158, 27 N. E. 272 [1891].

⁵ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899].

⁶ *Johns v. Connell*, 64 Neb. 233, 89 N. W. 806 [1902]; modifying opinion in *Johns v. Connell*, 61 Neb. 267, 85 N. W. 82.

⁷ *Wheeler v. City of Chicago*, 57 Ill. 415 [1870].

⁸ *Burton v. City of Chicago*, 53 Ill. 87 [1869].

⁹ *Beach v. Mayor, etc., Jersey City*, 71 N. J. L. (42 Vr.) 87, 58 Atl. 81 [1904]; *State, Board, Pros. v. City of Hoboken*, 36 N. J. L. (7 Vr.) 378 [1873].

¹⁰ *New Orleans praying for the opening of Dryades Street*, 11 La. Ann. 458 [1856].

of prior steps in the assessment proceedings do not give him a fair opportunity to be heard and are accordingly ineffectual. The fact that the notice provides only for a hearing between seven and nine o'clock P. M. does not render the assessment proceedings invalid if it does not appear that any property owners were in fact deprived of a hearing by reason of the short time allowed.¹¹ If the statute provides for a hearing, but no hearing is had upon the matters with reference to which the right of a hearing is given by statute, the proceedings are defective.¹² Thus, if the statute provides for a notice and a public hearing, an assessment made before,¹³ or after,¹⁴ such hearing is invalid, if by statute the improvement placed before such meeting could be changed only at such meeting. The property owner must be given an opportunity at the hearing to show that according to the method prescribed for making the assessment, the amount charged against him is incorrect,¹⁵ or that such assessment is invalid or unfair.¹⁶ A statute which gives to the property owners an opportunity to submit objections in writing but which does not provide for an opportunity to be heard or to submit evidence upon the question of the amount of the assessment does not of itself constitute due process of law; and if such hearing is not, in fact, given the assessment cannot be upheld.¹⁷ If the statute provides for a personal hearing, a notice which provides only for an opportunity of filing written objections without any personal hearing is insufficient.¹⁸ If notice is given to the property owner at a serviceable stage, so that the tribunal before which the hearing is had, has power to consider the facts adduced at the hearing in levying the assessment or in modifying

¹¹ *People, etc., ex rel. Butts v. Common Council of the City of Rochester*, 5 Lansing 142 [1871].

¹² *Clarke v. City of Chicago*, 185 Ill. 354, 57 N. E. 15 [1900].

¹³ *Derby v. West Chicago Park Commissioners*, 154 Ill. 215, 40 N. E. 438 [1894].

¹⁴ *City of Chicago v. Wilder*, 184 Ill. 397, 56 N. E. 395 [1900].

¹⁵ *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887].

¹⁶ *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885].

¹⁷ *Londoner v. City and County of Denver*, 210 U. S. 373, 28 S. 708 [1908]; (reversing *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117). In *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890], it seems to be assumed that the legislature need not provide for a personal hearing if it does not see fit so to do, but that it may provide for objections in writing which are to be put before the assessing body and acted upon by them.

¹⁸ *Hopkins v. Mason*, 61 Barb. 469; *Hopkins v. Mason*, 42 Howard 115 [1871].

or correcting the assessment already levied, such notice is sufficient.¹⁰ It has been said in some jurisdictions that if the property owners have an opportunity and a right to compel the assessing body by legal process to grant them a hearing, such right to compel a hearing is sufficient, although the hearing was denied by the assessing body and was not in fact given.²⁰

§732. Effect of giving notice in fact.

If provision is made by statute for notice and notice is in fact given, no objection can be made to the assessment on the ground of want of notice.¹ If the statute makes no provision for notice, but notice is in fact given by the public corporation, some conflict of authority is found to exist as to whether a notice actually given but not prescribed by statute is sufficient. According to the weight of authority, it is sufficient if notice is actually given by the public corporation and a full opportunity is given to the

¹⁰ *Hibben v. Smith*, 191 U. S. 310, 24 S. 88 [1903]; (affirming, *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]; *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *Calkins v. Spraker*, 26 Ill. App. 159 [1887]; *Pittsburgh, C. C. & St. L. Railway Company v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906]; *Voris v. Pittsburg Plate Glass Company*, 163 Ind. 599, 70 N. E. 249 [1904]; *Deane v. Indiana Macadam and Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903]; *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. Rep. 932 [1901]; *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930 [1901]; *Roundenbush v. Mitchell*, 154 Ind. 616, 57 N. E. 510 [1900]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 458 25 N. E. 436 [1890]; *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280 [1899]. The inferior Federal courts, differing from the Indiana courts, have construed the Indiana Statute as permitting a review only for the

purpose of determining if the prescribed basis of assessment has been followed, without allowing any hearing on the question of benefits, and hence as invalid as not providing for due notice. *Charles v. City of Marion*, 100 Fed. 538 [1900].

²⁰ *Brown v. Central Bermudez Company*, 162 Ind. 452, 69 N. E. 150 [1903].

¹ *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; *City of Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 998, 1100 [1900]; *Adams v. City of Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, 49 L. R. A. 797, 57 N. E. 114 [1899]; *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; *Walker v. City of Detroit*, 136 Mich. 6, 98 N. W. 744 [1904]; *City of Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. Rep. 1117 [1895]; *Nugent v. City of Jackson*, 72 Mass. 1040, 18 So. 493 [1895]; *In the Matter of Lowden*, 89 N. Y. 548 [1882]; *Hilliard v. City of Asheville*, 118 N. C. 845, 24 S. E. 738 [1896]; *Stone v. Little Yellow Drainage District*, 118 Wis. 388, 95 N. W. 405 [1903].

property owner to be heard even if the statute does not provide for such notice.² The theory underlying this rule is that the right to notice is a constitutional right as well as a statutory right; that the public corporation is bound to give the notice by constitutional provisions, even if there are no statutory provisions on the subject; and that if such notice is, in fact, given, the property owner cannot complain because his constitutional rights were not repeated by statute.³ In some jurisdictions it is said that a statute which does not provide for notice and hearing as a matter of right is invalid, even if a notice and hearing are, in fact, given, since such notice and hearing must be given as a right and not as a favor.⁴ This rule is based on the assumption that notice is a constitutional right, so as to make the statute invalid for want thereof; and yet is a mere favor, for the public corporation to grant or withhold at its pleasure, if it is not expressly named in the statutes. It seems illogical, but it has the support of some authority.

§ 733. Necessity of notice in case of charge for public duty.

Some types of assessment are, as has already been indicated,¹ levied, not upon the theory of benefits to the property affected by the improvement, but upon the theory that the property owner owes to the public the duty of constructing the particular improvement, whether any benefits are received therefrom or not.²

² See § 135.

³ *Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]; (affirming *Paulson v. City of Portland*, 16 Ore. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]); *Hagar v. Reclamation District*, 111 U. S. 701, 4 S. 663 [1884]; *Ford v. Town of North Des Moines*, 80 Ia. 626, 45 N. W. 1031 [1890]; *Gatch v. City of Des Moines*, 63 Ia. 718, 18 N. W. 310; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885]; *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259 [1903]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zabrieskie) 662 [1855]; *King v. Portland*, 38 Or. 402, 52 L. R. A. 812, 63 Pac. 2

[1900]; *Shannon v. Portland*, 38 Ore. 382, 62 Pac. 50 [1900]; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691 [1893]; *Paulson v. City of Portland*, 16 Ore. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (affirmed in *Paulsen v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]); *Strowbridge v. City of Portland*, 8 Or. 67 [1879]; *Tripp v. City of Yankton*, 10 S. D. 516, 74 N. W. 447 [1898]; *Baltimore & Ohio R. R. Co. v. Pittsburgh, Wheeling & Kentucky R. R. Co.*, 17 W. Va. 812 [1881].

⁴ *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; *Violett v. City Council of Alexandria*, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. 909 [1896].

¹ See § 9.

² See § 717.

Accordingly, it is held that the property owner has no constitutional right to a hearing upon the question of the amount with which he may be charged for the construction of such improvement, if he omits or neglects to construct it.³

§ 734. Necessity of notice in case of charge for goods furnished.

Charges which are sometimes called assessments are occasionally made for articles furnished to the property owner, and used by him which he is free to use or not as he may please. The property owner cannot be charged with the cost of these articles unless he sees fit to make use of them. His liability is therefore rather in the nature of a contract than of a tax, and he is not entitled to a notice and hearing as to the amount of the charge.¹ Thus, a charge of eight dollars per annum for unmetered service and thirty cents per thousand gallons of sewage for metered service is a valid charge even if no notice and hearing have been given to the property owner, since he is free to make use of the public system of sewage or not as he may choose.² If, however, the charge is not based upon the amount used and bears no relation thereto, and is imposed upon the property owner without reference to his voluntary use of the property for which the charge is made, it can be sustained only on the theory of taxation, if it can be sustained at all, and accordingly notice and hearing are necessary as in the case of other forms of assessment.³

§ 735. Effect of statutory provisions with reference to notice.

If the constitutional rights of the property owner are protected fully, the legislature may determine the nature of the hearing to be given and of the notice therefor.¹ If by statute specific pro-

³ *Hennepin County v. Bartleson*, 37 Minn. 343, 34 N. W. 222; *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983 [1898].

¹ *Carson v. Brockton Sewerage Commissions*, 182 U. S. 396, 48 L. 1115, 21 S. 860 [1901]; (affirming, *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]); *Silkman v. Board of Water Commissioners of City of Yonkers*, 152 N. Y. 327, 37 L. R. A. 827, 46 N. E. 612 [1897]; See § 124.

² *Carson v. Brockton Sewerage Commission*, 182 U. S. 398, 45 L. 1115, 21 S. 860 [1901]; (affirming *Carson v. Sewerage Commissioners of Brockton*, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]).

³ *In the Matter of the Trustees of Union College*, 129 N. Y. 308, 29 N. E. 460 [1891]; *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564 [1887].

¹ *Wilson v. State, Karle, Pros.*, 42 N. J. L. (13 Vr.) 612 [1880].

vision is made for notice, such notice must be given and failure to give it as provided for by the statute renders the assessment invalid for two reasons, either of which would be sufficient. If sufficient notice is not given, the property owner is deprived of his property without due process of law, and the assessment is on that account invalid.² Furthermore, since the legislature has ample power to prescribe the formalities with which the assessment must be levied, an omission to give notice, which is required by the legislature, invalidates the assessment as being a violation of the express statutory provisions, irrespective of the constitutional rights of the property owners.³ In some few cases, how-

² See §§ 119, 726.

³ *Thomason v. Carroll*, 132 Cal. 148, 64 Pac. 262 [1901]; *McLauren v. City of Grand Forks*, 6 Dakota 397, 43 N. W. Rep. 710 [1889]; *District of Columbia v. Weaver*, 6 App. D. C. 482 [1895]; *District of Columbia v. Burgdorf*, 6 App. D. C. 465 [1895]; *Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285 [1888]; *McDonald v. Littlefield*, 5 Mackey (D. C.) 574 [1887]; *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774 [1903]; *Robeson v. People ex rel. Curry*, 161 Ill. 176, 43 N. E. 619 [1896]; *Weld v. The People ex rel. Kern*, 149 Ill. 257, 36 N. E. 1006 [1894]; *The People ex rel. Davidson v. Cole*, 128 Ill. 158, 21 N. E. 6 [1890]; *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886]; *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Hemingway v. City of Chicago*, 60 Ill. 324 [1871]; *Waller v. City of Chicago*, 53 Ill. 88 [1869]; *Scammon v. City of Chicago*, 40 Ill. 156 [1866]; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531 [1891]; *Davis, Treas. v. Lake Shore & Michigan Southern Ry. Co.*, 114 Ind. 364, 16 N. E. 639 [1887]; *Kennedy v. State, for Use of Dorsett*, 109 Ind. 236, 9 N. E. 778 [1886]; *Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569 [1886]; *Pickering v. State for Use of Dyar*, 106 Ind. 228, 6 N. E. 611 [1885]; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867

[1885]; *Jackson v. State for Use of Lindley*, 103 Ind. 250, 2 N. E. 742 [1885]; *Strosser v. City of Ft. Wayne*, 100 Ind. 443 [1884]; *Daly v. Gubbins*, — Ind. —, 82 N. E. — *Daly v. Gubbins*, 35 Ind. App. 86, 73 N. E. 833 [1904]; *Spring Steel Fence & Wire Co. v. City of Anderson*, 32 Ind. App. 138, 69 N. E. 404 [1903]; *Busenbark v. Clements*, 22 Ind. App. 557, 53 N. E. 665 [1899]; *Stephenson v. Town of Salem*, 14 Ind. App. 386, 42 N. E. 44, 943 [1895]; *Kiphart v. Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co.*, 7 Ind. App. 122, 34 N. E. 375 [1893]; *Bennett v. City of Emmetsburg*, — Ia. —, 115 N. W. 582 [1908]; *City of Des Moines v. Casady*, 21 Ia. 570 [1866]; *Fox v. Middleborough Town Co.*, 96 Ky. 262, 28 S. W. 776 [1894]; *Second Municipality of New Orleans v. Botts*, 8 Robinson (La.) 198 [1844]; *Hayford v. City of Belfast*, 69 Me. 63 [1879]; *The Mayor of Baltimore v. The Grand Lodge of Maryland of the Independent Order of Odd Fellows*, 44 Md. 436 [1875]; *Parsons v. City of Grand Rapids*, 141 Mich. 467, 104 N. W. 730 [1905]; *Wright v. Township Drain Commissioners*, 44 Mich. 557, 7 N. W. 235 [1880]; *Taylor v. Burnap*, 39 Mich. 739 [1878]; *Daniels v. Smith*, 38 Mich. 660 [1878]; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876]; *State ex rel. Eaton v. District Court of Ramsey*

ever, statutory provisions with reference to notice have been held to be directory merely, and the violation of such provisions is held not to invalidate the assessment.⁴ In cases of this sort, however, the requirement that some notice should be given was complied with and the only departure from the statute was as to certain details with reference to the time and method of giving notice. If the statute provides a reasonable notice and notice is given by the public corporation in compliance with the terms of the statute, no objection can be made to the validity of the assessment upon the ground of notice.⁵ An agreement by city authorities that they would give notice of future proceedings, does not bind a public corporation, and does not require it to give notice in addition to that which is prescribed by statute.⁶

County, 95 Minn. 503, 104 N. W. 553 [1905]; State ex rel. City of St. Paul v. District Court of Ramsey County, 90 Minn. 294, 96 N. W. 737 [1903]; Flint v. Webb, 25 Minn. 93 [1878]; Sewell v. City of St. Paul, 20 Minn. 511 [1874]; Prindle v. Campbell, 9 Minn. 212 [1864]; Williams v. Monroe, 125 Mo. 574, 28 S. W. 853 [1894]; Leonard v. Sparks, 63 Mo. App. 585 [1895]; Horbach v. City of Omaha, 54 Neb. 83, 74 N. W. 434 [1898]; Poillon v. Mayor and Council of the Borough of Rutherford, 65 N. J. L. (36 Vr.) 538, 47 Atl. 439 [1900]; State, Stewart, Pros. v. Mayor and Common Council of the City of Hoboken, 57 N. J. L. (28 Vr.) 330, 31 Atl. 278 [1894]; State, Beam, Pros. v. Mayor and Aldermen of City of Paterson, 47 N. J. L. (18 Vr.) 15 [1885]; State, Board of Chosen Freeholders of Hudson County, Pros. v. Peterson Avenue and Secaucus Road Commissioners, 41 N. J. L. (12 Vr.) 83 [1879]; State, Kohler, Pros. v. Town of Guttenburg, 38 N. J. L. (9 Vr.) 419 [1876]; State, Ogden, Pros. v. Town and Common Council of City of Hudson, 29 N. J. L. (5 Dutcher) 475 [1861]; State, Tims, Pros. v. Mayor and Common Council of the City of Newark, 25 N. J. L. (1 Dutcher) 399 [1856]; Kean v. Asch, 27 N. J. Eq. (12 C. E. Greene) 57 [1875]; Merrit v. Village of Port Chester, 71

N. Y. 309, 27 Am. Rep. 47 [1877]; Sharp v. Johnson, 4 Hill (N. Y.) 92 40 Am. Dec. 259 [1843]; Hopkins v. Mason, 42 Howard 115 [1871]; Jordan v. Hyatt, 3 Barb. 275 [1848]; In the Matter of Pennie, 19 Abb. N. C. 117; Weeks v. City of Middletown, 95 N. Y. S. 352, 107 App. Div. 587 [1905]; Joyce v. Barron, 67 O. S. 264, 65 N. E. 1001 [1902]; Railroad Company v. Wagner, 43 O. S. 75, 1 N. E. 91 [1885]; Clinton v. City of Portland, 26 Or. 410, 38 Pac. 407 [1894]; Ladd v. Spencer, 23 Ore. 193, 31 Pac. Rep. 474 [1892]; Hershberger v. City of Pittsburg, 115 Pa. St. 78, 8 Atl. 381 [1886]; Pittsburg v. Coursin, 74 Pa. St. (24 P. F. Smith) 400 [1873]; Souillier v. Kern, 69 Pa. St. (19 P. F. Smith) 16 [1871]; City Council v. Pinckney, 1 Treadway (S. C.) 42 [1812]; Woodhouse v. City of Burlington, 47 Vt. 300 [1875].

⁴In the Matter of Douglas, 40 Howard, 201 [1870]; Pittsburg v. Coursin, 74 Pa. St. (24 P. F. Smith) 400 [1873].

⁵District of Columbia v. Wormley, 15 App. D. C. 58 [1899]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902].

⁶Wray v. Fry, 158 Ind. 92, 62 N. E. 1004 [1901]; Davison v. Campbell, 28 Ind. App. 688, 63 N. E. 779 [1901].

§ 736. Construction of statutory provisions concerning notice.

If the statute provides that certain assessments are to be made in the same manner as is provided for in the charter of the city for levying assessments for other improvements, and the provisions of the charter with reference to such other improvement make ample provision for notice, the statute and the charter must be taken together and the property owner's right to notice is amply protected, although the statute does not provide for notice specifically.¹ If the provisions as to notice are different in the statutes relating to one kind of assessment from provisions with reference to notice in statutes relating to other kinds of assessments, such statutes cannot be construed in *pari materia*, but each statute applies to the class of special assessments to which it relates.² If the context requires it, the word "and" is to be construed as "or."³ Thus, a provision that a resolution "shall be published and posted" was held to require it to be published "or" posted if, from the context, it appeared that notice in the alternative was intended by the legislature.⁴ In one section of the statute it was provided that notice should be given for three weeks by publication, and also by posting the same at a certain number of places within the district. Another section provided for two weeks' notice to be given in the manner required by the former section. Under the second section a notice must accordingly be given in the manner provided for by the first section, but only for the time specified in the second section.⁵ Statutory provisions as to notice in one kind of proceeding are not applicable to proceedings of a different sort.⁶ Thus, a statute requiring twenty days written notice of an intention to make an improvement does not apply to taking land for a street by eminent domain.⁷

§ 737. Notice of option to property owner to do work.

Under many statutes it is provided that the owner must be given an option to do the work himself, and that only in the event

¹ Grand Rapids School Furniture Co. v. Grand Rapids, 92 Mich. 564, 52 N. W. 1028 [1892].

² Potwin v. Johnson, 108 Ill. 70 [1883].

³ Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310 [1893].

⁴ Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310 [1893].

⁵ Stack v. People ex rel. Talbott, 217 Ill. 220, 75 N. E. 347 [1905].

⁶ Spades v. Phillips, 9 Ind. App. 487, 37 N. E. 297 [1893]; In the Matter of Warren, 85 N. Y. 268 [1881].

⁷ Caldwell v. Village of Carthage, 49 O. S. 334, 31 N. E. 602 [1892].

of his failure to exercise such option can the work be done by the public corporation at the expense of the property owner. Under such statutes it is usually provided that a notice must be given to the property owner requiring him to do such work; and under such statutes notice must be given to the property owner substantially in compliance with the terms of the statute.¹ Failure to notify the property owner in compliance with the terms of the statute or to give him the opportunity to do the work invalidates subsequent proceedings.² A property owner has no constitutional right to a notice requiring him to construct an improvement in front of his property or adjoining it, as an alternative to assessing him for the cost thereof.³ Accordingly he has no right to complain if the legislature or the city provides for constructing the improvement at his expense without giving him an opportunity to construct it himself.⁴ Since the property owner has no constitutional right to do such work at his own expense, notice giving him an opportunity to do such work is not necessary except in compliance with the terms of the statute.⁵

¹ *Blanchard v. Beideman*, 18 Cal. 261 [1861]; *City of Chicago v. Galt*, 225 Ill. 368, 80 N. E. 285 [1907]; *City of Chicago v. Burkhardt*, 223 Ill. 297, 79 N. E. 82 [1906]; *Bush v. City of Dubuque*, 69 Ia. 233, 28 N. W. 542 [1886]; *City of Des Moines v. Casady*, 21 Ia. 570 [1866]; *Hayford v. City of Belfast*, 69 Me. 63 [1879]; *State v. Foster*, 94 Minn. 412, 103 N. W. 14 [1905]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *State v. Several Parcels of Land*, — Neb. —, 107 N. W. 566 [1906]; *Brewster v. Mayor and Common Council of City of Newark*, 11 N. J. Eq. (3 Stockton) 114 [1856]; *Adams v. Joyner*, — N. C. —, 60 S. E. 725 [1908]; *Village of St. Marys v. Lake Erie & Western R. R. Co.*, 60 O. S. 136, 53 N. E. 795 [1899]; *Meanor v. Goldsmith*, 216 Pa. St. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907]; *Myrick v. City of La Crosse*, 17 Wis. 442 [1863].

² *City of Westport to the Use of Hoelzel v. Smith*, 68 Mo. App. 63 [1896]; *Horbach v. City of Omaha*,

54 Neb. 83, 74 N. W. 434 [1898]; *Ives v. Irey*, 51 Neb. 136, 70 N. W. 961 [1897]; *Schmidt v. Village of Elmwood Place*, 15 Ohio C. C. 351 [1897]; *Mt. Pleasant Borough v. Baltimore & Ohio R. R. Company*, 138 Pa. St. 365, 11 L. R. A. 520, 20 Atl. 1052 [1890]; *City of Philadelphia v. Richards*, 124 Pa. St. 303, 16 Atl. 802 [1889]; *City of Philadelphia to Use of Winmill v. Edwards*, 78 Pa. St. (28 P. F. Smith) 62 [1875]; *Erie City v. Willis*, 26 Pa. Super. Ct. 459 [1903]; *Washington v. Mayor and Aldermen of Nashville*, 31 Tenn. (1 Swan.) 177 [1851]; *Rork v. Smith*, 55 Wis. 67, 12 N. W. 408 [1882]; *Johnson v. City of Oshkosh*, 21 Wis. 184 [1866]; *Foot v. City of Milwaukee*, 18 Wis. 270 [1864]; *Rogers v. Milwaukee*, 13 Wis. 610 [1861].

³ See § 121.

⁴ *Huff v. City of Jacksonville*, 39 Fla. 1, 21 So. 776 [1897].

⁵ *Clapton v. Taylor*, 49 Mo. App. 117 [1892]; *Bingaman v. City of Pittsburg*, 147 Pa. St. 353, 23 Atl. 395 [1892]; *City of Philadelphia v.*

Notice to the property owner to do the work himself, not being a constitutional right, may be given by entry on the tax rolls, if the statute does not specifically provide for notice to him.⁶ If the statute so provides, the ordinance requiring the property owner to do such work may be sufficient notice,⁷ especially if such ordinance is published.⁸ If the statute does not require a notice to be given, but the ordinance requires a notice, the notice must be given in substantial compliance with the terms of the ordinance.⁹ It has been held in some jurisdictions that failure to give such notice, as is required by statute does not relieve the property owner from all liability, but relieves him from any assessment above what the work would have cost him had he done it himself.¹⁰

§ 738. Sufficiency of notice of commencement of improvement proceedings.

Notice of the commencement of improvement proceedings is not sufficient notice of an assessment therefor, if an assessment would not regularly follow as a part of such proceedings, but the cost of improvement might be paid for by general taxation, and the property owner is not advised that it is intended to pay for it by special assessment.¹ If, however, the assessment would, in the normal course of things, follow from the proceedings instituted, notice before the final ordinance is sufficient.² If the finding at the preliminary hearing is that certain land is not benefited by the improvement, an assessment cannot be levied against such land unless the owner thereof is notified that the

Richards, 124 Pa. St. 303, 16 Atl. 802 [1889]; City of Galveston v. Heard, 54 Tex. 420 [1881]; Hennessy v. Douglas County, 99 Wis. 129, 74 N. W. 983 [1898]; Fass v. Seehawer, 60 Wis. 525, 19 N. W. 533 [1884]; (distinguishing, State ex rel. Flint v. Fond du Lac, 42 Wis. 287 [1877]; Seifert v. Brooks, 34 Wis. 443 [1874]; Lumsden v. Milwaukee, 8 Wis. 485 [1859]; Hood v. Finch, 8 Wis. 381 [1859]).

⁶ Hennessy v. Douglass County, 99 Wis. 129, 74 N. W. 983 [1898].

⁷ Huff v. City of Jacksonville, 39 Fla. 1, 21 So. 776 [1897]; Village of

Western Springs v. Hill, 177 Ill. 634, 52 N. E. 959 [1899].

⁸ Chesapeake & Ohio Railway Company v. Mullins, 94 Ky. 355, 22 S. W. 556 [1893]; Adams v. Fisher, 63 Tex. 651 [1885]; City of Galveston v. Heard, 54 Tex. 420 [1881].

⁹ Hoover v. People ex rel. Peabody, 171 Ill. 182, 49 N. E. 367 [1898].

¹⁰ Philadelphia to Use v. Meighan, 159 Pa. St. 495, 28 Atl. 304 [1894].

¹ Scott v. City of Toledo, 36 Fed. 385, 1 L. R. A. 688 [1888].

² Beaumont v. Wilkes Barre City, 142 Pa. St. 198, 21 Atl. 888 [1891].

original finding has been reconsidered and modified.³ If notice is given of the commencement of an improvement, and in the regular course of things such improvement is to be paid for by special assessments, notice of such commencement of an improvement charges the property owner with notice of the subsequent proceedings, including the assessment.⁴ Thus, if a hearing is had at the time and place specified by the notice and such hearing is adjourned, it is not necessary that a further notice be given of such adjourned hearing.⁵ A property owner who is thus charged with notice of proceedings which will normally result in a special assessment, is not entitled to further notice, even if he is promised further notice by some public officer who has no authority thus to bind the public corporation.⁶ Advertisement for bids, while notice of the construction of the improvement, is not notice of the details of a subsequent ordinance providing for payment in installments.⁷ If an improvement has been constructed and an assessment levied after notice, it seems to be held that the property owner has no constitutional right to a notice of cleaning, repairing and the like, which in the ordinary course of things, will follow necessarily from the original improvement.⁸ If a notice is given of the hearing at which the fact of benefits is determined, it is not necessary to give notice of a supplemental assessment levied to pay for a deficit and not exceeding the amount of benefits already determined, in the ab-

³ *Spring Steel Fence & Wire Co. v. City of Anderson*, 32 Ind. App. 138, 69 N. E. 404 [1903].

⁴ *Voigt v. Detroit City*, 184 U. S. 115, 45 L. 459, 22 S. 337 [1902]; (affirming, *Voigt v. City of Detroit*, 123 Mich. 547, 82 N. W. 253 [1901]); *The Fair Haven & Westville Railroad Company v. City of New Haven*, 75 Conn. 442, 53 Atl. 690 [1903]; *City of Bridgewater v. Giddings*, 43 Conn. 304 [1876]; *Gilbert v. City of New Haven*, 39 Conn. 467 [1872]; *Hosmer v. The Hunt Drainage District*, 134 Ill. 360, 26 N. E. 584 [1891]; *The People ex rel. Barber, Collector v. Chapman*, 127 Ill. 387, 19 N. E. 872 [1890]; *McAuley v. City of Chicago*, 22 Ill. 563 [1859]; *Pleasant Township v. Cook*, 160 Ind. 533, 67 N. E. 262 [1902]; *Caskey v.*

City of Greensburg, 78 Ind. 233 [1881]; *Prince v. Boston*, 111 Mass. 226 [1872]; *Wilson v. State, Karle, Pros.*, 42 N. J. L. (13 Vr.) 612 [1880]; *Duniway v. Portland*, 47 Or. 103, 81 Pac. 945 [1905]; *Taylor v. Boyd*, 63 Tex. 533 [1885].

⁵ *McAuley v. City of Chicago*, 22 Ill. 563 [1859]; *Caskey v. City of Greensburg*, 78 Ind. 233 [1881].

⁶ *Gorman v. State ex rel. Koester*, 157 Ind. 205, 60 N. E. 1083 [1901]; *Alexander v. City of Tacoma*, 35 Wash. 366, 77 Pac. 686 [1904].

⁷ *Village of Morgan Park v. Gahan*, 35 Ill. App. 646 [1890].

⁸ *Veomans v. Riddle*, 84 Ia. 147, 50 N. W. 886 [1891]; *Lanning v. Palmer*, 117 Mich. 529, 76 N. W. 2 [1898].

sence of a statutory provision requiring such notice.⁹ If, however, the statute requires notice of such supplemental assessment to be given, notice must be given as required by statute.¹⁰ Want of notice in an original assessment, while rendering such assessment invalid, does not of itself invalidate a re-assessment under a statute specifically providing therefor.¹¹ If the legislature determines that the benefits caused by the improvement are equal to the cost thereof, no opportunity to be heard upon the question of the amount of benefits need be given.¹²

§ 739. Notice of improvement.

While the legislature must give to the property owner a reasonable opportunity for a hearing upon questions involving the amount and extent of his liability which have not been determined legislatively,¹ the legislature is not prevented from affording the property owner a notice and hearing upon questions involved in assessment proceedings to which the property owner has no constitutional right. As long as the legislature protects the constitutional rights of the property owners, it may add such other and further formalities to assessment proceedings as it pleases, and it may make failure to observe these formalities result in the invalidity of the assessment. The legislature may provide by statute for a notice of a hearing upon the question of the improvement and if such notice is required by statute, it must be given in order to render the assessment proceedings valid.²

⁹ *Manor v. Board of Commissioners*, Jay County, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; *Stone v. Little Yellow Drainage District*, 118 Wis. 388, 95 N. W. 405 [1903].

¹⁰ *Board of Commissioners, Wells Co. v. Gruver*, 115 Ind. 224, 17 N. E. 200 [1888]; *Board of Commissioners, Wells Co. v. Fahlon*, 114 Ind. 176, 15 N. E. 830 [1887]; *Board of Commissioners, Montgomery Co. v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887].

¹¹ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Townsend v. City of Manistee*, 88 Mich. 408, 50 N. W. 321 [1891].

¹² See § 728.

¹ See § 119.

² *Gregory v. City of Bridgeport*, 52 Conn. 40 [1884]; *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903]; *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902]; *Gage v. City of Chicago*, 196 Ill. 512, 63 N. E. 1031 [1902]; *Bass v. City of Chicago*, 195 Ill. 109, 62 N. E. 913 [1902]; *Elgin, Joliet and Eastern R. R. Co. v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102 [1901]; *Clarke v. City of Chicago*, 185 Ill. 354, 57 N. E. 15 [1900]; *City of Chicago v. Wilder*, 184 Ill. 397, 56 N. E. 395 [1900]; *Derby v. West Chicago Park Commissioners*, 154 Ill. 213, 40 N. E. 438 [1894]; *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *The People ex*

The property owner has, however, no constitutional right to a hearing upon the question of the propriety and necessity of the improvement,³ and accordingly such notice is not necessary unless it is required by statute.⁴ If the statute so provides, notice of the intention of the public corporation to make the improvement in question must be given.⁵ Under such statutes, such notice must be given for the very improvement which is actually constructed, and if the improvement is materially altered after the notice is given, a new notice must subsequently be given or the proceedings will be invalid.⁶ Under a statute which secures to the property owner the right to select materials,⁷ or the right to be heard upon the question of materials to be used,⁸ and providing for notice therefor, notice must be given in substantial compliance with the statute or the assessment proceedings will be invalidated. However, the property owners have no constitutional right to selection of material or to notice thereof, and accordingly it has been held that if the statute provides that the

rel. Samuel, Sr. v. Cooper, 139 Ill. 461, 29 N. E. 872 [1893]; The Wabash Eastern Railway Company of Illinois v. The Commissioners of the East Lake Fork Special Drainage District, 134 Ill. 334, 10 L. R. A. 285, 25 N. E. 781 [1891]; Fort Chartres & Ivy Landing Drainage & Levee Dist. No. 5 v. Smalkand, 70 Ill. App. 449 [1897]; Quill v. City of Indianapolis, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; Goodwine v. Leak, 114 Ind. 499, 16 N. E. 816 [1887]; Hackett v. State, for Use of Martindale, 113 Ind. 532, 15 N. E. 799 [1887]; Kennedy v. State, for use of Dorsett, 109 Ind. 236, 9 N. E. 778 [1886]; Indianapolis & Cumberland Gravel Road Co. v. State ex rel. Flack, 105 Ind. 37, 4 N. E. 316 [1885]; Bixby v. Goss, 54 Mich. 551, 20 N. W. 587 [1884]; Wright v. Township Drain Commissioners, 44 Mich. 557, 7 N. W. 235 [1880]; Daniels v. Smith, 38 Mich. 660 [1878]; City of St. Paul v. Nickl, 42 Minn. 262, 44 N. W. 59 [1890]; State ex rel. Boice, Pros. v. Inhabitants of City of Plainfield, 38 N. J. L. (9 Vr.) 95 [1875]; State

ex rel. Ogden, Pros. v. Mayor and Common Council of City of Hudson, 29 N. J. L. (5 Dutcher) 475 [1861]; State, Brinley, Pros. v. Inhabitants of the City of Perth Amboy, 29 N. J. L. (5 Dutcher) 259 [1861]; Weeks v. City of Middletown, 95 N. Y. S. 352, 107 App. Div. 587 [1905]; Beaumont v. Wilkes-Barre City, 142 Pa. St. 198, 21 Atl. 888 [1891].

³ See § 123, § 290 *et seq.*

⁴ Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890].

⁵ Zalesky v. City of Cedar Rapids, 118 Iowa, 714, 92 N. W. 657 [1902]; Clinton v. City of Portland, 26 Or. 410, 38 Pac. 407 [1894]; Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119 [1895]; Felker v. City of New Whatcom, 16 Wash. 178, 47 Pac. 505 [1896].

⁶ Angus v. City of Hartford, 74 Conn. 27, 49 Atl. 192 [1901].

⁷ Eddy v. City of Omaha, 72 Neb. 550, 101 N. W. 25 [1904]; (modified on rehearing, 102 N. W. 70, 103 N. W. 692 [1905]).

⁸ Beaumont v. Wilkes Barre City, 142 Pa. St. 198, 21 Atl. 888 [1891].

property owners may select the material, but does not provide for giving them notice, notice is unnecessary and that the property owners should take the initiative within a reasonable time and that in case they fail so to do, they waive their right.⁹ By statute in some jurisdictions it is necessary that notice of the opening of the street should be given to the property owners to be affected thereby.¹⁰ Under a statute requiring notice of intention to make an "improvement" it has been held that the term "improvement" does not include taking land for a street by appropriation and hence that a notice is not necessary.¹¹ If the statute provides therefor, it is necessary to give notice of a petition for a public improvement.¹² Such notice is not, however, necessarily a constitutional right, and it may accordingly be dispensed with.¹³ Thus, it may be provided that if the petition is signed by a majority of the owners of abutting property, notice thereof need not be given.¹⁴ If the statute requires a notice of the estimate of the cost of the improvement to be given, such notice must be given in substantial compliance therewith, and if so given is sufficient.¹⁵ Under some of these statutes a new notice and hearing are necessary if the cost is increased after the public hearing has been had,¹⁶ although a new hearing is not necessary if the cost is decreased.¹⁷

§ 740. Notice of resolution of intention.

By some statutes it is provided that a resolution declaring the intention of the public corporation to construct the improvement

⁹ *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883].

¹⁰ *Busenbark v. Clements*, 22 Ind. App. 557, 53 N. E. 665 [1899]; *Mayor and City Council of Baltimore v. Little Sisters of the Poor*, 56 Md. 400 [1881]; *State, Clark, Pros. v. City of Elizabeth*, 32 N. J. L. (3 Vr.) 357 [1867]; *State, Doyle & Co., Pros. v. Mayor and Common Council of Newark*, 30 N. J. L. (1 Vr.) 303 [1863].

¹¹ *Caldwell v. Villare of Carthage*, 49 O. S. 334, 31 N. E. 602 [1892].

¹² *Roth v. Forsee*, 107 Mo. App. 471, 81 S. W. 913 [1904]; *Thompson v. Love*, 42 O. S. 61 [1884]; *Town of Muskego v. Drainage Com-*

missioners, 78 Wis. 40, 47 N. W. 11 [1890].

¹³ See § 125.

¹⁴ *Oil City v. Lay*, 164 Pa. St. 370, 30 Atl. 289 [1894].

¹⁵ *City of Mobile v. Mobile Light & R. Co.*, 141 Ala. 442, 33 So. 127 [1904]; *Clarke v. City of Chicago*, 185 Ill. 354, 87 N. E. 15 [1900]; *City of Chicago v. Wilder*, 184 Ill. 397, 56 N. E. 395 [1900]; *Daly v. Gubbins*, 25 Ind. App. 86, 73 N. E. 833 [1904]; *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 [1901].

¹⁶ *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774 [1903].

¹⁷ *McChesnev v. City of Chicago*, 205 Ill. 611, 69 N. E. 82 [1903].

must be published as a notice to property owners; and under such statutes a failure to publish the resolution as required by statute invalidates the assessment proceedings.¹ Under statutes making specific provision therefor, omission to publish such resolution may be regarded as a mere irregularity;² if sufficient notice of the assessment proceedings is given otherwise.³ It has been held that after a resolution has been published the public corporation may change the material to be used in the improvement, if the material as used is cheaper and more serviceable than that required in the original resolution which was published.⁴ Under some statutes notice of the resolution must be given before its passage.⁵ Under other statutes notice must be given of the fact that the resolution has been introduced and passed.⁶ The notice must correspond to the resolution and ordinance.⁷ If the notice describes the improvement in general terms, the details of the

¹Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262 [1901]; King v. Lamb, 117 Cal. 401, 49 Pac. 561 [1897]; San Francisco v. Buckman, 111 Cal. 25, 43 Pac. Rep. 396 [1896]; Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337 [1895]; Starr v. City of Burlington, 45 Ia. 87 [1876]; Nugent v. City of Jackson, 72 Miss. 1040, 18 So. 493 [1895]; In the Matter of Conway, 62 N. Y. 504 [1875]; (modifying In the Matter of Conway v. Mayor, etc., of the City of New York, 4 Hun (N. Y.) 43 [1875]); Dolan v. The Mayor, Aldermen and Commonalty of the City of New York, 62 N. Y. 472 [1875]; In the Matter of Anderson, 60 N. Y. 457 [1875]; In the Matter of Burmeister, 56 Howard, 416 [1879]; Eno v. Mayor, etc., 53 Howard, 382 [1877]; In the Matter of Lewis, 35 Howard, 162 [1868]; Jardine v. Mayor, Aldermen and Commonalty of the City of New York, 11 Daly, 116 [1882]; Joyce v. Barron, 67 O. S. 264, 65 N. E. 1001 [1902]; City of Canton v. Warner, 54 Ohio St. 329, 45 N. E. 953 [1896]; Welber v. Potter, 18 O. S. 85 [1868]; Schmidt v. Village of Elmwood Place, 15 Ohio C. C. 351 [1897]; King v. Portland,

38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900]; Waln's Heirs v. City of Philadelphia to Use of Armstrong, 99 Pa. St. 330 [1882].

²Bolten v. City of Cleveland, 35 O. S. 319 [1880]; Upington v. Oviatt, 24 O. S. 232 [1873]; Finnell v. Fates, 19 O. S. 405 [1869]; City of Toledo v. McMahon, 9 Ohio C. C. 194 [1894]; Kirby v. Village of Winton Place, 7 Ohio N. P. 169 [1899].

³In the Matter of Agnew, 4 Hun, 435 [1875].

⁴Barkley v. Oregon City, 24 Ore. 515, 33 Pac. 978 [1893].

⁵In the Matter of DePierris, 82 N. Y. 243 [1880]; In the Matter of Little, 60 N. Y. 343 [1875]; (reversing, *In re* Little, 3 Hun, 215 [1874]); In the Matter of Smith, 52 N. Y. 526 [1873]; *In re* Douglas, 46 N. Y. 42 [1871]; In the Matter of Passford, 63 Barb. 161 [1872]; In the Matter of Corwin, 14 Hun, 34 [1878]; Matter of Douglas, 9 Abb. Pr. N. S. 84 [1870]; Hall v. City of Chippewa Falls, 47 Wis. 267, 2 N. W. 279 [1870].

⁶In the Matter of Levy, 4 Hun, 501 [1875].

⁷Callahan v. Garland, 126 Ia. 206, 101 N. W. 867 [1904].

improvement may be specified in the improvement ordinance.⁸ In the absence of a statute specifically providing for the effect of a failure to publish a resolution as required by statute, failure to publish it invalidates the assessment proceedings.⁹

§ 741. Notice of ordinance.

If the statute provides for the publication of the ordinance, such publication must be made in substantial compliance with the terms of the statute.¹ If proper notice is otherwise given, publication of the ordinance is unnecessary in the absence of specific statutory provisions therefor.² The statute may make publication necessary only in certain specific classes of cases, as in the case of an ordinance for improvements to cost in excess of one hundred thousand dollars.³ Under a statute which requires publication of ordinances of a general nature, an ordinance for the assessment of property benefited by a sewer is of a special nature, not of a general nature, and need not be published.⁴ Under some statutes, it is not necessary to publish the ordinance until after its passage.⁵ Thus, under a statute providing that the ordinance shall not "take effect until it is passed by a ye and a nay vote at two meetings of the board of council at least two weeks apart, and until the ordinance as first passed shall have been published at least one week in some newspaper in said city," it is not necessary to publish the ordinance between its first and second passage, but only for the required time after its second passage.⁶ Under other statutes, it may be necessary that the ordinance be published before its passage.⁷ Thus, it may be

⁸ *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutch.) 500 [1860].

⁹ *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891].

¹ *City of Napa v. Easterby*, 61 Cal. 509 [1882]; *Huff v. City of Jacksonville*, 39 Fla. 1, 21 So. 776 [1897]; *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101 [1902]; *Weld v. The People ex rel. Kern*, 149 Ill. 257, 36 N. E. 1006 [1894]; *Fox v. Middlesborough Town Co.*, 96 Ky. 262, 28 S. W. 776 [1894]; *In the Matter of Smith*, 65 Barb. 283 [1893]; *Tappan v. Young*, 9 Daly, 357 [1880].

² *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900].

³ *Ton v. City of Chicago*, 216 Ill. 331, 74 N. E. 1044 [1905]; *Nelson v. City of Chicago*, 196 Ill. 390, 63 N. E. 738 [1902].

⁴ *Kohler Brick Co. v. City of Toledo*, 29 Ohio C. C. 599 [1907].

⁵ *Fox v. Middlesborough Town Co.* 96 Ky. 262, 28 S. W. 776 [1894].

⁶ *Fox v. Middlesborough Town Co.*, 96 Ky. 262, 28 S. W. 776 [1894].

⁷ *In the Matter of Bassford*, 63 Barb. 161 [1872].

necessary to publish the ordinance between the second and third readings.⁸ In such case, if the ordinance has been published and a material change is made at the third reading, the ordinance must be published again and must be re-enacted after the second notice.⁹ An order to do certain work has been said not to be an ordinance, and hence not to be governed by a statute requiring publication of an ordinance.¹⁰

§ 742. Notice of contract.

If the legislature requires advertisements for bids, the public corporation must comply substantially with the requirements of such statute, but since the property owners have no constitutional right to such publication, it is not necessary to advertise for bids in the absence of statute specifically requiring it.¹ Under a statute requiring notice of the award of a contract, failure to publish such award by competent authority renders the subsequent proceedings void;² and if the contract is entered into before the publication is complete, the assessment is invalid.³ A property owner who does not interpose this objection until after the contract is performed, is then estopped to interpose it.⁴

§ 743. Notice of hearing to determine assessment district.

Notice of proceedings to determine the assessment district need not be given in the absence of statutory provision therefor as own-

⁸ State, Doyle & Company, Pros. v. Mayor and Common Council of New-ark, 30 N. J. L. (1 Vr.) 303 [1863].

⁹ State, Doyle & Company, Pros. v. Mayor and Common Council of New-ark, 30 N. J. L. (1 Vr.) 303 [1863].

¹⁰ City of Napa v. Easterby, 76 Cal. 222, 18 Pac. 253 [1888].

¹ Belser v. Allman, 134 Cal. 399, 66 Pac. 492 [1901]; Himmelman v. Cahn, 49 Cal. 285 [1874]; Himmelman v. Carpentier, 47 Cal. 42 [1873]; Shepard v. Colton, 44 Cal. 628 [1872]; Hewes v. Reis, 40 Cal. 255 [1870]; Shirk v. Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906]; Brookbank v. City of Jeffersonville, 41 Ind. 406 [1872]; Yaekel v. City of Lafayette, 48 Ind. 116 [1874]; Comstock v. Eagle Grove Citv, 133 Iowa, 589, 111 N. W. 51 [1907];

Owens v. City of Marion, 127 Ia. 469, 103 N. W. 381 [1905]; Arnold v. City of Ft. Dodge, 111 Ia. 152, 82 N. W. 495 [1900]; Attorney General ex rel. Cook v. City of Detroit, 26 Mich. 263 [1872]; Keane v. Cushing, 15 Mo. App. 96 [1884]; In the Matter of Pennie, 19 Abb. N. C. 117; Wilder v. City of Cincinnati, 26 O. S. 284 [1875]. See §§ 496, 500-504.

² Reis v. Graff, 51 Cal. 86 [1875]; Himmelmann v. Satterlee, 49 Cal. 289 [1874]; Donnelly v. Tillman, 47 Cal. 40 [1873]; Menzie v. City of Greensburg, — Ind. App. —, 85 N. E. 484 [1908]. See §§ 500-504.

³ Mannin v. Dean, 90 Cal. 610, 27 Pac. 435 [1891].

⁴ Peterson v. City of Ionia, — Mich. —, 116 N. W. 562 [1908]. See § 1015 *et seq.*

ers have no constitutional right thereto.¹ If the statute provides therefor, however, such notice is necessary and must be given in substantial compliance with the terms of the statute.² If the statute provides for giving notice of the boundaries of the assessment district after the boundaries are determined, such notice is necessary.³ By special statutory provisions the property owners may be entitled to a notice of the hearing at which the assessment district is to be fixed.⁴

§ 744. Notice of other proceedings in assessment.

Under a statute which provides for a notice of an opportunity to make objections, and a hearing of such objections, such notice must be given in substantial compliance with the terms of the statute;¹ and a hearing must be had in substantial compliance with the terms of the notice as given.² If the statute so provides, notice of application for the original appointment of commissioners, or for appointment to fill a vacancy, must be given.³ Such right is not a constitutional one, and if the statute does not provide for notice, none is necessary.⁴ Furthermore, by

¹ *Works v. City of Lockport*, 28 Hun, 9 [1882].

² *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905]; *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905].

³ *City of St. Joseph v. Truckenmiller*, 183 Mo. 9, 81 S. W. 1116 [1904]; *City of St. Louis v. Koch*, 169 Mo. 587, 70 S. W. 143 [1902].

⁴ *State ex rel. City of St. Paul v. District Court of Ramsey County*, 90 Minn. 294, 96 N. W. 737 [1903]; *State ex rel. Stees v. Otis*, 53 Minn. 318, 55 N. W. 143 [1893].

¹ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899]; *Hegeman v. City of Passaic*, 51 N. J. L. (22 Vr.) 544, 18 Atl. 776 [1889]; *State, White, Pros. v. Mayor and Council of the City of Bayonne*, 49 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887]; *Pooley v. City of Buffalo*, 122 N. Y. 592, 26 N. E. 16 [1890]; *Merritt v. Village of Port Chester*, 71 N. Y. 309, 27 Am. 47 [1877]; *Morewood*

Avenue, Ferguson's Appeal, 159 Pa. St. 39, 28 Atl. 130 [1893]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901]; *Town of Tumwater v. Pix*, 15 Wash. 324, 46 Pac. 388 [1896].

² *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899]; *Blake v. The People, for Use of Caldwell*, 109 Ill. 504 [1884]; *Beach v. Mayor and Aldermen of Jersey City*, 71 N. J. L. (42 Vr.) 87, 51 Atl. 81 [1904]; *Hegeman v. City of Passaic*, 51 N. J. L. (22 Vr.) 544, 18 Atl. 776 [1889]; *People of the State of New York v. Turner*, 117 N. Y. 227, 15 Am. St. Rep. 498, 22 N. E. 1022 [1889].

³ *Bettis v. Geddes*, 54 Mich. 608; *sub nomine Bettis v. Probate Judge*, 20 N. W. 608 [1884]; *Township of Whiteford v. Phinney*, 53 Mich. 130, 18 N. W. Rep. 593 [1884]; *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 47 N. Y. Sup. Ct. Rep. 539 [1874].

⁴ *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

the provisions of the statute the want of such notice may be a mere irregularity.⁵ It is both sufficient and necessary that notice of appeal be given in substantial compliance with the terms of the statute requiring it.⁶ In the absence of a statute specifically requiring it, it is not necessary to give notice of a rebate to be made upon an assessment where it is found that the assessment as levied exceeds the amount necessary to pay the cost of the improvement.⁷ If proceedings in eminent domain are separate from those assessing benefits upon the property benefited by such improvements, it is not necessary in the absence of statute, that notice of the proceedings in eminent domain be given to the owners of property which will subsequently be assessed.⁸ If an assessment is to be levied for benefits in the same proceedings as that in which property is taken by eminent domain, it is necessary that notice of such proceedings should be given.⁹ The fact that an assessment district is determined in one proceeding and that benefits are assessed in another and that notice is given of each proceeding does not invalidate the proceedings, although the district might have been determined and the assessments fixed in one proceeding.¹⁰ Notice of filing an assessment is sufficient if given in substantial compliance with statute.¹¹

§ 745. Notice of hearing after levy of assessment.

Under a statute requiring a notice of a hearing upon the question of benefits, such notice must be given and a substantial compliance with the statute is sufficient.¹ Under a statute requiring

⁵ In the Matter of Broadway Widening, 63 Barb. 572 [1872].

⁶ Williams v. Bergin, 108 Cal. 166, 41 Pac. 287 [1895]; Morgan Civil Township v. Hunt, 104 Ind. 590, 4 N. E. 299 [1885].

⁷ People ex rel. Hanberg v. McMahon, 224 Ill. 284, 79 N. E. 645 [1906].

⁸ McQuiddy v. Smith, 67 Mo. App. 205 [1896].

⁹ State, Stewart, Pros. v. Mayor and Common Council of the City of Hoboken, 57 N. J. L. (28 Vr.) 330, 31 Atl. 278 [1894].

¹⁰ State ex rel. Eaton v. District Court of Ramsey County, 95 Minn. 503, 104 N. W. 553 [1905].

¹¹ Board of Improvement District No. 5 of Texarkana v. Offenhauser, 84 Ark. 257, 105 S. W. 265 [1907].

¹ Pittsburgh, C. C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Deane v. Indiana Macadam and Construction Company, 161 Ind. 371, 68 N. E. 686 [1903]; Daly v. Gubbins, 35 Ind. App. 86, 73 N. E. 833 [1904]; Page v. Mayor and City Council of Baltimore, 34 Md. 558 [1871]; City of Lowell v. Wentworth 60 Mass. (6 Cush.) 221 [1850]; Cook v. Covert, 71 Mich. 249, 39 N. W. 47 [1888]; Beach v. Mayor and Aldermen of Jersey City, 71 N. J. L. (42 Vr.) 87, 58 Atl. 81 [1904]; Merritt v. Village of Port

notice of the filing of the report of the commissioners or the assessment roll, such notice must be given in substantial compliance with the terms of the statute, and, if so given, is sufficient.² Notice of the meeting of a board of review or equalization to act upon the assessment must be given in substantial compliance with the terms of the statute, and if so given is sufficient.³ Under a statute providing for notice of confirmation, such notice must be given.* If an opportunity is given to the property owner to

Chester, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; *Bell v. City of Yonkers*, 78 Hun 196, 28 N. Y. S. 947 [1894]; *In the Matter of Ford*, 6 Lansing, 92 [1871].

² *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *The Wabash Eastern Railway Company of Illinois v. The Commissioners of the East Lake Fork Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891]; *Blake v. The People*, 109 Ill. 504 [1884]; *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259 [1903]; *Hageman v. City of Passaic*, 51 N. J. L. (22 Vr.) 544, 18 Atl. 776 [1889]; *State, Van Solinger, Pros. v. Town of Harrison*, 39 N. J. L. (10 Vr.) 51 [1876]; *State, Kellogg, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 353 [1875]; *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 27 N. J. L. (3 Dutcher) 536 [1859]; *Pooley v. City of Buffalo*, 122 N. Y. 592, 26 N. E. 16 [1890]; *Merritt v. Village of Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; *Bell v. City of Yonkers*, 78 Hun, 196, 28 N. Y. S. 947 [1894]; *People ex rel. Locke v. Common Council of the City of Rochester*, 5 Lansing, 11 [1871]; *Petition of Folsom*, 2 S. (T. & C.) 55 [1873]; *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874].

* *City of Bridgeport v. Giddings*, 43 Conn. 304 [1876]; *Shannon v.*

City of Omaha, 72 Neb. 281, 100 N. W. 298 [1904]; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866 [1900]; *Wakeley v. City of Omaha*, 58 Neb. 245, 78 N. W. 511 [1899]; *Medland v. Connell*, 57 Neb. 10, 77 N. W. 437 [1898]; *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524 [1898].

⁴ *People v. Phinney*, 231 Ill. 180, 83 N. E. 143 [1907]; *Phillips v. People ex rel. Goedtner*, 218 Ill. 450, 75 N. E. 1016 [1905]; *Maxwell v. City of Chicago*, 185 Ill. 18, 56 N. E. 1101 [1900]; *Leitch v. People ex rel. Gannaway*, 183 Ill. 569, 56 N. E. 127 [1900]; *Royal Insurance Company v. South Park Commissioners*, 175 Ill. 491, 51 N. E. 558 [1898]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898]; *Larson v. People ex rel. Kochersperger*, 170 Ill. 93, 48 N. E. 443 [1897]; *Kearney v. City of Chicago*, 163 Ill. 293, 45 N. E. 224 [1896]; *Chandler v. People ex rel. Kochersperger*, 161 Ill. 41, 43 N. E. 590 [1896]; *Keeler v. People ex rel. Kern*, 160 Ill. 179, 43 N. E. 342 [1896]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *LeMoyné v. West Chicago Park Commissioners*, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48 [1886]; *Brown v. City of Chicago*, 62 Ill. 289 [1871]; *Burton v. City of Chicago*, 62 Ill. 179 [1871]; *Hemingway v. City of Chicago*, 60 Ill. 324 [1871]; *Allen v. City of Chicago*, 57 Ill. 264 [1870]; *City of New Orleans praying for the opening of Drvades Street*, 11 La. Ann. 458 [1856]; *Municipality No. 1 praying for the opening of Or-*

contest the fact of benefits, the fact that the notice given to him is the notice of the levy of assessment, does not impair any of his constitutional rights.⁵ A notice of a hearing upon the question of benefits followed by such hearing is sufficient,⁶ especially where such hearing is had before a court which is empowered to reduce or set aside the assessment.⁷ It has been held in some jurisdictions that if a confirmation is a mere review of the assessment proceedings, if such proceedings are *prima facie* valid, and if no inquiry can be made into the fact of benefit but merely into the principle adopted by the assessing body, a notice of such confirmation proceeding merely is not sufficient to protect the rights of the property owner.⁸ If the statute provides for giving notice of the assessment after it has been levied, it is necessary to comply substantially with the terms of the statute and such compliance is sufficient.⁹ Notice of the making of the assessment must be given if provided for by statute and a substantial compliance with the terms of such statute is sufficient.¹⁰

§ 746. Notice of collection.

The public corporation in collecting the assessment must give notice of the payment thereof where such notice is speci-

leans Avenue, 8 La. Ann. 377 [1853]; Flint v. Webb, 25 Minn. 93 [1878]; Watson v. Borough of Sewickley, 91 Pa. St. (10 Norris) 330 [1879].

⁵ English v. Mayor and Council of Wilmington, 2 Marvel (Del.) 63, 37 Atl. 158 [1896]; Smith v. Abington Savings Bank, 171 Mass. 178, 50 N. E. 545 [1898]; Butler v. City of Worcester, 112 Mass. 541 [1873].

⁶ Leeds v. Defrees, 157 Ind. 392, 61 N. E. 930 [1901]; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551 [1900].

⁷ Job v. City of Alton, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901].

⁸ State, Board of Chosen Freeholders of the Committee of Hudson, Pros. v. Paterson Avenue and Secaucus Road Commissioners, 41 N. J. L. (12 Vr.) 83 [1879]; (citing State,

Wilkinson, Pros. v. Inhabitants of the City of Trenton, 36 N. J. L. (7 Vr.) 499 [1873]; Vantilburgh v. Shann, 24 N. J. L. (4 Zab.) 740 [1853]; State, Mann, Pros. v. Mayor and Common Council of Jersey City, 24 N. J. L. (4 Zab.) 662 [1855]).

⁹ McDonald v. Littlefield, 5 Mackey (D. C.) 574 [1887]; Smith v. Abington Savings Bank, 171 Mass. 178, 50 N. E. 545 [1898]; Butler v. City of Worcester, 112 Mass. 541 [1873].

¹⁰ Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531 [1891]; Nevins and Otter Creek Township Draining Company v. Alkire, 36 Ind. 189 [1871]; State ex rel. Hughes v. District Court of Ramsey County, 95 Minn. 70, 103 N. W. 744 [1905]; Hutchinson v. Pittsburgh, 72 Pa. St. (22 P. F. Smith) 320 [1872].

cally provided for by statute.¹ If due notice has been given of the assessment at a previous stage thereof, it is not necessary that notice of payment be provided for by statute, since the property owner is charged with such knowledge.² If the statute provides for notice of an application for judgment, it is necessary that such notice be given in substantial compliance with the provisions of the statute, unless such notice is waived by the property owner; and a notice given in compliance with the terms of the statute is sufficient.³ If the statute provides for notice of the sale of the property for a delinquent assessment, such notice is sufficient.⁴ It has been said that the statute is void if it does not provide for notice of the sale.⁵ This view does not seem in accordance with the weight of authority, if a notice has already been given charging the property owner with knowledge of the assessment at a previous stage thereof; since he is bound to know the provisions of a statute with reference to collection of delinquent assessments. If the statute provides for the publication of a delinquent tax list publication in accordance with the terms of such statute is sufficient.⁶ If the statute provides that notice be given of the expiration of the time for redeeming the property, after sale for special assessments, substantial compliance with the provisions of such statute is sufficient.⁷

§ 747. Time for which notice must be given.

If the statute contains express provisions fixing the time for which notice must be given, such provisions control, if they give

¹ *People of City and County of San Francisco v. Reay*, 52 Cal. 423 [1877]; *Bowman v. The People ex rel. Baker, Collector*, 137 Ill. 436, 27 N. E. 598 [1892]; *Ross v. Van Natta*, 164 Ind. 557, 74 N. E. 10 [1905]; *Low v. Dallas*, 165 Ind. 392, 75 N. E. 822 [1905]; *Lovell v. City of St. Paul*, 10 Minn. 290 [1865]; *O'Bryne v. City of Philadelphia*, 93 Pa. St. (12 Norris) 225 [1880]; *Adams v. Fisher*, 63 Tex. 651 [1885].

² *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900].

³ *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903]; *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898]; *Nicholes v. People ex rel. Kochersperger*, 165 Ill.

502, 46 N. E. 237 [1897]; *People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876]; *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223 [1902].

⁴ *Gage v. Webb*, 141 Ill. 533, 31 N. E. 130 [1893]; *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543 [1889].

⁵ *People of the State of New York ex rel. Spencer v. Village of New Rochelle*, 83 Hun, 185, 31 N. Y. S. 592.

⁶ *Gage v. People ex rel.*, 205 Ill. 547, 69 N. E. 80 [1903].

⁷ *Gage v. Dupuy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386 [1892]; *Flanagan v. City of St. Paul*, 65 Minn. 347, 68 N. W. 47 [1896]; *Bergen v. Anderson*, 62 Minn. 232, 64 N. W. 561 [1895].

the property owner a reasonable opportunity to be heard, and, in any event, a notice which does not comply with such statutory requirements is insufficient and invalid.¹ Thus, if the notice is given for a shorter time than that specified by statute, it is insufficient.² If, however, notice is given for a period longer than that specified by statute, but otherwise in accordance with the statutory requirements, it is sufficient.³ In order to protect the constitutional rights of the property owner, the statute must give a reasonable time to the property owner to prepare for the hearing and to submit his objections.⁴ Notice for four weeks has been held to be reasonable.⁵ A notice of twenty days gives a reasonable opportunity for presenting objections.⁶ A statute which requires three successive publications in an official newspaper and which gives ten days after the date of the latest publication for filing objections, does not give an unreasonably short time.⁷ In this case, however, it seems to have been regarded as

¹ McDonald v. Littlefield, 5 Mackey (D. C.) 574 [1887]; Maxwell v. City of Chicago, 185 Ill. 18, 56 N. E. 1101 [1900]; Blake v. The People, for use of Caldwell, 109 Ill. 504 [1884]; Burton v. City of Chicago, 53 Ill. 87 [1869]; Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531 [1891]; Taylor v. Burnap, 39 Mich. 739 [1878]; In the Matter of the Appeal of Powers, 29 Mich. 504 [1874]; State ex rel. City of St. Paul v. District Court of Ramsey County, 90 Minn. 294, 96 N. W. 737 [1903]; Flanagan v. City of St. Paul, 65 Minn. 347, 68 N. W. 47 [1896]; Bergen v. Anderson, 62 Minn. 232, 64 N. W. 561 [1895]; Leonard v. Sparks, 63 Mo. App. 585 [1895]; Shannon v. City of Omaha, 72 Neb. 281, 100 N. W. 298 [1904]; State, Leuly, Pros. v. Town of West Hoboken, 53 N. J. L. (24 Vr.) 64, 20 Atl. 737 [1890]; In the Matter of Levy, 4 Hun, 501 [1875]; In the Matter of Pennie, 19 Abb. N. C. 117; Olds v. Erie City, 79 Pa. St. (29 P. F. Smith) 380 [1875]; Washington v. Mayor and Aldermen of Nashville, 1 Swan. (31 Tenn.) 177 [1851]; Woodhouse v. City of Burlington, 47 Vt. 300 [1875].

² Taylor v. Burnap, 39 Mich. 739 [1878]; Lane v. Burnap, 39 Mich. 736 [1878]; In the Matter of the Appeal of Powers, 29 Mich. 504 [1874].

³ Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325.

⁴ Bellingham Bay & British Columbia Railroad v. New Whatcom, 172 U. S. 314, 43 L. 460, 19 S. 205 [1899]; (affirming City of New Whatcom v. Bellingham Bay Improvement Company, 16 Wash. 131, 47 Pac. 236 [1896]); Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892].

⁵ Ballard v. Hunter, 204 U. S. 241, 51 L. 461, 27 S. 261 [1907]; (affirming 74 Ark. 174, 85 S. W. 252 [1905]).

⁶ Stiewel v. Fencing District No. 6 of Johnson County, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

⁷ Bellingham Bay & British Columbia Railroad v. New Whatcom, 172 U. S. 314, 43 L. 460, 19 S. 205 [1899]; (affirming City of New Whatcom v. Bellingham Bay Improvement Company, 16 Wash. 131, 47 Pac. 236 [1896]).

material that the improvement was upon the street on which the complainant had an office, and that the complainant had, in fact, known about the improvement for a long time. A statutory provision requiring a notice to be given for seven days has been said to be sufficient.⁸ If the statute does not specifically provide the length of time for which notice must be given,⁹ or if it provides that notice must be given for a reasonable time,¹⁰ the time must be reasonable. It has been said that the determination by the public authorities as to what a reasonable time is, is conclusive in the absence of fraud;¹¹ though if it can be shown that the time for which the notice was given was made so short that under the circumstances no fair opportunity was given to the property owners to do the work, such notice is insufficient.¹² What is a reasonable time depends upon the circumstances of each case.¹³ Ten days' notice has been held to be sufficient.¹⁴ It is sufficient if a reasonable opportunity is given to the property owner for a hearing. Notice for six days,¹⁵ or for five days,¹⁶ has been held to be sufficient. If the statute provides for giving notice for time which is reasonable; and the notice is given for the time fixed by statute, no objection can be made to the time of giving such notice.¹⁷ The context of the statute may show in some cases that notice is to be given or may be given prior to certain designated steps in the proceedings. If the statute requires a notice of the first meeting of the commissioners and requires the commissioners to take an oath to perform their duties, the notice may be given before they take the oath, since other-

⁸ *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

⁹ *Porphyry Paving Co. v. Ancker*, 104 Cal. 340, 37 Pac. 1050 [1894]; *Burton v. City of Chicago*, 53 Ill. 87 [1869]; *City of Auburn v. Paul*, 84 Me. 212, 24 Atl. 817 [1892]; *King v. Portland*, 38 Or. 402, 52 L. R. A. 812, 63 Pac. 2 [1900].

¹⁰ *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

¹¹ *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

¹² *Foote v. City of Milwaukee*, 18 Wis. 270 [1864].

¹³ *Porphyry Paving Co. v. Ancker*, 104 Cal. 340, 37 Pac. 1050 [1894].

¹⁴ *City of Auburn v. Paul*, 84 Me. 212, 24 Atl. 817 [1892].

¹⁵ *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902]; *Gave v. City of Chicago*, 196 Ill. 512, 63 N. E. 1031 [1902].

¹⁶ *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903].

¹⁷ *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337 [1895]; *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266 [1892]; *Pooley v. City of Buffalo*, 122 N. Y. 592, 26 N. E. 16 [1890]; *City of Toledo v. Lake Shore & Michigan Southern Railway Company*, 4 Ohio C. C. 113 [1889]; *Beaumont v. Wilkes Barre City*, 142 Pa. St. 198, 21 Atl. 888 [1891].

wise it would be necessary that they hold their first meeting at which they take their oath and then give notice of their second meeting.¹⁸ Under a statute requiring notice of an application to appropriate land for opening a street, the notice may be given before the application is made.¹⁹ A substantial compliance with the statutory provisions as to the time of giving notice is sufficient.²⁰ If a resolution requires a notice for ten days from and after a specified date, and the publication is not begun until two days after such date but is then given for ten days, this is a substantial compliance with the provisions of a statute requiring ten days' notice from the time fixed by resolution.²¹ If the ordinance requires one week's notice, notice for seven days, which are consecutive except that Sunday intervenes between the last two publications, the newspaper not being published on Sunday, is sufficient.²² Under some statutes, failure to comply literally with the statutory provisions as to the time for which the notice is to be given is said to be a mere irregularity and not to defeat the assessment proceedings if substantial notice has, in fact, been given.²³ In some cases, statutes specifying in detail the method of giving notice are said to be directory and not mandatory.²⁴ It is held accordingly that a departure from the method prescribed by statute does not invalidate the proceedings as long as a substantial notice is given. If a notice is given for the time required by statute and a subsequent notice for the same improvement is given, not for the time required by statute, the second defective notice does not invalidate the first notice.²⁵ If the time and method of giving notice are left to the discretion of the city and the city provides by ordinance a method of giving notice, notice must be given in compliance with provisions of such ordinance.²⁶ In such cases a city ordinance is sufficient author-

¹⁸ *Page v. Mayor and City Council of Baltimore*, 34 Md. 558 [1871].

¹⁹ *Mayor and City Council of Baltimore v. The Little Sisters of the Poor*, 56 Md. 400 [1881].

²⁰ *Chambers v. Satterlee*, 40 Cal. 497 [1871].

²¹ *Chambers v. Satterlee*, 40 Cal. 497 [1871].

²² *City of Mexico v. Lakeman*, — Mo. App. —, 108 S. W. 141 [1908]; *City of Trenton v. Collier*, 68 Mo. App. 483 [1896].

²³ *The People ex rel. Little v. Clayton*, 115 Ill. 150, 4 N. E. 193 [1886]; *Owens v. City of Marion*, 127 Ia. 469, 103 N. W. 381 [1905].

²⁴ *In the Matter of Douglas*, 58 Barb. 174 [1870]; *Lyth v. Buffalo*, 48 Hun, 175 [1888].

²⁵ *Felker v. City of New Whatcom*, 16 Wash. 178, 47 Pac. 505 [1896].

²⁶ *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367 [1898]; *Zalesky v. City of Cedar Rapids*, 118 Ia. 714, 92 N. W. 657

ity for publishing such notice.²⁷ If the proceedings for assessment are by statute conducted before a court, it is not necessary that the court fix in advance what notice shall be given. If a proper notice is given in fact, it is sufficient.²⁸ If there are statutory provisions which prescribe the time and method of giving notice, and the city has by ordinance made provision for the same subject, a compliance with the statute is sufficient, even if the ordinance imposes additional requirements which are not complied with.²⁹ A defect in the time of giving notice may be cured by confirmation.³⁰

§ 748. To whom notice must be given.

The owner of the property to be assessed is the person to whom is given by the constitution the right to notice of the taking of his property, and it is usually provided by statute that the notice must be served upon the owner.¹ Notice of enlarging an assessment district must be given to those whose lands are to be brought into the district.² Notice need not be given to the own-

[1902]; *Starr v. Burlington*, 45 Ia. 87 [1876]; *Roche v. City of Dubuque*, 42 Ia. 250 [1875]; *City of Dubuque v. Wooton*, 28 Ia. 571 [1870]; *Ives v. Irey*, 51 Neb. 136, 70 N. W. 961 [1897]; *Wilson v. City of Seattle*, 2 Wash. 543, 27 Pac. 474 [1891]; (modified in *City of Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002 [1893]).

²⁷ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853].

²⁸ *Osborn v. Maxinkuckee Lake Ice Company*, 154 Ind. 101, 56 N. E. 33 [1899].

²⁹ *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112 [1895]; *City of Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632 [1905].

³⁰ *Illinois Central R. R. Co. v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609 [1901]; *Dickey v. People ex rel. Kochersperger*, 160 Ill. 633, 43 N. E. 606 [1896].

¹ *City of Mobile v. Mobile Light & Railroad Company*, 141 Ala. 442, 38 So. 127 [1904]; *Williams v. Viselich*, 121 Cal. 314, 53 Pac. 807 [1898]; *Shepard v. Colton*, 44 Cal. 628 [1872]; *West Chicago Street*

Railway Co. v. People ex rel. Kern, 156 Ill. 18, 40 N. E. 605 [1895]; *The Chicago West Division Railway Company v. People ex rel. Kern*, 154 Ill. 256, 40 N. E. 342 [1894]; *Gage v. Webb*, 141 Ill. 533, 31 N. E. 130 [1893]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888]; *Indianapolis & Cumberland Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316 [1885]; *Chicago, Rock Island & Pacific Railway Company v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; *Palmer v. City of Port Huron*, 139 Mich. 471, 102 N. W. 996 [1905]; *Campau v. Charbenau*, 105 Mich. 422, 63 N. W. 435 [1895]; *State ex rel. Stotts v. Wall*, 153 Mo. 216, 54 S. W. 465 [1899]; *State ex rel. Greely v. City of St. Louis*, 67 Mo. 113 [1877]; *Bell v. City of Yonkers*, 78 Hun, 196, 28 N. Y. S. 947 [1894]; *Estate of White*, 19 Phil. 106 [1888].

² *Commissioners of Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891]; *Ireland v. City of Rochester*, 51 Barb. 414 [1868].

ers of land already assessed, who have paid their assessments.³ The trustees are bound to exercise more care in ascertaining who are the owners of the land assessed than merely examining the assessment roll.⁴ Under some statutes, it is provided that notice must be served upon the registered owner, as he appears of record and also upon the reputed owner.⁵ A notice addressed to the deceased ancestor of the owners is insufficient.⁶ If easements are subject to assessment, notice should be given to the owners of easements as well as to the owners of land.⁷ Accordingly, notice should be given to a street railway company where such railway is to be assessed.⁸ If an assessment is to be levied against a public road for benefits thereto, the highway commissioners are entitled to the same notice as individual land owners.⁹ A creditor secured by a deed of trust is not the owner of land within the meaning of a statute requiring notice to be given to owners.¹⁰ Notice must be given to all the property owners whose property is to be assessed for the improvement for which the assessment is levied.¹¹ Notice to some of the property owners does not bind others to whom such notice is not given.¹² On the other hand, the failure to give notice to some of the property owners cannot be

³ *Richardson v. City of Omaha*, — Neb. —, 110 N. W. 648 [1907].

⁴ *Hyland v. President and Trustees of Village of Ossining*, 107 N. Y. S. 225 [1907].

⁵ *City v. Crump*, 1 Penn. Dis. Rep. 698 [1890].

⁶ *Estate of White, deceased*, 19 Phil. 106 [1888].

⁷ *City of Mobile v. Mobile Light & Railroad Company*, 141 Ala. 442, 38 So. 127 [1904]; *Indianapolis & Cumberland Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316 [1885].

⁸ *City of Mobile v. Mobile Light & Railroad Company*, 141 Ala. 442, 38 So. 127 [1904].

⁹ *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 51 N. E. 206 [1897].

¹⁰ *City of Richmond v. Williams*, 102 Va. 733, 47 S. E. 844 [1904].

¹¹ *Payson v. People ex rel. Parsons*,

175 Ill. 267, 51 N. E. 588 [1898]; *City of Logansport v. Shirk*, 129 Ind. 352, 28 N. E. 538 [1891]; *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152; *Goodwine v. Leak*, 114 Ind. 499, 16 N. E. 816 [1887]; *State ex rel. Stotts v. Wall*, 153 Mo. 216, 54 S. W. 465 [1899]; *In the Matter of the Common Council of the City of Amsterdam*, 55 Hun. 270, 8 N. Y. Supp. 234 [1889]; *Ireland v. City of Rochester*, 51 Barb. 414 [1868].

¹² *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898]; *City of Logansport v. Shirk*, 129 Ind. 352, 28 N. E. 538 [1891]; *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 27 N. E. 725 [1890]; *Goodwine v. Leak*, 114 Ind. 499, 16 N. E. 816 [1887]; *State ex rel. Stotts v. Wall*, 153 Mo. 216, 54 S. W. 465 [1899]; *In the Matter of the Common Council of the City of Amsterdam*, 55 Hun. 270, 8 N. Y. Supp. 234 [1889]; *Ireland v. City of Rochester*, 51 Barb. 414 [1868].

taken advantage of by other property owners to whom notice was given, where the assessment against the property of each is considered separately with reference to a rule of apportionment which does not make the assessment upon one depend upon the assessment upon others.¹³ If, however, the statute requires a hearing at which all the property owners are to be present, a notice is insufficient which fixes a given time and place for all the owners except one, and a different time and place for such remaining owner.¹⁴ If a notice has been given to all the property owners and an opportunity to file objections, it may be provided by statute that notice of the hearing of objections shall be given only to those owners who have filed objections.¹⁵ Notice given to an agent who is authorized to receive such notice is sufficient.¹⁶ A notice given to an agent is insufficient unless it is shown that the authority of the agent included authority to receive such notice.¹⁷ Actual notice to one co-tenant and notice by publication have been held sufficient to bind a co-tenant to whom actual notice was not given.¹⁸ Notice to one co-tenant is not sufficient as notice to other co-tenants.¹⁹ Whether a co-tenant to whom notice is not given can complain or not, co-tenants to whom notice has been given cannot object on the ground that other co-tenants have not been notified.²⁰ If a married woman owns property, notice to her husband is insufficient to bind her.²¹ Accordingly, if husband and wife hold land by entireties, notice to the husband is not sufficient as service upon the wife.²² While, ordinarily, notice can not be given to an executor, since, under most systems of descent and distribution he has nothing to do

¹³ *Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735 [1885]; *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899].

¹⁴ *City of Lowell v. Wentworth*, 6 Cush. 221 [1850].

¹⁵ *State, Wetmore, Pros. v. City of Elizabeth*, 41 N. J. L. (12 Vr.) 152 [1879].

¹⁶ *Wilson v. Inhabitants of City of Trenton*, 53 N. J. L. (24 Vr.) 645, 16 L. R. A. 200, 23 Atl. 278 [1891].

¹⁷ *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543 [1889].

¹⁸ *Darlington v. Commonwealth to use of City of Allegheny*, 41 Pa. St. 68 [1861].

¹⁹ *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908]. Apparently *Contra*, *Darlington v. Commonwealth to Use of City of Allegheny*, 41 Pa. St. 68 [1861].

²⁰ *Birket v. City of Peoria*, 185 Ill. 369, 57 N. E. 30 [1900]; *City of Louisiana v. McAllister*, 104 Mo. App. 152, 78 S. W. 314 [1903].

²¹ *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908]; *Bixby v. Goss*, 54 Mich. 551, 20 N. W. 587 [1884]; *Watson v. Borough of Sewickley*, 91 Pa. St. (10 Norris) 330 [1879].

²² *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908].

with land, yet if realty is devised to a person as executor and trustee, notice directed to the heirs and given to such executor and trustee, has been held to be sufficient,²³ and so has notice given to one who was both life tenant and executrix.²⁴ If the statute so provides, a notice given to a minor is sufficient without notifying the guardian.²⁵ It is not necessary that the infant should be represented by guardian *ad litem* in the assessment proceedings, if the statute does not so require.²⁶ If notice is not given to a minor, but her guardian voluntarily appears and his action is approved by the court, it will be presumed in a collateral proceeding that the minor had notice of a proceeding to obtain approval of such action.²⁷ Under some statutes, it is provided that notice shall be given to the persons last paying taxes upon the realty assessed, and to the occupants of such realty.²⁸

§ 749. By whom notice may be ordered.

The statutes usually provide by whom notice is to be ordered. A notice which is ordered by the authorities designated by statute is sufficient as the act of the public corporation levying the assessment.¹ A notice published without the authority of the officials designated by statute has no legal effect.² Authority to publish one notice is not authority to publish a new or an amended notice without a special grant of authority.³

§ 750. Form and contents of notice.

The form of the notice must be such as to advise the property owner of the pendency of the proceedings which will result in

²³ *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899].

²⁴ *Peck v. City of Bridgeport*, 75 Conn. 417, 53 Atl. 893 [1903]. *

²⁵ *The People ex rel. Samuel, Sr. v. Cooper*, 139 Ill. 461, 29 N. E. 872 [1893].

²⁶ *The People ex rel. Samuel, Sr. v. Cooper*, 139 Ill. 461, 29 N. E. 872 [1893].

²⁷ *Ross v. Board of Supervisors of Wright County*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

²⁸ *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127 [1907]; *Roberts*

v. City of Evanston, 218 Ill. 296, 75 N. E. 923 [1905].

¹ *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492 [1901]; *King v. Lamb*, 117 Cal. 401, 49 Pac. 561 [1897]; *Dyer v. North*, 44 Cal. 157 [1872]; *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150 [1903].

² *City of Napa v. Easterby*, 61 Cal. 509 [1882]; *Reis v. Graff*, 51 Cal. 86 [1875]; *Himmelmänn v. Satterlee*, 49 Cal. 289 [1874]; *Donnelly v. Tillman*, 47 Cal. 40 [1873]; *Whyte v. Mayor and Aldermen of Nashville*, 2 Swan (Tenn.) 364 [1852].

³ *Ladd v. Spencer*, 23 Or. 193, 31 Pac. Rep. 474 [1892].

an assessment and to give him an opportunity to be heard upon the question of benefits. This he is entitled to, as of constitutional right.¹ If these requirements are observed, the remaining provisions as to the form of the notice are to be determined by statutes applicable thereto.² The statutory requirements must be complied with.³ A substantial compliance is said to be all that is necessary.⁴ A notice is to be construed liberally.⁵ A typographical error in a notice which does not mislead the property owner does not invalidate the assessment.⁶ Thus, where a notice was given to advise the property owner that the extent and nature of the improvement might be changed, it was held that the use of the word "expense" in place of "extent" did not invalidate the notice.⁷ The notice of intention to assess must set forth the proposed improvement and the assessment district.⁸ If notice of intention to improve is necessary, a notice which gives such information is sufficient, although its language may be inapt and ambiguous.⁹ If notice is to be given of an order,¹⁰ or ordinance,¹¹ publishing such ordinance or resolution entire is a sufficient notice. A notice of intention to levy an assessment according to law is a sufficient notice that action is taken under the provisions of the law authorizing the assessment of benefits.¹² If the statute does not limit objections to those made in writing, a notice which limits objections to written ones is insufficient.¹³ It has been held, however, that neither

¹ *Gilmore County Clerk v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885].

² *Armstrong v. Ogden City*, 12 Utah, 476, 43 Pac. 119 [1895].

³ *Kentucky R. R. Tax Cases*, 115 U. S. 321, 29 L. 414, 6 S. 57 [1885]; (affirming *Cincinnati, New Orleans & Texas Pacific R. R. Co. v. Commonwealth*, 81 Ky. 492 [1883]); *Shrum v. Town of Salem*, 13 Ind. App. 115, 39 N. E. 1050 [1895]; *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144 [1895]; *Palmer v. City of Port Huron*, 139 Mich. 471, 102 N. W. 996 [1905]; *Meritt v. Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112 [1902].

⁴ *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866 [1900].

⁵ *Kansas City v. Naviecek*, — Kan. —, 92 Pac. 827 [1907].

⁶ *Warner & Malley v. Russell*, 129 Cal. 381, 62 Pac. 75 [1900]; *Heiple v. City of Washington*, 219 Ill. 604, 76 N. E. 854 [1906].

⁷ *Heiple v. City of Washington*, 219 Ill. 604, 76 N. E. 854 [1906].

⁸ *Thayer Lumber Co. v. City of Muskegon*, — Mich. —, 115 N. W. 957 [1908].

⁹ *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112 [1902].

¹⁰ *Town of Muskego v. Drainage Commissioners*, 78 Wis. 40, 47 N. W. 11 [1890].

¹¹ *Seovill v. City of Cleveland*, 1 O. S. 126.

¹² *Quinn v. James*, 174 Mass. 23, 54 N. E. 343 [1899].

¹³ *Merritt v. Village of Port Chester*, 71 N. Y. 309, 27 Am. 47 [1877]; *Hopkins v. Mason*, 61 Barb. 469 [1871].

those who make written objections, nor those who do not appear at all, can complain of such defect.¹⁴ If the statute requires objections to be presented to the chairman of a board to be placed before the board by him, a notice requiring objections to be made to the board is an immaterial variance.¹⁵ A notice of a hearing of objections does not advise property owners that the council may amend the assessment roll by levying the assessment upon property not already included therein.¹⁶ The notice need not contain statements of the law applicable to the improvement,¹⁷ as a statement of where the ordinance is filed if the statute prescribes where it shall be filed,¹⁸ or a statement that the board may adopt a resolution for the improvement,¹⁹ where this is provided for by law. A notice that land-owners are to vote to determine "whether or not an annual tax rate of two per cent. shall be levied," to build a levee, sufficiently shows in connection with the statute that the levy is to be made annually.²⁰ If the notice refers to the resolution of intention, such resolution may be read in connection with the notice to determine whether the notice is sufficient.²¹ A notice of confirmation is not required to contain a description of the property assessed, in the absence of a special requirement therefor.²² A notice for the payment of taxes must specify the length of time to which the property owner is entitled for payment of the taxes after the notice is given.²³ A notice of a tax sale must show for what year the tax is levied and whether it is a general tax or a special assessment.²⁴

¹⁴ *State v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutcher) 500 [1860]. The result reached in this case seems unsatisfactory, as it requires the property owner to appear and to present oral objections, although he is expressly advised by the notice that they will not be considered.

¹⁵ In the *Matter of Lowden*, 89 N. Y. 548 [1882]. As taking the opposite view, see *Adriance v. McCafferty*, 25 N. Y. Sup. Ct. Rep. 153 [1864].

¹⁶ *State of Washington on the Relation of the Barber Asphalt Paving Company v. City of Seattle*, 42 Wash. 370, 85 Pac. 11 [1906].

¹⁷ *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898].

¹⁸ *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898].

¹⁹ *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903].

²⁰ *Memphis Land & Timber Co. v. St. Francis Levee District*, 64 Ark. 258, 42 S. W. 763 [1897].

²¹ *Davies v. City of Los Angeles*, 86 Cal. 37, 24 Pac. 771 [1890].

²² *City of Chicago v. Becker*, 233 Ill. 189, 84 N. E. 242 [1908].

²³ *Bowman v. The People ex rel. Baker, Collector*, 137 Ill. 436, 27 N. E. 598 [1892].

²⁴ *Gage v. Dupuy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386 [1892].

§ 751. To whom notice to be addressed.

In the absence of a statute specifically requiring it, it is not necessary that a notice be given to the property owners by name.¹ It may be addressed generally to the owners of land, designated in a certain manner;² as to the owners of land abutting upon a specified part of a designated street;³ or to the "property owners in sidewalk district No. 6."⁴ If the notice shows what land is to be affected, it is sufficient if it is addressed "To whom it may concern,"⁵ or to "all interested."⁶ A notice addressed to the heirs of a deceased ancestor and served on the trustee has been held sufficient.⁷ The notice must, however, give either the name of the property owner or such reference to his property that it may be determined thereby.⁸ A notice "to all appellants" without designating them personally or as the owners of certain property, is insufficient.⁹ Notice "to the owners of abutting lots" is not a sufficient notice to the owner of a lot abutting on a street other than the one to be improved,¹⁰ even though his lot is composed of portions of lots which, as originally platted, abutted upon the street named.¹¹ A notice to the owners of property on a street is insufficient as notice to a street railway whose tracks are situated within the street.¹² A notice addressed to a lessee of a railroad has been held to be a sufficient notice.¹³ Notice addressed "W. Div. R. W. Co.," instead of to the "Chicago West Division Railway Company," and sent to the

¹ *Williams v. Viselich*, 121 Cal. 314, 53 Pac. 807 [1898]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *City of Ottawa v. Macy*, 20 Ill. 413, [1858]; *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144 [1895].

² *Palmer v. City of Port Huron*, 139 Mich. 471, 102 N. W. 996 [1905].

³ *Palmer v. City of Port Huron*, 139 Mich. 471, 102 N. W. 996 [1905].

⁴ *Hallett v. United States Security & Bond Co.*, — Colo. —, 90 Pac. 683 [1907].

⁵ *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983 [1898].

⁶ *City of Ottawa v. Macy*, 20 Ill. 413 [1858].

⁷ *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899].

⁸ *Williams v. Bergin*, 108 Cal. 166,

41 Pac. 287 [1895]; *Campau v. Charbeneau*, Drain Commissioner, 105 Mich. 422, 63 N. W. 435 [1895].

⁹ *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287 [1895].

¹⁰ *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903]; *Spring Steel Fence & Wire Company v. City of Anderson*, 32 Ind. App. 138, 69 N. E. 404 [1903].

¹¹ *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903].

¹² *People of the State of New York, ex rel. Troy & Lansingburgh R. R. Co. v. Coffey*, 66 Hun, 160, 21 N. Y. Supp. 34 [1892].

¹³ *Chicago, Rock Island & Pacific Railroad Company v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900].

place of business of the latter company, is sufficient.¹⁴ The fact that a notice was addressed to parties outside of the assessment district, as well as to those within it, does not invalidate it as to the latter.¹⁵ If the statute requires the notice to be addressed to the owners of land within the district, a notice not addressed to any one is defective.¹⁶

§ 752. By whom notice must be signed.

The statutory provisions upon the subject generally determine by whom a notice must be signed.¹ If a notice is to be signed by three commissioners, signature by two out of three is insufficient.² The same rule applies if the notice is signed by two commissioners and a third person not appointed commissioner.³ This defect is, however, cured by confirmation.⁴ Under other statutes, it has been held that a notice published by less than all of the assessors is valid, in the absence of proof that they did not all authorize such publication.⁵ If the ordinance does not expressly require notice to be given by the council, a notice given by the clerk and adopted and acted on by the council is sufficient.⁶ Publication as a news item, without authority from the public corporation to make publication as notice, is not, in legal effect, notice.⁷

§ 753. Time and place of hearing in notice.

A notice which does not show the place of the meeting and hearing is insufficient.¹ Such defect may be waived;² but the mere filing of written objections is not of itself a waiver.³ While a

¹⁴ *West Chicago St. Ry. Co. v. People ex rel. Kern*, 156 Ill. 18, 40 N. E. 605 [1895]. See to the same effect *The Chicago West Division Railway Company v. People ex rel. Kern*, 154 Ill. 256, 40 N. E. 342 [1894].

¹⁵ *Ball v. City of Yonkers*, 78 Hun, 196, 28 N. Y. S. 947 [1894].

¹⁶ *Hopkins v. Mason*, 42 Howard, 115 [1871].

¹ *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895].

² *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895].

³ *McChesney v. People ex rel. Kern*, 148 Ill. 221, 35 N. E. 739 [1894].

⁴ *People ex rel. Kochersperger v. Markley*, 166 Ill. 48, 46 N. E. 742 [1897].

⁵ *In the Matter of Merriam*, 84 N. Y. 596 [1881].

⁶ *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutcher) 500 [1860].

⁷ *City of East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674 [1908]; *Olds v. Erie City*, 79 Pa. St. (29 P. F. Smith) 380 [1875].

¹ *State, Leuly, Pros. v. Town of West Hoboken*, 53 N. J. L. (24 Vr.) 64, 20 Atl. 737 [1890].

² *State, Townsend, Pros. v. Mayor and Common Council of Jersey City*, 26 N. J. L. (2 Dutcher) 444 [1857].

³ *State, Leuly, Pros. v. Town of West Hoboken*, 53 N. J. L. (24 Vr.) 64, 20 Atl. 737 [1890].

notice should show the date of the hearing, such defect may be waived;⁴ and the fact that it fixes the hearing for "Friday, July sixth, next," and is itself undated, does not render the notice invalid, if the property owners actually appeared, made no objection to the defective notice, and were heard upon the merits.⁵ In the absence of a statute requiring a notice to be dated, an erroneous date, which does not mislead the property owners, does not invalidate the proceeding.⁶

§ 754. Description of improvement in notice.

By statute the notice may be required to show the character of the improvement, the materials used and the like, and the absence of such facts will invalidate a notice under such statutes.¹ Thus, a notice that a street is to be improved "by building to the established grade an elevated roadway thirty-six feet wide, and an elevated sidewalk twelve feet wide," is insufficient.² The improvement must be identified.³ If it is proposed to establish two alleys in one block, a notice of opening "an alley" in such block is insufficient, as it does not specify which alley is intended.⁴ It is necessary that the notice state the land which is to be taken for a public use.⁵ This may be done by stating the numbers of the lots and the portion of them to be taken for the improvement.⁶ A notice of an intention to improve a street *prima facie* refers to the street as it lawfully exists, and not as it is actually used.⁷ It is sufficient to describe an improvement of a road as "macadamizing."⁸ A notice need not state the proposed depth of the sewer

⁴ State, Townsend, Pros. v. Mayor and Common Council of Jersey City, 26 N. J. L. (2 Dutcher) 444 [1857].

⁵ State, Hand, Pros. v. City Council of the City of Elizabeth, 31 N. J. L. (2 Vr.) 547 [1864].

⁶ Clark v. Mead, 102 Cal. 516, 36 Pac. 862 [1894].

¹ Ladd v. Spencer, 23 Or. 193, 31 Pac. 474 [1892]; Hawthorne v. City of East Portland, 13 Or. 271, 10 Pac. 342 [1886]; Bucklev v. City of Tacoma, 9 Wash. 253, 37 Pac. 441 [1894]. By special statute it may be an irregularity which is waived if prompt objection is not made. Owens v. City of Marion. Iowa, 127 Ia. 469, 103 N. W. 381 [1905].

² Ladd v. Spencer, 23 Or. 193, 31 Pac. 474 [1892].

³ City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 S. W. 1091 [1907].

⁴ City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 S. W. 1091 [1907].

⁵ Hemingway v. Chicago, 60 Ill. 324 [1871]; In the Matter of Orange Street, 50 How. (N. Y.) 244 [1875].

⁶ Hemingway v. City of Chicago, 60 Ill. 324 [1871].

⁷ Mayor and Common Council of Jersey City v. State, Howeth, Pros., 30 N. J. L. (1 Vr.) 521 [1863].

⁸ Thompson v. Love, 42 O. S. 61 [1884].

beneath the surface of the street.⁹ The notice need not state specifically that the improvement is within the city.¹⁰ A street may be described by its name, without specific reference to the map on which it is shown.¹¹ In notifying a property owner to construct an improvement, the notice must specify what improvement he is required to construct.¹² Thus, if a person owns two different tracts of land upon a street, a notice to him to improve the sidewalk adjoining his estate on that street, without specifying which tract, is insufficient.¹³ A notice must describe the improvement so as to conform to the statute.¹⁴ Thus, if by statute a property owner, by building a sidewalk, relieves himself from assessment for a sidewalk, a notice that he may build such sidewalk and relieve himself from all liability, except from intersections, is defective.¹⁵ A notice which contains apt language may advise the property owners of the intention to construct two different improvements.¹⁶ It is, however, proper to give a separate notice for each improvement, even though two improvements are combined in one resolution of intention.¹⁷ If an entire improvement is ordered,¹⁸ such as a connected sewer along two or more streets,¹⁹ a notice must describe the work as an entirety, and cannot describe the section on each street as a separate improvement. Defects in description in a notice may be supplied by reference to plans,²⁰ or to the resolution for the improvement.²¹ If the entire resolution is published, no reference to the resolution for further particulars is necessary.²² If a notice has been given, and the plans have subsequently been changed, such notice is insufficient

⁹ *People ex rel. Locke v. Common Council of City of Rochester*, 5 Lansing, 11 [1871].

¹⁰ *Wheeler v. People ex rel. Kern*, 153 Ill. 480, 39 N. E. 123 [1894].

¹¹ *Mayor and City Council of Baltimore v. The Little Sisters of the Poor*, 56 Md. 400 [1881].

¹² *Simmons v. City of Gardner*, 6 R. I. 255 [1859].

¹³ *Simmons v. City of Gardner*, 6 R. I. 255 [1859].

¹⁴ *City of Chicago v. Burkhardt*, 223 Ill. 297, 79 N. E. 82 [1906].

¹⁵ *City of Chicago v. Burkhardt*, 223 Ill. 297, 79 N. E. 82 [1906].

¹⁶ *Iowa Pipe & Tile Co. v. Callanan*, 125 Iowa, 358, 106 Am. St.

Rep. 311, 67 L. R. A. 408, 101 N. W. 141 [1904].

¹⁷ *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023 [1902].

¹⁸ *White v. Harris*, 116 Cal. 470, 48 Pac. 382 [1897].

¹⁹ *White v. Harris*, 116 Cal. 470, 48 Pac. 382 [1897].

²⁰ *Arnold v. City of Ft. Dodge*, Iowa, 111 Ia. 152, 82 N. W. 495 [1900]; *City of Canton v. Wagner*, 54 Ohio St. 329, 45 N. E. 953 [1896]; *Felker v. City of New Whatcom*, 16 Wash. 178, 47 Pac. 505 [1896].

²¹ *Perine v. Erzgraber*, 102 Cal. 234, 36 Pac. 585 [1894].

²² *Schmidt v. Market St. & Willow Glenn R. R. Co.*, 90 Cal. 37, 27 Pac. 61 [1891].

as to the new improvement.²³ After a notice has been served upon the property owners, specifying the type and kind of improvement, the public corporation cannot alter the improvement materially without instituting new proceedings and serving a new notice.²⁴ An error in describing an improvement, which would mislead the property owner, renders the notice invalid.²⁵ A notice must describe the improvement with sufficient certainty to advise the property owners of the improvement intended.²⁶ In the case of a street improvement, it must show both termini of the improvement.²⁷ A notice of an assessment for a private drain is insufficient, where the improvement consists of curbing, grading and paving.²⁸ A notice for repaving has been held insufficient, where the assessment has been made for paving.²⁹ On the other hand, a notice for regrading has been held to be sufficient, where the improvement was grading.³⁰ A defect in locating sewers by omitting the word "west" from the description of the streets where the sewers are to be laid, is waived, if a plat is filed, showing the exact location of the sewers; and the property owners appear and object solely on other grounds.³¹

§ 755. Description in notice of land assessed.

If the statute requires a description of the land assessed, reference to a map showing the land bounding on the improvement is not sufficient.¹ If the description of the land to be assessed does not include it all, only the land included in the description, as given in the notice, can be assessed.² A description of land, as that bounding on a certain street,³ or included within certain city

²³ *Angus v. City of Hartford*, 74 Conn. 27, 49 Atl. 192 [1901].

²⁴ *Angus v. City of Hartford*, 74 Conn. 27, 49 Atl. 192 [1901].

²⁵ *Miller v. Graham*, 17 O. S. 1 [1866].

²⁶ *State, Clark, Pros. v. City of Elizabeth*, 32 N. J. L. (3 Vr.) 357 [1867].

²⁷ *The Mayor and City Council of Baltimore v. The Grand Lodge of Maryland of the Independent Order of Odd Fellows*, 44 Mo. 436 [1875]; *State, Clark, Pros. v. City of Elizabeth*, 32 N. J. L. (3 Vr.) 357 [1867].

²⁸ *Waller v. City of Chicago*, 53 Ill. 88 [1869].

²⁹ *State ex rel. v. Mayor and Common Council of Jersey City*, 27 N. J. L. (3 Dutcher) 536 [1859].

³⁰ *Brady v. Feisel*, 53 Cal. 49 [1878].

³¹ *Reed v. City of Cedar Rapids*, — Iowa, —, 111 N. W. 1013 [1907].

¹ *State, Central Railroad Company of New Jersey, Pros. v. Mayor, etc., of the City of Bayonne*, 51 N. J. L. (22 Vr.) 428, 17 Atl. 971 [1889].

² *Jackson v. Healy*, 20 Johnson (N. Y.) 495 [1823].

³ *Tingue v. The Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625 [1886].

blocks,⁴ is sufficient as a description of such land. Notice of the filing of a report must show, at least, what land is to be assessed, and against whom, as owners, the assessment is to be made.⁵ If the assessment district is to be laid out after notice is given, it is, of course, not necessary to describe such district in the notice of such assessment.⁶

§ 756. Method of service of notice.

If the constitutional rights of the property owner are protected, and a notice is provided for which gives him an opportunity to be heard upon the question of benefits, the legislature may determine what method of service shall be resorted to, and it is both necessary and sufficient that service be made in accordance with the terms of the statute.¹ If the statute does not provide specifically for the method of giving notice, a reasonable method of giving notice affording property owners a fair opportunity for hearing, is sufficient,² service by mailing the notice being held sufficient.³ Personal service is unnecessary under such statutes.⁴ The filing of a petition for an improvement, and the report of the commissioners, amount to notice of the amount assessed against each land owner for a drain.⁵ However, it has been held that personal service is necessary, if the statute requires a notice but makes no provision as to the method of service.⁶

§ 757. Personal service.

If personal service is required by statute, such method of service is necessary.¹ Under a statute requiring service upon own-

¹ *City of St. Louis v. Koch*, 169 Mo. 587, 70 S. W. 143 [1902].

² *State, Kellogg, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 353 [1875].

³ *State of Minnesota ex rel. Merriek v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

⁴ *Elgin, Joliet & Eastern Railway Company v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102 [1901]; *Johnson v. Lewis*, 115 Ind. 490, 18 N. E. 7 [1888]; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887]; *Wilson v. State, Karle, Pros.*, 42 N. J. L. (13 Vr.) 612 [1880].

⁵ *Lawrence v. Webster*, 167 Mass. 513, 46 N. E. 123; *King v. Portland*, 38 Or. 402, 52 L. R. A. 812, 63 Pac. 2 [1900].

⁶ *City of Lawrence v. Webster*, 167 Mass. 513, 46 N. E. 123.

⁴ *City of Lawrence v. Webster*, 167 Mass. 513, 46 N. E. 123.

⁵ *Pierce v. Bronnenberg's Estate*, — Ind. App. —, 82 N. E. 126; (denying rehearing of 81 N. E. 739).

⁶ *City of Sedalia v. Gallie*, 49 Mo. App. 392 [1892]; *Wilson v. Inhabitants of City of Trenton*, 53 N. J. L. (24 Vr.) 645, 16 L. R. A. 200, 23 Atl. 278 [1891].

¹ *Simmons v. City of Gardner*, 6 R. I. 255 [1859].

ers who reside in the city, it has been held to be sufficient to deliver a copy of the notice to an authorized agent,² but not to a member of the land owner's family at his residence, it not appearing of what age or degree of intelligence such member was, or whether he was accustomed to receive notices on behalf of the land owner.³ Service by leaving a copy of the notice at the owner's boarding house, during his temporary absence, has been held insufficient as personal notice.⁴ Under a statute providing for service by giving a copy of the notice to the owner personally, or by leaving a copy at his usual place of abode, and for service by publication, if service cannot be made within the city by either of the two foregoing methods, service by publication cannot be made merely by showing that the owner cannot be found, since it is still possible to serve notice by leaving a copy at his usual place of residence.⁵

§ 758. Service by mailing notice.

If the statute provides for service by mailing notices, it is sufficient if the notices are mailed in accordance with the provisions of the statute.¹ The fact that notice is not received,² or that it is received too late,³ does not prevent the notice from being valid, if the statute specifically authorizes service of notice by mail. In such cases, it is the mailing of the notice, and not the receipt thereof, which constitutes service. If the statute requires service by publication, mailing a notice is insufficient,⁴ and is unneces-

² *Wilson v. Inhabitants of City of Trenton*, 53 N. J. L. (24 Vr.) 645, 16 L. R. A. 200, 23 Atl. 278 [1891].

³ *Wilson v. City of Trenton*, 53 N. J. L. (24 Vr.) 645, 16 L. R. A. 200, 23 Atl. 278 [1891]; (reversing *State, Wilson, Pros. v. Trenton*, 53 N. J. L. (24 Vr.) 178, 20 Atl. 738 [1890]).

⁴ *Simmons v. City of Gardner*, 6 R. I. 255 [1859].

⁵ *Longwell v. Kansas City*, 69 Mo. App. 177 [1896].

¹ *City of Chicago v. Galt*, 225 Ill. 368, 80 N. E. 285 [1907]; *People ex rel. Coffman v. Ryan*, 225 Ill. 359, 80 N. E. 279 [1907]; *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127 [1907]; *Gage v. City of Chicago*,

223 Ill. 602, 79 N. E. 294 [1906]; *Elgin, Joliet & Eastern Railway Company v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102 [1901]; *The Chicago West Division Railway Co. v. People ex rel. Kern*, 154 Ill. 256, 40 N. E. 343 [1894]; *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *State, Forbes, Pros. v. City of Elizabeth*, 42 N. J. L. (13 Vr.) 56 [1880].

² *City of Chicago v. Galt*, 225 Ill. 368, 80 N. E. 285 [1907].

³ *People ex rel. Coffman v. Ryan*, 225 Ill. 359, 80 N. E. 279 [1907].

⁴ *Wilson v. Inhabitants of the City of Trenton*, 53 N. J. L. (24 Vr.) 645, 16 L. R. A. 200, 23 Atl. 278 [1891].

sary.⁵ The notice must be sent at the time specified by statute.⁶ To constitute notice by mail, the contents of the notice and the time and place of mailing must be shown.⁷ Failure to give such notice, when required, invalidates the assessment.⁸

§ 759. Service by posting notice or by leaving notice on premises.

Service by posting notices in public and conspicuous places, where the owners of property affected by the improvement would see them in the ordinary course of events in going to and from their property, is a sufficient compliance with the constitutional rights of the property owner, and, if such service is made in compliance with the statutory provisions, it is sufficient.¹ Such service can, however, be made only in substantial compliance with the provisions of the statute, or it will be insufficient.² Posting notices along the line of the improvement, at intervals of not less than one hundred feet, as provided for by statute, is sufficient,³ without reference to gaps to be left where the curbs and roadway are already constructed.⁴ The fact that the improvement includes a street crossing does not render it necessary that notice should be posted in front of each quarter block liable to be assessed.⁵ A provision, requiring a notice to be "published and posted," has been held to mean published "or" posted, where the context shows

⁵ *The Wabash Eastern Railway Company of Illinois v. The Commissioners of the East Lake Fork Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891].

⁶ *Maxwell v. City of Chicago*, 185 Ill. 18, 56 N. E. 1101 [1900].

⁷ *Hayes v. State ex rel. Murray*, 96 Ind. 284 [1884].

⁸ *City of Mobile v. Mobile Light & Railroad Company*, 141 Ala. 442, 38 So. 127 [1904].

¹ *Moll v. City of Chicago*, 194 Ill. 28, 61 N. E. 1012 [1901]; *Blake v. The People, for Use of Caldwell*, 109 Ill. 504 [1884]; *Indianapolis & Cumberland Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316 [1885].

² *White v. Harris*, 116 Cal. 470, 48 Pac. 382 [1897]; *Brooks v. Satterlee*, 49 Cal. 289 [1874]; *Himmelman v. Cahn*, 49 Cal. 285 [1874]; *Hewes v. Reis*, 40 Cal. 255 [1870]; *White &*

Gleason v. City of Chicago, 188 Ill. 392, 58 N. E. 917 [1900]; *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *The People ex rel. Samuel, Sr. v. Cooper*, 139 Ill. 461, 29 N. E. 572 [1893]. *Contra*: that failure to post notices does not invalidate the assessment, *Astor v. Mayor, etc., of the City of New York*, 39 N. Y. Sup. Ct. 120 [1875].

³ *Dowling v. Hibernia Savings & Loan Society*, 143 Cal. 425, 77 Pac. 141 [1904].

⁴ *Dowling v. Hibernia Savings & Loan Society*, 143 Cal. 425, 77 Pac. 141 [1904].

⁵ *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891]. See also *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023 [1902]; *California Improvement Company v. Reynolds*, 123 Cal. 88, 55 Pac. 802 [1898]; *White v. Harris*, 116 Cal. 470, 48 Pac. 382 [1897].

that publication is necessary, if there is a newspaper published in the city, and that otherwise posting is necessary.⁶ By statute it is sometimes provided that a notice must be left on the premises.⁷ Such a statute is sufficiently complied with only if the notice is left where it would ordinarily be seen by the property owner,⁸ and, accordingly, placing the notice under a stone, which covered it entirely, has been held not to be a sufficient notice.⁹ The notice must be posted for the time provided by statute.¹⁰

§ 760. Service by publication.

The property owner has no constitutional right to personal service. If the statute provides for a service by publication of such a sort as fairly to amount to constructive notice, and publication is had in compliance with the terms of the statute, the property owner receives sufficient notice and cannot attack the assessment proceedings on the ground of want of notice.¹ If, by statute, ser-

⁶ Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310 [1893].

⁷ O'Bryne v. City of Philadelphia, to Use of Adams, 93 Pa. St. 225 [1880].

⁸ City of Philadelphia to Use of Winmill v. Edwards, 78 Pa. St. (28 P. F. Smith) 62 [1875].

⁹ City of Philadelphia to Use of Winmill v. Edwards, 78 Pa. St. (28 P. F. Smith) 62 [1875].

¹⁰ O'Bryne v. City of Philadelphia, 93 Pa. St. 225 [1880].

¹ Ballard v. Hunter, 204 U. S. 241, 27 S. 261 [1907]; (affirming, 74 Ark. 174, 85 S. W. 252 [1905]); Wight v. Davidson, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (reversing, Davidson v. Wight, 16 D. C. App. 371 [1900]); Bellingham Bay & British Columbia Railroad v. New Whatcom, 172 U. S. 314, 19 S. 205, 43 L. 460 [1899]; (affirming City of New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131, 47 Pac. 236 [1896]); Ogden City v. Armstrong, 168 U. S. 224, 18 S. 98 [1897]; (modifying, Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119 [1895]); Fallbrook Irrigation District v. Bradlev, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing, Bradley v.

Fallbrook Irrigation District, 68 Fed. 948 [1895]); Paulsen v. Portland, 149 U. S. 30, 13 S. 750 [1893]; Lent v. Tillson, 140 U. S. 316, 35 L. 419, 11 S. 825 [1891]; (affirming, Lent v. Tillson, 72 Cal. 404, 14 Pac. 71 [1887]); Hagar v. Reclamation District, 111 U. S. 701, 4 S. 663 [1884]; Wulzen v. Board of Supervisors of the City of San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353 [1894]; Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310 [1893]; Elgin, Joliet & Eastern Railroad Company v. Hohenshell, 193 Ill. 159, 61 N. E. 1102 [1901]; Dickey v. City of Chicago, 152 Ill. 468, 38 N. E. 932 [1894]; The Wabash Eastern Ry. Co. of Illinois v. The Commissioners of the East Lake Fork Special Drainage District, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891]; Sarber v. Rankin, 154 Ind. 236, 56 N. E. 225 [1899]; Bannister v. Grassy Fork Ditching Assoc., 52 Ind. 178 [1875]; Moberry v. City of Jeffersonville, 38 Ind. 198 [1871]; Diven v. Burlington Savings Bank, — Ind. App. —, 82 N. E. 1020 [1907]; Lyman v. Plummer, 75 Ia. 353, 39 N. W. 527 [1888]; Roche v. The City of Dubuque, 42 Ia. 250 [1875]; City of

vice by publication is specifically provided for, such service must ordinarily be made.² It has been held, however, that if the statute provides for constructive notice by publication, personal service of a notice in place of service by publication is sufficient.³ If the statute requires notice,⁴ or a notice in writing,⁵ without specifying notice by publication, it has been held that notice by publication is insufficient. The propriety of notice by publication, under such circumstances, has been queried but not decided.⁶ In other cases, it has been suggested that, if the statute makes no specific provision as to the method of service, service by publication is sufficient, on the theory that the method of serving notice is left to the discretion of the public corporation.⁷ It may be provided by statute that personal service shall be had upon residents,⁸ or upon the owners who can be found,⁹ while service by publication may be had as against non-residents,¹⁰ or against owners who cannot be found.¹¹ If the statute provides for service by

Dubuque v. Wooton, 28 Ia. 571 [1870]; Hoertz v. Jefferson Southern Pond Draining Co., 119 Ky. 824, 84 S. W. 1141, 27 Ky. Law Rep. 278 [1905]; Chesapeake & Ohio Ry. Co. v. Mullins, 94 Ky. 355, 22 S. W. 558 [1893]; Williams v. Mayor, etc., of Detroit, 2 Mich. 560 [1853]; Dousman v. City of St. Paul, 23 Minn. 394 [1877]; City of St. Joseph v. Truckenmiller, 183 Mo. 9, 81 S. W. 1116 [1904]; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600 [1896]; State, Forbes, Pros. v. City of Elizabeth, 42 N. J. L. (13 Vr.) 56 [1880]; State ex rel. Boice, Pros. v. City of Plainfield, 38 N. J. L. (9 Vr.) 95 [1875]; In the Matter of DePyster, 80 N. Y. 565 [1880]; Hastings v. Columbus, 42 O. S. 585 [1885]; City of Cincinnati, for Use of Ashman v. Bickett, 26 O. S. 49 [1875]; Duniway v. City of Portland, 47 Or. 103, 81 Pac. 945 [1905]; Barkley v. Oregon City, 24 Or. 515, 33 Pac. 978 [1893]; City of Galveston v. Heard, 54 Tex. 420 [1881]; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332 [1896]; Fass v. Seehawer, 60 Wis. 525, 19 N. W. 533 [1884].

²Starr v. City of Burlington, 45 Ia. 87 [1876]; Roche v. The City of Dubuque, 42 Ia. 250 [1875]; City of Dubuque v. Wooton, 28 Ia. 571 [1870].

³City of Charton v. Holliday, 60 Ia. 391, 14 N. W. 775 [1882]; Town of Tumwater v. Pix, 15 Wash. 324, 46 Pac. 388 [1896].

⁴City of Sedalia v. Gallie, 49 Mo. App. 392 [1892].

⁵Sessions v. Crunkilton, 20 O. S. 349 [1870].

⁶Brewster v. Mayor and Common Council of City of Newark, 11 N. J. Eq. (3 Stockton) 114 [1856].

⁷Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 781 [1885]; Chesapeake & Ohio Railway Company v. Mullins, 94 Ky. 355, 22 S. W. 558 [1893]; Plackie v. Hudson, 117 Mass. 181 [1875].

⁸City of Charton v. Holliday, 60 Ia. 391, 14 N. W. 775 [1882].

⁹Gage v. Webb, 141 Ill. 533, 31 N. E. 130 [1893].

¹⁰City of Charton v. Holliday, 60 Ia. 391, 14 N. W. 775 [1882].

¹¹Gage v. Webb, 141 Ill. 533, 31 N. E. 130 [1893].

publication only in cases where the owner is unknown, such service cannot be made upon a known owner.¹²

§ 761. In what newspaper publication may be had.

If notice by publication is provided for, publication can be had only in a newspaper, which conforms to the statutory requirements prescribing the kind of newspaper in which publication may be had.¹ A statute, which, without previously referring to a daily newspaper, requires publication in at least one of "said daily newspapers," merely requires such publication in any daily newspaper in the city.² Whether notice can be published on Sunday or not, a Sunday edition, which is furnished and sold under different terms from the issue of the paper on week days, is not regarded as an edition in which it is necessary to publish a notice. Where such paper is selected as an official organ of publication, the week-day issue is presumed to be intended under such circumstances, although the Sunday edition is numbered consecutively with the week-day edition.³ In the absence of a statutory provision to the contrary, the newspaper selected for publication must be printed in the English language.⁴ If the paper is printed in two or more parts, which are always sold or delivered together, one of which is called a supplement, insertion of the notice in such supplement is proper.⁵ If two or more editions of a paper are published daily, both circulating in the public corporation by which the improvement is being constructed, the notice may be printed in either edition.⁶ If, however, one edition circulates only in the country, and not in the city, it is not proper to publish in such edition a notice with reference to an improvement in the city.⁷ The fact that the name of the paper is changed during the course of publication of a notice does not invalidate such publica-

¹² *Dickey v. City of Chicago*, 152 Ill. 468, 38 N. E. 932 [1894].

¹ *California Improvement Co. v. Moran*, 128 Cal. 373, 60 Pac. 969 [1900]; *Chase v. City Treasurer of City of Los Angeles*, 122 Cal. 540, 55 Pac. 414 [1898].

² *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

³ *Voght v. City of Buffalo*, 133 N. Y. 463, 31 N. E. 340 [1892].

⁴ *Wilder v. City of Cincinnati*, 26 O. S. 284 [1875]; *City of Cincinnati for Use of Ashman v. Bickett*, 26 O. S. 49 [1875].

⁵ *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 285 [1891]; (affirming. *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]).

⁶ *Guest v. City of Brooklyn*, 9 Hun. 198 [1876].

⁷ *Haskell v. Bartlett*, 34 Cal. 281 [1867].

tion, if the volume and number of the paper are not changed, and the notice is published for a sufficient number of times.⁸ The public corporation may designate the paper in which a resolution is to be published, by a provision in such resolution in the absence of a statutory provision to the contrary.⁹

§ 762. Official newspaper.

Under some statutes, it is provided that one or more newspapers shall be designated in some way by the public corporation as the official organs in which notices are to be published.¹ Under such statutes a notice published in the official organ is sufficient, if otherwise in conformity to law.² A publication in any paper, other than that officially designated, has no legal effect.³ If the notice, which it is necessary to publish, is not published in the official newspaper, it is without legal effect, and the proceedings are invalid.* Under some statutes, which provide for the appointment of more than one official paper, it is necessary that the notice should be published in all the special papers.⁵ Such a provision is mandatory, and a failure to publish the notice in all the official papers invalidates the proceedings.⁶ While, in some of the earlier cases decided by the inferior courts, these provisions were regarded as directory merely, and it was held that failure to publish in

⁸ *Clinton v. City of Portland*, 26 Ore. 410, 38 Pac. 407 [1894].

⁹ *King v. Lamb*, 117 Cal. 401, 49 Pac. 561 [1897].

¹ In the *Matter of Astor*, 50 N. Y. 363 [1872].

² *Erie v. Bootz*, 72 Pa. St. (22 P. F. Smith) 196 [1872].

³ *California Improvement Company v. Moran*, 128 Cal. 373, 60 Pac. 969 [1900]; *Chase v. City Treasurer of the City of Los Angeles*, 122 Cal. 540, 55 Pac. 414 [1898]; *Yaggy v. City of Chicago*, 194 Ill. 88, 62 N. E. 316 [1901]; (distinguished in *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902]); *Medland v. Connell*, 57 Neb. 10, 77 N. W. 437 [1898]. See also *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866 [1900]; In the *Matter of Keteltas*, 48 Howard (N. Y.) 116 [1874].

⁴ *Eno v. Mayor, etc.*, 53 Howard, 382 [1877]; In the *Matter of Keteltas*, 48 Howard, 116 [1874]; *Redmond v. Mayor, etc., of the City of New York*, 58 N. Y. Sup. Ct. -Rep. 348, 11 N. Y. S. 782 [1890].

⁵ In the *Matter of Burmeister*, 76 N. Y. 174 [1879]; (reversing, In the *Matter of Burmeister*, 9 Hun, 613 [1877]); In the *Matter of Anderson*, 60 N. Y. 457 [1875]; In the *Matter of Astor*, 50 N. Y. 363 [1872].

⁶ In the *Matter of Conway*, 62 N. Y. 504 [1875]; (modifying In the *Matter of Conway v. Mayor, etc., of the City of New York*, 4 Hun (N. Y.) 43 [1875]); In the *Matter of Astor*, 50 N. Y. 363 [1872]; In the *Matter of Douglas*, 46 N. Y. 42 [1871]; (reversing In the *Matter of Douglas*, 58 Barb. 174, 40 Howard 201 [1870]); *Matter of Douglas*, 12 Abb. Pr. 161 [1871].

all the papers did not invalidate the improvement,⁷ this original view must be regarded as abandoned, and some of the specific cases have been overruled. If no official paper has been designated, no valid notice can be published, and proceedings in which a notice is requisite cannot be had.⁸ The official paper must be designated in compliance with the statutory requirements. It has been said to be necessary that the name and title of the paper should be communicated to the common council and to the clerk of each board thereof.⁹ It will be presumed that the clerk read to the council the name of the paper as it appeared in the resolution adopted, and not the name of another newspaper subsequently inserted after the name of the first paper was erased.¹⁰ The paper in which publication is to be made must be designated in advance. Publication in an unauthorized newspaper cannot be ratified subsequently,¹¹ even if, before publication, the statute is changed so as to make designation of a newspaper unnecessary.¹² To establish the fact that a given newspaper is the official newspaper of the city, it must further be shown that such newspaper accepted the employment.¹³ As to the public at large, the fact that official proceedings are published in a given newspaper, and that it acts as the official newspaper and is so recognized by the public officials, shows sufficiently that such paper is the official paper without producing the record of its appointment.¹⁴ If the official paper is to be selected by competitive bidding, and an award is made to a given paper in which notices are subsequently published, a property owner cannot show in a suit involving the validity of an assessment, that such paper was not, in fact, the lowest bidder, and

⁷ In the Matter of Douglas, 58 Barb. 174 [1870]; In the Matter of Smith, 65 Barb. 283 [1873]; In the Matter of Douglas, 40 Howard, 201 [1870].

⁸ In the Matter of Smith, 52 N. Y. 526 [1873]; Zeigler v. Flack, 54 N. Y. Sup. Ct. Rep. 69 [1886]; In the Matter of Burmeister, 56 Howard, 416 [1879].

⁹ In the Matter of Peugnet, 5 Hun, 434 [1875].

¹⁰ California Improvement Co. v. Moran, 128 Cal. 373, 60 Pac. 969 [1900].

¹¹ California Improvement Co. v. Moran, 128 Cal. 373, 60 Pac. 969 [1900]; Yaggy v. City of Chicago, 194 Ill. 88, 62 N. E. 316 [1901]; (distinguished in Field v. City of Chicago, 198 Ill. 224, 64 N. E. 840 [1902]).

¹² Yaggy v. City of Chicago, 194 Ill. 88, 62 N. E. 316 [1901].

¹³ In the Matter of Anderson, 48 Howard, 279 [1874]; In the Matter of Phillips v. Mayor, Aldermen and Commonalty of the City of New York, 2 Hun (N. Y.) 212 [1874].

¹⁴ Rich v. City of Chicago, 59 Ill. 286 [1871].

that such appointment was therefore irregular.¹⁵ Where an award had been made to a newspaper, declaring it the official paper, the fact that the contract between such paper and the city has not been reduced to writing and a bond has not been given by the newspaper, does not invalidate the publication by notice in such paper.¹⁶ If, by the appointment of an official newspaper, the term of its appointment is limited to one year, such newspaper ceases to be the official newspaper at the end of the year, unless a new appointment is made;¹⁷ and it will not be presumed, in the absence of evidence, that such paper was designated by new appointment for the following year.¹⁸ Accordingly, the fact that a notice is not published in such paper after the expiration of the year for which its appointment was to run, does not show that the notice was not published in all official newspapers.¹⁹ If the official paper has been changed, it will be presumed, in the absence of evidence to the contrary, in case notice is not published in the official paper thus designated, that publication was ordered and had been begun before the official designation of the newspaper was complete.²⁰ Under some statutes, failure to publish notices in a designated paper is an irregularity which does not invalidate the assessment, except in case of fraud or repavement.²¹ Within the meaning of such statute laying a new sidewalk is repaving.²²

¹⁵ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900].

¹⁶ *M'Kusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890].

¹⁷ *In the Matter of Burke*, 62 N. Y. 224 [1875]; *Adrianee v. McCafferty*, 25 N. Y. Sup. Ct. Rep. 153 [1864].

¹⁸ *In the Matter of Burke*, 62 N. Y. 224 [1875]. For other cases involving change of statutes as to designation of official newspapers, and as to the official who is to designate such paper, and the presumptions arising thereunder, see *In the Matter of Astor*, 50 N. Y. 363 [1872]; *In the Matter of Folsom*, 56 N. Y. 60; (distinguished in *In re Burke*, 62 N. Y. 224 [1875];) *In re Burke*, 62 N. Y. 224; - (distinguishing *In the Matter of Astor*, 50 N. Y. 363 [1872]; *In the Matter of Folsom*, 56 N. Y. 60

[1874]); *In the Matter of Anderson*, 60 N. Y. 457 [1875]; (distinguishing *In the Matter of Phillips*, 60 N. Y. 16, which reverses *In re Phillips*, 2 Hun, 212, 4 N. Y. S. C. (T. & C.) 484, and *In the Matter of Little*, 60 N. Y. 343 [1875] and *In the Matter of Astor*, 50 N. Y. 363 [1872]).

¹⁹ *In the Matter of Anderson*, 60 N. Y. 457 [1875].

²⁰ *In the Matter of Corwin*, 14 Hun. 34 [1878].

²¹ *In the Matter of Warren*, 85 N. Y. 268 [1881].

²² *In the Matter of Burmeister*, 76 N. Y. 174 [1879]; (reversing, *In the Matter of Burmeister*, 12 Hun, 478 [1878]; which followed *In the Matter of Burmeister*, 9 Hun, 613 [1877]); *In the Matter of Burke*, 62 N. Y. 224 [1875]; *In the Matter of Phillips*, 60 N. Y. 16.

§ 763. Time and number of publications necessary.

The provisions of the statute control as to the number of publications which is necessary to render the notice valid.¹ A notice published for the number of times required by statute is sufficient, if otherwise in compliance with the statute;² while a notice published a less number of times than required by statute is insufficient.³ A statute fixing the number of times of publication of a notice, in case of a specific improvement, supersedes a general statute on the subject of the publication of notices.⁴ If the statute requires the publication for four weeks before an assessment is equalized, a publication of a notice in the issue of September eleventh, and in the issue of September thirtieth, has been held to be insufficient, where the assessment was equalized on the third of October.⁵ If the statute requires notice for at least six days prior to a meeting, a notice published on the twenty-third and followed by a meeting on the twenty-eighth of the same month, is insufficient.⁶ Under some statutes, failure to publish for the statutory time is held to be a mere irregularity, which may be waived if objection is not made within a short period of limitations specified by statute.⁷ If the statute requires publication each day for two weeks in two newspapers, publication for two weeks in one newspaper

¹ *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223 [1902].

² *Evans v. The People ex rel. Kern*, 139 Ill. 552, 28 N. E. 1111 [1893]; *LeMoyne v. West Chicago Park Commissioners*, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48 [1886]; *Allen v. City of Chicago*, 57 Ill. 264 [1870]; *Rue v. City of Chicago*, 57 Ill. 435 [1870].

³ *Anderson v. DeUrioste*, 96 Cal. 404, 31 Pac. 266 [1892]; *Andrews v. People ex rel. Rumsey*, 83 Ill. 529 [1876]; *Beyrigh v. City of Chicago*, 65 Ill. 189 [1872]; *Mars' v. City of Chicago*, 62 Ill. 115 [1871]; *Brown v. City of Chicago*, 62 Ill. 289 [1871]; *Heminway v. City of Chicago*, 60 Ill. 324 [1871]; *Yaekel v. City of Lafayette*, 48 Ind. 116 [1874]; *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223 [1902]; *Lovell v. City of St. Paul*, 10 Minn. 290 [1865]; *Shannon v. City of Omaha*, 72 Neb. 281, 100 N. W. 298 [1904];

Wakeley v. City of Omaha, 58 Neb. 245, 78 N. W. 511 [1899]; *Medland v. Connell*, 57 Neb. 10, 77 N. W. 437 [1898]; *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524 [1898]; *Cook v. Gage County*, 65 Neb. 611, 91 N. W. 559 [1902]; *State, White, Pros. v. Mayor and Council of the City of Bayonne*, 49 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887].

⁴ *LeMoyne v. West Chicago Park Commissioners*, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48 [1886]. For other cases involving conflicting statutes on this question see *Anderson v. De Urioste*, 96 Cal. 404, 31 Pac. 266 [1892]; *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 223 [1902].

⁵ *Cook v. Gage County*, 65 Neb. 611, 91 N. W. 559 [1902].

⁶ *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524 [1898].

⁷ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

and for one day less than two weeks in the other, is insufficient.⁸ Under some statutes, it has been held that notice cannot be published on Sunday in the absence of a provision expressly authorizing such publication, and that, accordingly, if a sufficient number of publications cannot be shown without the publication on Sunday, such publication is insufficient.⁹ It is said to be proper to omit publication on Sunday.¹⁰ Under some statutes, publication on Sunday is specifically forbidden;¹¹ or it is provided that the notice need be published on week days only.¹² If the newspaper in which the notice is published is not issued on Sunday, publication is sufficient, if made for a sufficient number of times without counting Sunday.¹³ The fact that a notice is published on Sunday does not invalidate the assessment proceedings, if it is published a sufficient number of times, exclusive of Sunday.¹⁴ Thus, under a statute requiring a publication for six days, a publication on each day, beginning with the sixth and ending with the twelfth, inclusive, was sufficient, although one of the publications was made on Sunday.¹⁵ Under some statutes, the fact that in order to make up the necessary number of publications a publication on Sunday must be counted, is a mere irregularity within the curative provisions of statutes concerning irregularities.¹⁶ Under other statutes, it has been held that if no specific provision is made with reference to publication on Sunday, a valid publication may be made on Sunday.¹⁷ This holding is based on the theory that restrictions on serving writs or legal process on Sunday apply to actual service and not to constructive service.¹⁸ A return

⁸ *State, White, Pros. v. Mayor and Council of the City of Bayonne*, 49 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887].

⁹ *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *Sewell v. City of St. Paul*, 20 Minn. 511 [1874].

¹⁰ *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144 [1895].

¹¹ *The People of the City and County of San Francisco v. McCain*, 50 Cal. 210 [1875].

¹² *Bank of Columbia v. Portland*, 41 Or. 1. 67 Pac. 1112 [1902].

¹³ *California Improvement Company v. Reynolds*, 123 Cal. 88, 55 Pac. 802 [1898].

¹⁴ *Portsmouth Savings Bank v. City of Omaha*, 67 Neb. 50, 93 N. W. 231 [1903].

¹⁵ *Portsmouth Sav. Bank v. City of Omaha*, 67 Neb. 50, 93 N. W. 231 [1903].

¹⁶ *Hastings v. Columbus*, 42 O. S. 585 [1885].

¹⁷ *Smith v. Hazard*, 110 Cal. 145, 42 Pac. 465 [1895]; *Miles v. McDermott*, 31 Cal. 271 [1866]; *Taylor v. Palmer*, 31 Cal. 240 [1866]; *Barber Asphalt Paving Company v. Muchenberger*, 105 Mo. App. 47, 78 S. W. 280 [1903].

¹⁸ *Barber Asphalt Paving Company v. Muchenberger*, 105 Mo. App. 47, 78 S. W. 280 [1903].

showing that a notice has been published ten days, has been said *prima facie* to imply publication on ten secular days.¹⁹ It is frequently provided by statute that publication must be made for a certain number of successive days. Under such statutes, publication must be made for the number of successive days prescribed by statute.²⁰ Accordingly, if the statute requires publication on five successive days, a showing that the publication was made five times is, of itself, insufficient.²¹ If Sundays and holidays are not to be counted as days on which publication may be had, a statute requiring publication for a certain number of successive days is satisfied by publication for the required number of days, excluding from the computation Sundays and holidays.²² It has been held that if it is shown that the notice is, in fact, published, it will be presumed, in the absence of further evidence, that it was published for the length of time required by statute.²³ A defective publication of notices in assessment proceedings may be cured by a subsequent confirmation.²⁴ If the statute does not fix the number of days' notice to be given before application to the court for appointment of assessors, it has been said that the court should be asked to fix the period of publication.²⁵ If, however, notice is published without order of the court, and the court then appoints assessors, this is looked on as an approval of the publication as made.²⁶ It is frequently provided by statute that so many "days' notice" must be published. It is generally held that this does not mean publication for each day for the specified number of days, but that such a statute is specified by a single publication for the requisite number of days before the step in the assessment

¹⁹ Jenks v. City of Chicago, 48 Ill. 296 [1868].

²⁰ Perry v. People ex rel. Kern, 155 Ill. 307, 40 N. E. 468 [1895].

²¹ Casey v. People ex rel. Kochersperger, 165 Ill. 49, 46 N. E. 7 [1897]; Tober v. City of Chicago, 164 Ill. 572, 45 N. E. 1010 [1897]; Chandler v. People ex rel. Kochersperger, 161 Ill. 41, 43 N. E. 590 [1896]; Evans v. The People ex rel. Kern, 139 Ill. 552, 28 N. E. 1111 [1893].

²² Rasmussen v. People ex rel. Kern, 155 Ill. 70, 39 N. E. 606 [1895]; Jenks v. City of Chicago, 48

Ill. 296 [1868]; Galveston v. Heard, 54 Tex. 420 [1881].

²³ Arnold v. City of Ft. Dodge, 111 Ia. 152, 82 N. W. 495 [1900].

²⁴ Illinois Central Railroad Co. v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901].

²⁵ State of Minnesota ex rel. Merrick v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625 [1885].

²⁶ State of Minnesota ex rel. Merrick v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625 [1885].

proceedings for which notice is to be given.²⁷ Thus, a statute requiring "at least sixty days notice," has been held to mean that the period of sixty days must elapse after the publication of the notice before the performance of the act of which notice is to be given. Accordingly, giving notice once a week for nine successive weeks was held to be a compliance with the statute.²⁸ It has, however, been held that a statute requiring notice "by six days publication," means publication for six different days;²⁹ and a statute providing "— days notice" has been held to require at least more than one publication.³⁰ A statute requiring publication for "two successive weeks," has been held to be complied with by publication on the seventh and fourteenth of the same month.³¹ If the notice is published in a weekly newspaper, it is not necessary that it shall be for two full weeks.³² Under a statute requiring publication for two weeks, successively, it has been said that publication on Tuesday and Saturday for two successive weeks was sufficient, although the paper was issued daily, except Sunday.³³ If the statute requires publication in a daily newspaper, and, if there is no daily newspaper, in a semi-weekly or a weekly newspaper, as often as the same is issued, it is held to require publication in the daily newspaper as often as it is regularly issued; and, if the regular publication is omitted on Sundays and holidays, such omission does not invalidate the notice.³⁴ The fact that on one holiday an extra edition, of one-half the regular size, was published, on account of a strike, from which the notice was omitted, does not render the publication of the notice invalid.³⁵

²⁷ *McGilvery v. City of Lewiston*, 13 Idaho 338, 90 Pac. 348 [1907]; *Royal Insurance Co. v. South Park Commissioners*, 175 Ill. 491, 51 N. E. 558 [1898]; *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898]; *Hayes v. State ex rel. Murray*, 96 Ind. 284 [1884]; *Philadelphia, Wilmington & Baltimore R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890]; *The Central Savings Bank of Baltimore v. The Mayor and City Council of Baltimore*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283 [1889]; *In the Matter of Bassford*, 50 N. Y. 509 [1872]; *In the Matter of Corwin*, 14 Hun, 34 [1878]; *In the Matter of Douglas*, 58 Barb. 174 [1870]; *In the*

Matter of Douglas, 12 Abb. Pr. 161 [1871].

²⁸ *Mayor and City Council of Baltimore v. The Little Sisters of the Poor*, 56 Md. 400 [1881].

²⁹ *Scammon v. The City of Chicago*, 40 Ill. 146 [1866].

³⁰ *Olds v. Erie City*, 79 Pa. St. (29 P. F. Smith) 380 [1875].

³¹ *Ricketts v. Village of Hyde Park*, 85 Ill. 110 [1877].

³² *Brewer v. City of Springfield*, 97 Mass. 152 [1867].

³³ *Brewer v. City of Springfield*, 97 Mass. 152 [1867].

³⁴ *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772 [1900].

³⁵ *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772 [1900].

The statute may specifically require publication for a certain number of times a week for a certain number of weeks.³⁶ It has been held that where the statute requires notice to be given for at least six days prior to a meeting, notice must be given during the six days immediately prior to such meeting.³⁷ If the statute requires publication for a specified number of days, the question is frequently presented, how to compute such number. If the statute requires ten days to elapse between the first publication and the first date of the next term of the court at which confirmation can be heard, it is said to be proper to exclude the day on which the notice is first published, and include the day on which the term begins.³⁸ Under a statute, requiring publication daily for five days, excepting Sunday, a publication beginning on March 4th and ending on Sunday, March 8th, was held to be insufficient.³⁹ If the statute requires the notice to be published daily, Sundays excepted, for ten days, the fact that on two days, other than Sundays, the paper was not issued and publication was not made, renders the publication invalid.⁴⁰ Under a statute requiring publication three times for three successive weeks, publication on Friday and Saturday of the first week, on each day of the second week, and from Monday to Thursday of the third week, is sufficient.⁴¹ Under a statute requiring three weeks' publication, a notice given, beginning October first and ending on October twenty-second, inclusive, was held to be sufficient notice of an act to be done on October thirtieth.⁴²

§ 764. Proof of service of notice.

By many statutory provisions some formal proof of the service of the notice in a manner prescribed by law is necessary.¹ The return or proof of service must ordinarily show affirmatively what acts were done in serving the notice, and the acts thus shown

³⁶ *Andrews v. People ex rel. Rumsey*, 83 Ill. 529 [1876].

³⁷ *Shannon v. City of Omaha*, 72 Neb. 281, 100 N. W. 298 [1904].

³⁸ *Brown v. City of Chicago*, 117 Ill. 21, 7 N. E. 108 [1887].

³⁹ *Alameda Macadamizing Company v. Huff*, 57 Cal. 331 [1881]. See also *The People of the City and County of San Francisco v. McCain*, 50 Cal. 210 [1875].

⁴⁰ *Haskell v. Bartlett*, 34 Cal. 281 [1867].

⁴¹ *Andrews v. The People ex rel. Rumsey*, 84 Ill. 28 [1876].

⁴² *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906]. As to computation of time, see also, *City of Trenton ex rel. Gardner v. Collier*, 68 Mo. App. 483 [1896].

¹ *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

must in law constitute a sufficient service.² A statement that the parties serving the notice "gave the notice required by statute," is not sufficient.³ If the notice can be served in time only by serving it before the date of the return, the return, to be sufficient, must show on what date the notice was served.⁴ The facts stated in the proof or return are regarded as *prima facie* true.⁵ A return showing service on the person in whose name the property is "taxed," is insufficient, since it may be assessed in the name of another person.⁶ Where the formal proof of publication is sufficient, it must show on its face the facts which constitute sufficient service by publication, although such facts, if stated substantially, need not be given in literal compliance with the statute. It is sufficient if the certificate states the day of the first publication, and the fact that the notice was published a certain number of successive days, if such facts comply with the statutory requirements as to publication.⁷ This is true, even if the first and last days are given, and they are separated by a greater interval of time than the number of successive days on which the certificate shows the publication was had.⁸ A certificate showing that a notice was published a certain number of consecutive days, excepting Sundays and holidays, and commencing on a specified date, is insufficient, since, by reason of such exception and the failure to state the last day of publication, it cannot be determined from the certificate on what days the notice was published.⁹ Under a statute providing for publication for "five successive days," a certificate showing a publication for "five times" is insufficient.¹⁰ This is true, even if the date of the first publication and the last was given.¹¹ If a certain length of time must elapse

² Gage v. Webb, 141 Ill. 533, 31 N. E. 130 [1893]; Lane v. Burnap, Drain Commissioner, 39 Mich. 736 [1878]; O'Bryne v. City of Philadelphia, 93 Pa. St. (12 Norris) 225 [1880].

³ People ex rel. Livermore v. Burnap, 38 Mich. 350 [1878].

⁴ Lane v. Burnap, 39 Mich. 736 [1878].

⁵ Beals v. James, 173 Mass. 501, 54 N. E. 245 [1899].

⁶ Gage v. Webb, 141 Ill. 533, 31 N. E. 130 [1893].

⁷ McChesney v. The People ex rel. Kern, 145 Ill. 614, 34 N. E. 431 [1893]; Hemingway v. City of Chi-

cago, 60 Ill. 324 [1871]; Smith v. City of Chicago, 57 Ill. 497 [1870]; Jenks v. City of Chicago, 48 Ill. 296 [1868].

⁸ Perry v. People ex rel. Kern, 155 Ill. 307, 40 N. E. 468 [1895].

⁹ Beygeh v. City of Chicago, 65 Ill. 189 [1872].

¹⁰ Tober v. City of Chicago, 164 Ill. 572, 45 N. E. 1010 [1897]; Evans v. People ex rel. Kern, 139 Ill. 552, 28 N. E. 1111 [1893].

¹¹ Chandler v. People ex rel. Kochersperger, 161 Ill. 41, 43 N. E. 590 [1896]; Evans v. People ex rel. Kern, 139 Ill. 552, 28 N. E. 1111 [1893].

between the termination of the publication and the act of which notice is given, the certificate or formal proof of publication must state the last day of publication or something equivalent thereto.¹² If the proof of publication states that it was published for a certain number of successive days, commencing at a specified date, the court can, from these facts, determine the date of the first and last publication.¹³ If notices are to be mailed to the property owner, the proof of mailing must show upon its face that the statutory requirements were complied with, substantially at least.¹⁴ The affidavit of mailing notices must show that they were mailed within the time prescribed by statute.¹⁵ If the affidavit does not show the time at which the notices were mailed, such defect is cured by confirmation.¹⁶ Unless the statute requires the names of the owners, it is sufficient if the affidavit states in general terms that notice was mailed to the owners whose premises have been assessed, and whose names and places of residence are known, without setting out the names of such owners.¹⁷ The use of abbreviations does not invalidate the notice.¹⁸ The affidavit need not set out a copy of the notice which was mailed.¹⁹ If a copy is set out, it may be regarded as surplusage, and, hence, a defect in such copy does not render the affidavit invalid.²⁰ The affidavit of mailing must be made by the persons prescribed by statute. If the statute provides that the affidavit may be made by one or more of the commissioners, it need not be made by all of them, even if by statute the notice must be mailed to owners,

¹² *Brown v. City of Chicago*, 62 Ill. 289 [1871]; *Marsh v. City of Chicago*, 62 Ill. 115 [1871]; *Hemingway v. Chicago*, 60 Ill. 324 [1871]; *Rich v. City of Chicago*, 59 Ill. 286 [1871]; *Butler v. City of Chicago*, 56 Ill. 341 [1870]; *Rue v. City of Chicago*, 57 Ill. 435 [1870]; *Allen v. City of Chicago*, 57 Ill. 264 [1870].

¹³ *Griffin v. City of Chicago*, 57 Ill. 317 [1870].

¹⁴ *Sheridan v. City of Chicago*, 175 Ill. 421, 51 N. E. 898 [1898].

¹⁵ *Sheridan v. City of Chicago*, 175 Ill. 421, 51 N. E. 898 [1898]; *Maxwell v. City of Chicago*, 185 Ill. 18, 56 N. E. 1101 [1900].

¹⁶ *Dickey v. People ex rel. Kochersperger*, 160 Ill. 633, 43 N. E. 606 [1896].

¹⁷ *Link v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893].

¹⁸ *West Chicago Street Ry. Co. v. People ex rel. Kern*, 156 Ill. 18, 40 N. E. 605 [1895]; *West Chicago Street Railway Co. v. People, Kern*, 155 Ill. 299, 40 N. E. Rep. 599 [1895]; *Chicago West Division Ry. Co. v. People ex rel. 154 Ill. 256*, 40 N. E. 342 [1894].

¹⁹ *West Chicago Street Railway Co. v. People ex rel. Kern*, 155 Ill. 299, 40 N. E. 599 [1895]; *Falch v. People ex rel. 8 Bradwell (Ill.) 351* [1880].

²⁰ *Schemick v. City of Chicago*, 151 Ill. 336, 37 N. E. 888 [1894].

who are known to any one of the commissioners.²¹ In cases of personal service a return, showing that a true copy of the notice was given to the property owners or their agents, or was left at their last and usual place of abode, has been held to be sufficient.²² In another jurisdiction, however, a return that notice was served by handing a true copy of the notice to the legal agent of the owner, has been held to be insufficient, since it does not show that the agent had authority to accept such notice.²³ A return that a notice was served "by having had personal service" upon the owners is insufficient, as it does not show what acts were done to constitute personal service.²⁴ If a notice is to be posted, the proof or affidavit of posting must show the facts, which constitute a compliance with the terms of the statute.²⁵ Such statement is sufficient.²⁶ Unless the statute specifically requires it, it is sufficient, under a statute requiring a notice to be published in four public places in the city, two of which shall be in the neighborhood of the proposed improvement, if the affidavit follows the language of the statute and does not show specifically in what places the notices were posted.²⁷ If the affidavit does not show that the notices were posted in public places, such affidavit is defective, but it may be cured by the certificate of the clerk, showing that the notices were posted in public places.²⁸ Proof of posting notices may be made by affidavit, if such affidavit is provided for by ordinance, and if by statute the city is authorized to fix the method of notice by ordinance.²⁹ This affidavit may be subscribed and sworn to by the party by whom the notice was posted.³⁰ An affidavit as to the posting and mailing of notices may be amended after confirmation, and at a subsequent term of court, on giving

²¹ *Evans v. The People ex rel. Kern*, 139 Ill. 552, 28 N. E. 1111 [1893]; *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *McChesney v. People ex rel. Kern*, 148 Ill. 221, 35 N. E. 739 [1894].

²² *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899].

²³ *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543 [1889].

²⁴ *State ex rel. Greely v. City of St. Louis*, 67 Mo. 113 [1877].

²⁵ *White ex rel. Gleason v. City of*

Chicago, 188 Ill. 392, 58 N. E. 917 [1900].

²⁶ *Dowling v. Hibernia Savings & Loan Society*, 143 Cal. 425, 77 Pac. 141 [1904].

²⁷ *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155.

²⁸ *People ex rel. Samuel, Sr. v. Cooper*, 139 Ill. 461, 29 N. E. 872 [1893].

²⁹ *Goodrich v. City of Minonk*, 62 Ill. 121 [1871].

³⁰ *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893].

notice of the application for leave to amend.³¹ Amendment cannot be made without leave of the court.³² In a proper case, the court may permit the certificate or formal proof of publication to be amended.³³ If the evidence on which the court acts is not preserved, it will be presumed that this action, in allowing the amendment to be made, was justified by the evidence.³⁴ A defect in a certificate or formal proof of publication may be cured by a subsequent judgment of confirmation, if the court rendering such judgment of confirmation had jurisdiction so to do.³⁵ It is often provided by statute that proof of publication must be certified by the printer or publisher of the newspaper in which the publication is claimed to have been made.³⁶ Under such statute it may be shown by the extrinsic evidence that the person who signs the certificate was not, in fact, the publisher of the newspaper until after the time of the publication, and, if such fact is established, the certificate of publication is insufficient.³⁷ An affidavit, purporting to be made by one person and sworn to by another, is insufficient.³⁸

§ 765. Necessity that service of notice appear of record.

In the absence of some specific statutory provision, the fact of giving notice need not appear of record.¹ The assessment cannot be attacked collaterally on the ground that the proof of publication is not made a matter of record.² In the absence of a specific statute, any proof which is competent evidence of the fact is sufficient.³ If the certificate of the publisher of the fact of publication is filed and is defective, extrinsic evidence may accord-

³¹ *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898].

³² *State ex rel. Greely v. City of St. Louis*, 67 Mo. 113 [1877].

³³ *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

³⁴ *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

³⁵ *Casey v. People ex rel. Kochersperger*, 165 Ill. 49, 46 N. E. 7 [1897]; *Glover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Gage v. City of Chicago*, 223 Ill. 602, 79 N. E. 294 [1906].

³⁶ *Armstrong v. City of Chicago*, 61 Ill. 352 [1871].

³⁷ *Armstrong v. City of Chicago* 61 Ill. 352 [1871].

³⁸ *Moll v. City of Chicago*, 194 Ill. 28, 61 N. E. 1012 [1901].

¹ *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901].

² *City of Bloomington v. Phelps*, 149 Ind. 596, 49 N. E. 581 [1897].

³ *Lingle v. City of Chicago*, 172 Ill. 170, 50 N. E. 192 [1898]; *State v. Several Parcels of Land*, — Neb. —, 107 N. W. 566 [1906]; *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407 [1894]; *City of Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002 [1893].

ingly be admitted to supplement it.⁴ So it is not necessary to certify to the common council notice of an application for confirmation.⁵ The absence of formal proof of publication at confirmation is immaterial, if such publication was, in fact, made.⁶ It may be provided by statute, however, that the fact of giving notice can be shown only by some official record or by some formal proof of publication.⁷ Thus, if notice of the introduction of a local bill is constitutionally necessary, the fact of giving such notice can be shown only by the journals of the legislature.⁸ By statute a certificate of publication of the requisite notice may be both necessary to prove the fact of publication,⁹ and sufficient proof of such fact.¹⁰ Under statutory authority a formal certificate, proof of publication, or entry on the record may be sufficient proof of giving notice. Recital on the record of the fact of giving notice is said to be sufficient evidence.¹¹ In the absence of statutory authority, it has been held that the certificate of the clerk of court is not evidence of publication of a notice of confirmation.¹²

§ 766. Presumption of sufficiency of notice.

Whether there is a presumption of the sufficiency of notice in assessment proceedings is a question upon which there is some divergence of authority. In many cases it has been held that the presumption that public officers have performed their legal duties will control, and that, accordingly, if the record is consistent therewith, it will be presumed that notice was sent in due form, and served in compliance with statute.¹ This presumption exists

⁴ *Larson v. People ex rel. Kochersperger*, 170 Ill. 93, 48 N. E. 443 [1897]; *Rue v. City of Chicago*, 66 Ill. 256 [1872].

⁵ *Gurnee v. City of Chicago*, 40 Ill. 165 [1866].

⁶ *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895].

⁷ *McChesney v. People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *Scott v. State for Use of Busenberg*, 89 Ind. 368 [1883]; *State ex rel. Pope v. Town of Union*, 32 N. J. L. (3 Vr.) 343 [1867].

⁸ *Speer v. Mayor and Council of the City of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890].

⁹ *Kearney v. City of Chicago*, 163 Ill. 293, 45 N. E. 224 [1896].

¹⁰ *McChesney v. People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893].

¹¹ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

¹² *Municipality No. 1 Praying for the Opening of Orleans Avenue*, 8 La. Ann. 377 [1853].

¹ *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896]; *Brown v. City of Chicago*, 117 Ill. 21, 7 N. E. 108 [1887]; *McAuley v. City of Chicago*, 22 Ill. 563 [1859]; *Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33 [1894]; *Martin v. City of*

with especial force where proof of publication has been filed in compliance with statute.² So, under statutes which make the assessment *prima facie* evidence of its own validity, if the proceedings are regular on their face, notice will be presumed.³ A recital of the fact of notice in the order⁴ or record,⁵ is *prima facie* true. In other cases it has been held that the fact of notice must appear affirmatively on the record.⁶

§ 767. Change of statute as affecting pending proceedings.

If the statute which provides for giving notice is changed during the pendency of assessment proceedings, and is intended to apply to pending proceedings, such statute must be followed in proceedings already instituted.¹ Accordingly, if the new statute provides for notice, the original statute being unconstitutional for want of notice, proceedings begun under the original statute may be rendered valid by giving a notice under the new statute, where such new statute takes effect just as the proceedings had reached the stage where notice should have been given to protect the constitutional rights of the property owners.² Unless it affirmatively appears to be the intention of the legislature to change the statutory requirements as to notice, with reference to pending pro-

Oskaloosa, 126 Ia. 680, 102 N. W. 529 [1905]; (opinion on former hearing, 99 N. W. 557, withdrawn on petition for rehearing); Arnold v. City of Ft. Dodge, 111 Ia. 152, 82 N. W. 495 [1900]; Page v. Mayor and City Council of Baltimore, 34 Md. 558 [1871]; Lyth v. City of Buffalo, 48 Hun (N. Y.) 175 [1888]; Barkley v. Oregon City, 24 Ore. 515, 33 Pac. 978 [1893].

² Schemick v. City of Chicago, 151 Ill. 336, 37 N. E. 888 [1894]; McChesney v. The People ex rel. Kern, 145 Ill. 614, 34 N. E. 431 [1893]; Beals v. James, 173 Mass. 591, 54 N. E. 245 [1899].

³ Jennings v. LeRoy, 63 Cal. 397 [1883]; Watson v. City of Philadelphia, to Use of Adams, 93 Pa. St. (12 Norris) 111 [1880]; City of Seattle v. Smith, 8 Wash. 387, 36 Pac. 280 [1894].

⁴ Driver v. Moore, 81 Ark. 80, 98 S. W. 734 [1906].

⁵ Owens v. City of Marion, Iowa, 127 Ia. 469, 103 N. W. 381 [1905].

⁶ State ex rel. Greely v. City of St. Louis, 67 Mo. 113 [1877]; Poillon v. Mayor and Council of the Borough of Rutherford, 65 N. J. L. (36 Vr.) 538, 47 Atl. 439 [1900]; Tappan v. Young, 9 Daly, 357 [1880]; Van Sant v. City of Portland, 6 Or. 395 [1877]; Wilson v. City of Seattle, 2 Wash. 543, 27 Pac. 474 [1891]; (modified in City of Seattle v. Doran, 5 Wash. 482, 32 Pac. 105, 1002 [1893]).

¹ Ross v. Board of Supervisors of Wright County, Iowa, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 505 [1905].

² Ross v. Board of Supervisors of Wright County, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

ceedings, a statute with reference to notice will not be considered as applying to pending assessment proceedings.³

§ 768. Who can complain of want of notice.

Only the party injured by a failure to give notice can complain of lack of notice.¹ A party not entitled to receive notice cannot complain because property owners, who are entitled to notice, have not received it.² A property owner who has received notice, cannot complain because no notice was given to other property owners.³ As between the city and the contractor who has constructed the public improvement, it has been held that the city cannot take advantage of a want of notice.⁴ Where the amount of the assessment against one person depends upon the amount of the assessment against others,⁵ or where the right of the property owner who is assessed to make use of the improvement, depends upon the fact of notice to those whose property has been taken, it has been said that any party who is liable to be assessed may complain, if notice is not given to others interested, and if the assessment proceedings are not binding upon all. One who petitions for a public improvement cannot claim that he did not have notice that such petition was presented.⁶ A property owner who is also attorney for the city, is not by reason of his official position charged, in his capacity of property owner, with notice of the action of the various boards and officials with reference to his property.⁷

* *Yaggy v. City of Chicago*, 194 Ill. 88, 62 N. E. 316 [1901]; *Mayor and City Council of Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43 [1894].

¹ *Turpin v. Lemon*, 187 U. S. 51, 23 S. 20 [1902]; *Bannister v. Grassy Fork Ditching Association*, 52 Ind. 178 [1875]; *State v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutcher) 500 [1860].

² *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, 77 Pac. 933 [1904].

³ *Birket v. City of Peoria*, 185 Ill. 369, 57 N. E. 30 [1900]; *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 27 N. E. 725 [1890]; *Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735 [1885];

Mason v. City of Des Moines, 108 Ia. 658, 79 N. W. 389 [1899]; *City of Charton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882]; *City of Louisiana v. McAllister*, 104 Mo. App. 152, 78 S. W. 314 [1903].

⁴ *Moore v. Mayor, Aldermen and Commonalty of the City of New York*, 73 N. Y. 238, 29 Am. Rep. 134 [1878].

⁵ *Commissioners of Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891]. See §§ 393, 396, 455.

⁶ *Hackett v. State for Use of Martindale*, 113 Ind. 532, 15 N. E. 799 [1887].

⁷ *Shannon v. City of Omaha*, 72 Neb. 281, 100 N. W. 298 [1904].

§ 769. Effect of notice.

If notice is given in proper form, the property owner is charged with the knowledge which would reasonably be imparted thereby,¹ and he is bound by the proceedings, unless he attacks them directly. He cannot institute a collateral attack upon the assessment proceedings.² On the other hand, the public corporation is limited to improvements of the type and character specified in the notice therefor.³

§ 770. Effect of want of proper notice.

If a notice, which is required by statute, is not given, such omission invalidates subsequent proceedings in the absence of a specific statutory provision determining the effect of such omission.¹ While statutory provisions requiring notice have been held to be directory only,² this view is contrary to the well settled weight of authority.³ In the absence of some specific statutory provision determining the effect of a defective notice, a notice which is not in substantial compliance with the terms of the statute, is without legal effect, and subsequent proceedings are invalid.⁴ If no notice is given, and no opportunity afforded for a hearing upon the question of benefits, the property owner may at-

¹ *Leitch v. People ex rel. Gannaway*, 183 Ill. 569, 56 N. E. 127 [1900]; *Storer v. City of Cincinnati*, 4 Ohio C. C. 279 [1889].

² *Leitch v. People ex rel. Gannaway*, 183 Ill. 569, 56 N. E. 127 [1900].

³ *Owen v. City of Chicago*, 53 Ill. 95 [1869]; *Waller v. City of Chicago*, 53 Ill. 88 [1869].

⁴ *City of East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674 [1908]; *People v. Phinney*, 231 Ill. 180, 83 N. E. 143 [1907]; *Pickering v. State for Use of Dyar*, 106 Ind. 228, 6 N. E. 611 [1885]; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867 [1885]; *Strosser v. City of Ft. Wayne*, 100 Ind. 443 [1884]; *The Mayor of Baltimore v. The Grand Lodge of Maryland of the Independent Order of Odd Fellows*, 44 Md. 436 [1875]; *Hoffman v. Shell*, — Mich. —, 115 N. W. 979 [1908]; *Prindle v. Campbell*, 9 Minn. 212 [1864]; *Leonard v. Sparks*, 63 Mo. App. 585 [1895];

State ex rel. v. Mayor and Aldermen of the City of Paterson, 47 N. J. L. (18 Vr.) 15 [1885]; *Merritt v. Village of Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; *Lyth v. City of Buffalo*, 48 Hun (N. Y.) 175 [1888]; *In the Matter of Pennie*, 19 Abb. N. C. 117; *In the Matter of Ford*, 6 Lansing, 92 [1871]; *Matter of Douglas*, 9 Abb. Pr. N. S. 84 [1870].

² *People ex rel. Locke v. Common Council of the City of Rochester*, 5 Lansing, 11 [1871].

³ See §§ 119, 726, 735 *et seq.*

⁴ *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]; *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895]; *McChesney v. People ex rel. Kern*, 148 Ill. 221, 35 N. E. 739 [1894]; *Sewall v. City of St. Paul*, 20 Minn. 511 [1874]; *State, Leuly, Pros. v. Town of West Hoboken*, 53 N. J. L. (24 Vr.) 64, 20 Atl. 737 [1890].

tack such assessment collaterally.⁵ As long as the constitutional rights of the property owner are protected, and as long as the legislature is not bound to require the notice which it has, in fact, required, it may provide specifically what shall be the effect of omitting to give notice required by statute. If the legislature, either in so many words, or in legal effect, provides that omission to give such notice shall not invalidate subsequent proceedings, full effect must be given to such statute,⁶ as long as, at some serviceable stage of the proceedings, sufficient notice is given to the property owner. If notice is not given, or, if given, is given in a defective manner, and the statute applicable to such proceedings provides that the want of such notice shall not invalidate the assessment, full effect must be given to such statute, as long as the constitutional rights of the property owner are not infringed.⁷ If a defective notice is given, it has been said to be sufficient as against collateral attack.⁸ A defective notice may be cured by a subsequent notice given in compliance with the terms of the statute.⁹ A sufficient notice of a re-assessment, is not rendered invalid by a defective notice in the original proceeding.¹⁰

§ 771. Waiver of insufficiency of notice.

Defects in the notice as given, or omission to give notice entirely, may be waived by the property owner.¹ A special agreement in a petition for an improvement, whereby those signing the petition agreed to pay their assessments and to answer for deficiencies in collecting assessments against other property owners, waives the right of a property owner to notice.² If a property owner appears in the assessment proceedings, makes objections thereto, and is heard on the merits without raising the question of

⁵ *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895].

⁶ *In the Matter of Belmont*, 12 Hun, 558 [1878]; *City of Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117 [1895]; *In the Matter of Peugnet*, 5 Hun. 434 [1875]; *Astor v. Mayor and Aldermen of the City of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874].

⁷ *In the Matter of Agnew*, 4 Hun. 435 [1875]; *In re Amberson Ave., Appeal of Childs*, 179 Pa. St. 634, 36 Atl. 354 [1897].

⁸ *Montgomery v. Wasem*, 116 Ind.

343, 19 N. E. 184, 15 N. E. 795 [1888].

⁹ *Himmelman v. Carpentier*, 47 Cal. 42 [1873]; *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841 [1892].

¹⁰ *Harrison v. City of Chicago*, 61 Ill. 459 [1871].

¹ *Eddy v. City of Omaha*, 72 Neb. 550, 101 N. W. 25 [1904]; (modified on rehearing, 102 N. W. 70, 103 N. W. 692 [1905]).

² *Murdock v. City of Cincinnati*, 44 Fed. 726 [1891]. See to the same effect, *Tacoma Land Co. v. City of Tacoma*, 15 Wash. 133, 45 Pac. 733 [1896].

want of notice, or of defective notice, he thereby waives such objection.³ If, however, the property owner objects to the proceedings on the ground of want of proper notice, his appearance does not operate as a waiver of defects in the notice.⁴ Property owners who voluntarily accept the benefits of the improvement, being free to accept or reject such benefits, waive want of notice or defects therein.⁵ If provision is made for an appeal, at which a hearing on the merits can be had, a property owner who takes such appeal and is heard on the merits, waives objections to the notice as originally given.⁶ If, under the statutes in force, de-

³ *People v. Warren*, 231 Ill. 518, 83 N. E. 271 [1907]; *Waite v. People*, 228 Ill. 173, 81 N. E. 837 [1907]; *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903]; *Hintze v. City of Elgin*, 186 Ill. 251, 57 N. E. 856 [1900]; *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *Nicholes v. People ex rel. Kochersperger*, 165 Ill. 502, 46 N. E. 237 [1897]; *Zeigler v. People ex rel. Kochersperger*, 164 Ill. 531, 45 N. E. 965 [1897]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *White v. Alton*, 149 Ill. 626, 37 N. E. Rep. 96 [1894]; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893]; *Quick v. Village of River Forest*, 130 Ill. 323, 22 N. E. 816 [1890]; *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888]; *The People ex rel. Miller v. Sherman*, 83 Ill. 165 [1876]; *Gilkerson v. Scott*, 76 Ill. 509 [1875]; *Jerome v. City of Chicago*, 62 Ill. 285 [1871]; *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867 [1885]; *Rose v. Board of Sup'rs. of Wright County, Iowa*, 128 Iowa, 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905]; *City of Auburn v. Paul*, 84 Me. 212, 24 Atl. 817 [1892]; *Copeland v. Peckard*, 33 Mass. (16 Pick.) 217 [1834]; *East Saginaw and St. Clair R. R. Co. v. Penham*, 28 Mich. 459 [1874]; *State of Minnesota ex rel. Thompson v. District Court of Ramsey County*, 51 Minn.

401, 53 N. W. 714 [1892]; *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53 [1905]; *Boston, etc., Railroad v. Folsom*, 46 N. H. 64; *Rowe, Pros. v. Commissioners of Assessments, East Orange*, 69 N. J. L. (40 Vr.) 600, 55 Atl. 649 [1903]; *State, Forbes, Pros. v. City of Elizabeth*, 42 N. J. L. (13 Vr.) 56 [1880]; *State, Henderson, Pros. v. Mayor, etc., Jersey City*, 41 N. J. L. (12 Vr.) 489 [1879]; *State, Hampton, Pros. v. Mayor and Aldermen of the City of Paterson*, 36 N. J. L. (7 Vr.) 159 [1873]; *State ex rel. Hand, Pros. v. City of Elizabeth*, 31 N. J. L. (2 Vr.) 547 [1864]; *State, Townsend, Pros. ex rel. v. Jersey City*, 26 N. J. L. (2 Dutcher) 444 [1857]; *People ex rel. Becker v. Burton*, 65 N. Y. 452 [1875]; *Muire v. Falconer*, 51 Va. (10 Gratt.) 12 [1853]; *Barlow v. City of Tacoma*, 12 Wash. 32, 40 Pac. 382 [1895].

⁴ *Central R. R. Company of New Jersey, Pros. v. Mayor, etc., of the City of Bayonne*, 51 N. J. L. (22 Vr.) 428, 17 Atl. 971 [1889]; *State ex rel. Brinley, Pros. v. Inhabitants of the City of Perth Amboy*, 29 N. J. L. (5 Dutcher) 259 [1861].

⁵ *Drainage District No. 3 v. The People ex rel. Baron*, 147 Ill. 404, 35 N. E. 238 [1894]; *Scudder v. Jones*, 134 Ind. 547, 32 N. E. 221 [1893]; *Clements v. Lee*, 114 Ind. 397, 16 N. E. 799 [1887]; *Butler v. City of Worcester*, 112 Mass. 541 [1873].

⁶ *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

fective service of notice is to be taken advantage of by appeal, failure to appeal waives such defect.⁷ Where a property owner voluntarily pays the assessment due for an improvement, he thereby waives objections for want of notice or defective notice.⁸ Thus, a property owner who voluntarily pays an assessment for benefits for changing the grade of a street, waives any want of notice of such improvement, and he cannot subsequently set up such want of notice when it is sought to assess him for grading the street in accordance with the grade as changed.⁹ Waiving defects in one notice is not, however, a waiver of a similar defect in a notice given in the same proceeding but for a different assessment, made necessary because the former assessments were sent back for revision and correction.¹⁰

§ 772. Determination of public official as to sufficiency of notice.

It may be provided by statute that the finding or determination, either of the public corporation conducting the assessment or of the court before which the assessment proceedings are conducted, shall be conclusive as to the notice of certain steps which has to be given.¹ Thus, a judgment of confirmation is conclusive as against collateral attack upon all the property owners of whom the court had jurisdiction in the confirmation proceedings.² Such finding is conclusive, even if the notice or certificate as given in the record is defective, since the finding of the court might have

⁷ *Dashiell v. Mayor and City Council of Baltimore, for Use of Hax*, 45 Md. 615 [1876]; (where the notice was given for twenty-nine instead of for thirty days.)

⁸ *State of Minnesota ex rel. Chapin v. District Court of Ramsey County*, 40 Minn. 5, 41 N. W. 235 [1889].

⁹ *State of Minn. ex rel. Chapin v. District Court of Ramsey County*, 40 Minn. 5, 41 N. W. 235 [1889].

¹⁰ *Merritt v. Village of Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877].

¹ *Roth v. Forsee*, 107 Mo. App. 471, 81 S. W. 913 [1904].

² *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898]; *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898]; *Mer-*

riam v. People ex rel. Kochersperger, 160 Ill. 555, 43 N. E. 705 [1896]; *Kirchman v. People ex rel. Kochersperger*, 159 Ill. 321, 42 N. E. 883 [1896]; *Hertig v. People ex rel. Kochersperger*, 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879 [1896]; *People ex rel. Kern v. Ryan*, 156 Ill. 620, 41 N. E. 180 [1895]; *West Chicago Street Ry. Co. v. People ex rel. Kern*, 156 Ill. 18, 40 N. E. 605 [1895]; *West Chicago Street Ry. Co. v. People ex rel. Kern*, 155 Ill. 299, 40 N. E. 599 [1895]; *Chicago West Division Railway Co. v. People ex rel.*, 154 Ill. 256, 40 N. E. 342 [1894]; *Clark v. The People ex rel.* 146 Ill. 348, 35 N. E. 60 [1893]; *Calkins v. Spraker*, 26 Ill. App. 159 [1887]; *Clements v. Lee*, 114 Ind. 397, 16 N. E. 799 [1887].

been based on other evidence,³ and even if the property owner makes default and does not appear at confirmation, as long as the court has obtained jurisdiction over him.* The finding of a board of public officials that notice has been given, is sufficient as against collateral attack.⁵ Such finding is conclusive, especially where a subsequent opportunity has been given for a hearing upon the merits.⁶ A property owner, of whom the court had no jurisdiction when rendering judgment of confirmation, is not bound by a finding as to notice.⁷ If there is no specific finding of notice, and the record does not show notice, a judgment of confirmation is not conclusive as to the fact of notice as against collateral attack.⁸ If the record shows affirmatively that notice was given in a defective manner, a judgment of confirmation is not conclusive as to the validity of such notice.⁹ Appeal or error are forms of direct, and not collateral, attack. A finding that notice has been given will be presumed on appeal to be correct, if the evidence has not been preserved in the record,¹⁰ even if the certificate in the record is defective, since the finding of the court might have been based on other evidence.¹¹ If the record does

* *Illinois Central Railway Co. v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609 [1901]; *Glover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898]; *Dickey v. People ex rel. Kochersperger*, 160 Ill. 633, 43 N. E. 606 [1896]; *Merriam v. People ex rel. Kochersperger*, 160 Ill. 555, 43 N. E. 705 [1896]; *West Chicago Street Railway Co. v. People ex rel. Fern*, 155 Ill. 299, 40 N. E. 599 [1895].

⁴ *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898]; *Leitch v. People ex rel. Gannaway*, 183 Ill. 569, 56 N. E. 127 [1900].

⁵ *Otis v. DeBoer*, 116 Ind. 531, 19 N. E. 317 [1888]; *Montgomery v. Wasem*, 116 Ind. 343, 19 N. E. 184, 15 N. E. 795 [1888]; *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495 [1887]; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867 [1885]; *Jackson v. State for Use of Dyar*, 104 Ind. 516, 3 N. E. 863 [1885]; *Kiphart v. Pittsburgh, Cin., Chicago & St. Louis Rv. Co.*, 7 Ind. App. 122, 34 N. E. 375 [1893].

⁶ *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904].

⁷ *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898]; *Clark v. The People ex rel. Kern*, 146 Ill. 348, 35 N. E. 60 [1893].

⁸ *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895]; *McChesney v. People ex rel. Kern*, 148 Ill. 221, 35 N. E. 739 [1894]; *McChesney v. People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893].

⁹ *Chandler v. People ex rel. Kochersperger*, 161 Ill. 41, 43 N. E. 590 [1896].

¹⁰ *Cramer v. City of Charleston*, 176 Ill. 507, 52 N. E. 73 [1898]; *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *Perry v. People ex rel. Kern*, 155 Ill. 307, 40 N. E. 468 [1895]; *Casey v. People ex rel. Kochersperger*, 165 Ill. 49, 46 N. E. 7 [1897]; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

¹¹ *Casey v. People ex rel. Kochersperger*, 165 Ill. 49, 46 N. E. 7 [1897].

not show that notice was given in the proper form, the property owner, on appeal, may attack the proceedings, on the ground of insufficient notice.¹² A finding in a judgment against real property for a special assessment, that due notice was given of the application for judgment, is *prima facie* valid,¹³ even if the notice does not appear in the record.¹⁴ Questions of the sufficiency of notice cannot be raised for the first time on appeal.¹⁵ If the record contains no finding that notice has been given, the property owner may attack the proceedings collaterally, and may show affirmatively that no notice was, in fact, given.¹⁶

§ 773. Action, appeal and injunction as substitutes for notice.

If the assessment can be enforced only by an action at law or a suit in equity, and in such proceeding the property owner is given a full opportunity to be heard upon the question of benefits, the property owner is not entitled, as of constitutional right in the absence of statutory provision therefor, to any notice, except that of the institution of such proceedings to enforce the assessment.¹ If, by statute, the right of appeal is secured to the property owner, and by such appeal he has an opportunity of a full hearing upon the question of benefits, he has no constitutional right to any notice, except such as will enable him to take such appeal.²

¹² White & Gleason v. City of Chicago, 188 Ill. 392, 58 N. E. 917 [1900]; Casey v. People ex rel. Koehersperger, 165 Ill. 49, 46 N. E. 7 [1897]; Toberg v. City of Chicago, 164 Ill. 572, 49 N. E. 1010 [1897]; Kearney v. City of Chicago, 163 Ill. 293, 45 N. E. 224 [1896]; Butler v. City of Chicago, 56 Ill. 341 [1870].

¹³ Prout v. The People ex rel. Miller, 83 Ill. 154 [1876].

¹⁴ Prout v. The People ex rel. Miller, 83 Ill. 154 [1876].

¹⁵ Young v. People ex rel. Kern, 155 Ill. 247, 40 N. E. 604 [1895].

¹⁶ Daly v. Gubbins, 35 Ind. App. 86, 73 N. E. 833 [1904]; Soullier v. Kern, 69 Pa. St. (19 P. F. Smith) 16 [1871].

¹ Ballard v. Hunter, 204 U. S. 241, 27 S. 261 [1907]; (affirming 74 Ark. 174, 85 S. W. 252 [1905]); Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 (affirming Reclamation

District No. 108 v. Hagar, 4 Fed. 366 [1880]); Lower King's River Reclamation District No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887 [1899]; Reclamation District No. 3 v. Goldman, 65 Cal. 635, 4 Pac. 676 [1884]; Reclamation District No. 108 v. Evans, 61 Cal. 104 [1882]; City of Indianapolis v. Holt, 155 Ind. 222, 57 N. E. 966, 988-1100 [1900]; Law v. Johnston, 118 Ind. 261, 20 N. E. 745 [1888]; Garvin v. Daussman, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; Nevin v. Roach, 86 Ky. 492, 5 S. W. 546 [1887]; City of St. Louis v. Richeson, 76 Mo. 470 [1882]; City of Schenectady v. Trustees of Union College, 66 Hun. 179, 21 N. Y. Supp. 147 [1892]; City of Galveston v. Heard, 54 Tex. 420 [1881]; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566 [1892].

² Roundenbush v. Mitchell, 154 Ind. 616, 57 N. E. 510 [1900]; State ex

If, under the procedure in force in that jurisdiction, the property owner is entitled to an injunction against an invalid or an excessive assessment, and in such injunction proceedings he may have the question of benefits determined, it has been held that he is not entitled as of constitutional right, in the absence of statutory provision, to any notice other than one which will enable him to institute such proceedings in time to avail him.³ In other jurisdictions, however, it seems to be held that the right to bring an injunction suit is not equivalent to notice in advance.⁴ If an assessment is to be enforced by a summary sale, without either an action at law or a suit in equity, the property owner is entitled, as of constitutional right, to a notice of assessment proceedings at such time as will enable him to have a hearing upon the question of benefits.⁵

§ 774. Knowledge as substitute for notice.

It has been held that actual knowledge is not always the legal equivalent of notice. The term "notice" implies that information is given, but it also implies that it comes from an authentic and official source, and that it is directed to some one who is to act or to refrain from acting in consequence of the information contained in the notice.¹ In other cases it has been said that actual knowledge of the proceedings and of the fact that an assessment is to be levied for the improvement, is a substitute for notice as required by statute,² especially if the party to whom notice was not given actually appears and is heard on the merits.³

rel. *French v. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885]; *Yeomans v. Riddle*, 84 Ia. 147, 50 N. W. 886 [1891]; *Smith v. Abington Savings Bank*, 171 Mass. 178, 50 N. E. 545 [1898]; *Butler v. City of Worcester*, 112 Mass. 541 [1873].

³ *McMillen v. Anderson*, 95 U. S. 37 [1877]; (a case of general taxation).

⁴ *Murdock v. City of Cincinnati*, 39 Fed. 891 [1891]; *Chicago & Erie Railroad Co. v. Keith*, 67 O. S. 279, 60 L. R. A. 525, 65 N. E. 1020 [1902].

⁵ *Hutson v. Woodbridge Protection District No. 1*, 79 Cal. 90, 21 Pac. 435, 16 Pac. 549 [1889].

¹ *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287 [1895].

² *Hart v. West Chicago Park Commissioners*, 186 Ill. 464, 57 N. E. 1036 [1900]. (Under a statute permitting an appeal from a default judgment if appellant made affidavit that he had not received notice of the proceedings or had otherwise learned of their pendency until within ten days of the default). *Hewes v. Village of Winnetka*, 60 Ill. App. 654 [1895]; *Scudder v. Jones*, 134 Ind. 547, 32 N. E. 221 [1893].

³ *Waite v. People*, 228 Ill. 173, 81 N. E. 837 [1907]; *Ross v. Board of Supervisors of Wright County*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

CHAPTER XV.

METHOD OF LEVYING ASSESSMENT.

§ 775. Necessity of statutory authority for power to levy assessment.

A public corporation possesses no inherent power to levy a local assessment. No such power exists at the common law. In order, therefore, to justify the levying of a local assessment by a public corporation, it is necessary that statutory authority be given therefor by the legislature.¹ Since the power of levying local assessments is construed strictly, a grant of power to construct a

¹San Diego Investment Company v. Shaw, 129 Cal. 273, 61 Pac. Rep. 1082 [1900]; Ede v. Cuneo, 126 Cal. 167, 58 Pac. Rep. 538 [1899]; Kelso v. Cole, 121 Cal. 121, 53 Pac. 353 [1898]; Hensley v. Reclamation District No. 556, 121 Cal. 96, 53 Pac. 401 [1898]; Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595 [1867]; Blanchard v. Beideman, 18 Cal. 261 [1861]; Gray v. Town of Cicero, 177 Ill. 459, 53 N. E. 91 [1899]; Delamater v. City of Chicago, 158 Ill. 575, 42 N. E. Rep. 444 [1895]; City of Chicago v. Law, 144 Ill. 569, 33 N. E. 855 [1893]; City of Carlyle v. County of Clinton, 140 Ill. 512, 30 N. E. 782 [1893]; Churchman v. City of Indianapolis, 110 Ind. 259, 11 N. E. 301 [1886]; Marion Trust Co. v. City of Indianapolis, 37 Ind. App. 672, 75 N. E. 834, 836 [1905]; City of Henderson v. Lambert, 77 Ky. (14 W. P. D. Bush) 24 [1878]; Murray v. Tucker 73 Ky. (10 Bush.) 241 [1874]; Caldwell v. Rupert, 73 Ky. (10 Bush.) 179 [1873]; Trephagen v. City of South Omaha, 69 Neb. 577, 96 N. W. 248 [1903]; Cortelyou v. Anderson, 73 N. J. L. (44 Vr.) 427, 63 Atl. 1095 [1906]; State, Nor-

ris, Pros. v. City of Elizabeth, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889]; *In re* Second Avenue Methodist Episcopal Church, 66 N. Y. 395 [1876]; Village of Pleasant Hill v. Commissioners, 71 O. S. 133, 72 N. E. 896 [1904]; State ex rel. City of Columbus v. Mitchell, 31 O. S. 592 [1877]; Adkins v. Toledo, 27 Ohio Cir. Ct. R. 417 [1905]; Ehni v. City of Columbus, 3 Ohio C. C. 494 [1889]; Philadelphia to use of Parker v. Spring Garden Farmers Market Company, 161 Pa. 522, 29 Atl. 286 [1894]; City of Meadville v. Dickson, 129 Pa. St. 1, 18 Atl. Rep. 513 [1889]; City of Philadelphia v. Richards, 124 Pa. St. 303, 16 Atl. Rep. 802 [1889]; Western Pennsylvania Railway Company v. City of Allegheny, 92 Pa. St. (11 Norris) 100 [1879]; The Borough of Mauch Chunk v. Shortz, 61 Pa. St. (11 P. F. Smith) 399 [1869]; Connor v. City of Paris, 87 Tex. 32, 27 S. W. Rep. 88 [1894]; City of El Paso v. Mundy Brothers, 85 Tex. 316, 20 S. W. 140 [1892]; Flewellin v. Proetz, 80 Tex. 191, 15 S. W. Rep. 1043 [1891]. See § 223 *et seq.*

public improvement does not of itself confer a power to levy an assessment therefor,² but, in the absence of a grant of the power to levy assessments, it will be presumed that the legislature intended that such improvement should be paid for by general taxation. Accordingly, a grant of power to appropriate land by eminent domain, conferred by a statute which provides that certain sections relating to villages shall be applicable to cities, does not confer the power to levy local assessments to pay the cost of such appropriation, which power is conferred upon villages by sections other than those referred to in such statute.³ A restriction upon the power of general taxation is not applicable to the power of levying local assessments, which is elsewhere conferred expressly.⁴ Conversely, provisions as to the method of constructing improvements, if they are to be paid for by special assessments, are not applicable to the construction of such improvements, if they are to be paid for by general taxation.⁵ Since the power of levying local assessments may be conferred by the legislature, if the rights of the property owners are properly protected,⁶ the power of levying local assessments exists wherever it is clearly given by the legislature.⁷ Since the power to levy special assessments depends entirely upon statute, the provisions of the statute control as to the method in which said assessment is to be levied.⁸ The public corporation which undertakes to levy an assessment must follow the provisions of the statute, from which it derives its authority, in at least a substantial manner.⁹ In levying the assessment, the public corporation levying it need not

² *City of Chicago v. Law*, 144 Ill. 569, 33 N. E. 855 [1893]; *Wright v. City of Chicago*, 20 Ill. 252 [1858]; *City of Fairfield v. Ratcliff*, 20 Ia. 396 [1866].

³ *Dietz v. City of Neenah*, 91 Wis. 422, 65 N. W. Rep. 500, 64 N. W. 299 [1895].

⁴ *Storrie v. The Houston City St. Ry. Co.*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

⁵ *Allen v. City of Janesville*, 35 Wis. 403 [1874].

⁶ See § 86.

⁷ *Seward v. Rheiner*, 2 Kans. App. 95, 43 Pac. Rep. 433 [1895]; *City of Covington v. W. T. Noland*, 28 Ky. L. Rep. 314, 89 S. W. 216 [1905]; *Kellog v. Village of Janes-*

ville, 34 Minn. 132, 24 N. W. Rep. 359 [1885]; *City of Springfield to use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1886]; *In the Matter of Tappan*, 54 Barb. 225 [1869]; *Beers v. Dalles City*, 16 Or. 334, 18 Pac. Rep. 835 [1888].

⁸ *Village of Melrose Park v. Dannelbecke*, 210 Ill. 422, 71 N. E. 431 [1904]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888]; *In re Locust Avenue*, 87 N. Y. S. 798, 93 App. Div. 416 [1904].

⁹ *Leman v. City of Lake View*, 131 Ill. 388, 25 N. E. 346 [1890]; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866 [1900]; *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524 [1898];

refer to the statute under the authority of which it is acting. It is sufficient if the acts of the public corporation are authorized by a valid statute.¹⁰ It is not, accordingly, necessary that an ordinance refer to the statute by virtue of which it is enacted in the absence of some specific statutory requirement to that effect,¹¹ but if any existing statute authorizes the ordinance in question, it will be upheld.¹² Accordingly, if the ordinance recites as authority for its enactment certain statutes which have been repealed, and omits to cite a statute in force which authorizes its enactment, such recital may be treated as surplusage and such ordinance is valid.¹³ If the public corporation in levying an assessment refers to a section of an act which has been amended, it will be assumed that the reference is intended to be to the section as amended.¹⁴

§ 776. General rules of statutory construction.

Such statutes are in derogation of the rights which the property owners would have had otherwise, and afford a means of imposing an involuntary exaction upon a property owner, who is often unwilling to submit thereto, and it is, accordingly, often said that such statutes are to be construed strictly.¹ As far as such statutes impose burdens upon the property owner, they are undoubtedly to be construed strictly, so as to not confer upon the public corporation greater latitude in imposing such exactions than the legislature has seen fit to grant.² Provisions which are inserted

Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218 [1897]; *Smith v. City of Omaha*, 49 Neb. 883, 69 N. W. 402 [1896]; *State ex rel. Skinkle, Pros. v. Inhabitants of the Township of Clinton*, 39 N. J. L. (10 Vr.) 656 [1877]; *State, Townsend, Pros. v. Mayor and Common Council of Jersey City*, 26 N. J. L. (2 Dutcher) 444 [1857]. "The record of a special assessment for a local improvement must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power." *Hutchinson v. City of Omaha*, 52 Neb. 345, 348, 72 N. W. Rep. 218 [1897].

¹⁰ *Jones v. Board of Aldermen of City of Boston*, 104 Mass. 461 [1870].

¹¹ *Andrews v. People ex rel. Koch-*

ersperger, 173 Ill. 123, 50 N. E. 335 [1898]; *Delamater v. City of Chicago*, 158 Ill. 575, 42 N. E. Rep. 444 [1895].

¹² *Andrews v. People ex rel. Kochersperger*, 173 Ill. 123, 50 N. E. 335 [1898].

¹³ *Delamater v. City of Chicago*, 158 Ill. 575, 42 N. E. Rep. 444 [1895].

¹⁴ *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034 [1893].

¹ See § 229.

² *City Street Improvement Co. v. Babcock*, 139 Cal. 690, 73 Pac. 666 [1903]; *Fair Haven & Westville Railroad Co. v. City of New Haven*, 77 Conn. 494, 59 Atl. 737 [1905]; *Sargent & Co. v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028 [1895]; *New Haven v. Whit-*

in such statutes in favor of the property owner for the purpose of protecting his rights, are, however, to be construed liberally.³ The rule that statutes conferring the power to levy the local assessments, are to be construed strictly as far as they confer upon the public corporation power to impose burdens upon the property owners, does not prevent the application of well settled rules of construction and interpretation. In statutes of this sort, as in statutes generally, the grant of a power includes the incidental powers which are reasonably proper as means of carrying into execution the power which is specifically granted.⁴ If the purpose of the legislature in framing a statute can be gathered from the statute as a whole, such purpose must be given effect, even though a literal interpretation must be reached.⁵ If, on the other hand, a literal interpretation would defeat the statute in whole or in part, such interpretation cannot be given.⁶ In enforcing the intention of the legislature, as deduced from the entire statute, the court may be authorized to reject words which, as appears from the entire statute, are clearly inserted inadvertently.⁷ Thus, a provision that any person whose property was "taken or assessed" might appeal from such judgment, was retained from the original statute, which provided for an assessment of benefits by the jury which awarded damages, and which had been subse-

ney, 36 Conn. 373 [1870]; *McChesney v. The People ex rel. Kern*, 148 Ill. 221, 35 N. E. Rep. 739 [1894]; *Davis v. City of Litchfield*, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. Rep. 888 [1893]; *Niklaus v. Conkling*, 118 Ind. 289, 20 N. E. Rep. 797 [1888]; *Fort Chartres and Ivy Landing Drainage and Levee District No. 5 v. Smalkand*, 70 Ill. App. 449 [1897]; *Churchman v. City of Indianapolis*, 110 Ind. 259, 11 N. E. 301 [1886]; *Marion Trust Co. v. City of Indianapolis*, 37 Ind. App. 672, 75 N. E. 834, 836 [1905]; *City of Henderson v. Lambert*, 77 Ky. (14 W. P. D. Bush) 24 [1878]; *Murray v. Tucker*, 73 Ky. (10 Bush.) 241 [1874]; *Caldwell v. Rupert*, 73 Ky. (10 Bush.) 179 [1873]; *Whitney v. Common Council of Village of Hudson*, 69 Mich. 189, 37 N. W. Rep. 184 [1888]; *City of St. Louis to use of*

Saxton National Bank v. Landis, 54 Mo. App. 315 [1893]; *People ex rel. Kerber v. Utica*, 7 Abb. N. C. 414 [1879]; *Western Pennsylvania Railway Company v. City of Allegheny*, 92 Pa. St. 100 [1879].

³ *City Street Improvement Co. v. Babcock*, 139 Cal. 690, 73 Pac. 666 [1903].

⁴ *City of Springfield to use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511 [1902].

⁵ *City of St. Joseph to the use of Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893].

⁶ *Cole v. Skrainka*, 105 Mo. 303, 16 S. W. 491 [1891]; *City of St. Joseph to use of Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893].

⁷ *Brown v. City of Saginaw*, 107 Mich. 643, 65 N. W. Rep. 601 [1895].

quently amended so as to provide for separate assessments of damages and benefits. It was held, accordingly, that, in construing this statute, the words "or assessed" must be rejected as inconsistent with the intention of the legislature as deduced from the entire statute.⁸ Words which are consistent with the statute as a whole are a part thereof, even though they are placed in brackets, if they were in the act as passed by the legislature, and as approved by the governor.⁹ A new statute or an amendment to a pre-existing statute must be construed so as to reconcile it as far as possible with the pre-existing statutes which are not repealed.¹⁰ If two or more statutes are passed upon the subject of assessment, and they are consistent with each other, and the later statute contains no repealing clause, both statutes are to be regarded as in effect.¹¹ Thus, a statute provided for awarding an improvement contract in certain cases to the owners of a majority of the frontage. A subsequent statute provided that a contract for a public improvement, entered into between the public corporation and one of its own officers, should be void. It was held that, even if these two statutes were at all inconsistent, the second statute affected the first only in so far as it was inconsistent therewith, that is, in cases where one of the owners of a majority of the frontage was also a public official.¹² The result of such construction often is to provide one method of assessment for certain conditions, while under other conditions another method is to be resorted to.¹³ This rule of construction often results in an alternative method of assessment, leaving the public corporation free to decide which method it will employ.¹⁴ If two statutes, passed at

⁸ *Brown v. City of Saginaw*, 107 Mich. 643, 65 N. W. Rep. 601 [1895].

⁹ *Murphy v. Dobben*, 137 Mich. 565, 100 N. W. 891 [1904].

¹⁰ *Angus v. City of Hartford*, 74 Conn. 27, 49 Atl. Rep. 192 [1901].

¹¹ *Reclamation District No. 3 v. Godman*, 61 Cal. 205 [1882]; *Sefton v. Board of Commissioners of Howard County*, 160 Ind. 357, 66 N. E. 891 [1903]; *Whiting v. Mayor and Aldermen of City of Boston*, 106 Mass. 89 [1870]; *Anderson v. Cortelyou*, — N. J. L. —, 68 Atl. 119 [1907]; (reversing *Cortelyou v. Anderson*, 73 N. J. L. (44 Vr.) 427, 63 Atl. 1095 [1906]); *In the Matter of Opening Locust Avenue in Village of*

Port Chester, 185 N. Y. 115, 77 N. E. 1012 [1906]; *Frederick Street, Hanover Burrough's Appeal*, 150 Pa. St. 202, 24 Atl. Rep. 669 [1892]; *Hand v. Fellows*, 148 Pa. St. 456, 23 Atl. 1126 [1892].

¹² *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 [1893].

¹³ *Stack v. People ex rel. Talbott*, 217 Ill. 220, 75 N. E. 347 [1905]; *Hand v. Fellows*, 148 Pa. St. 456, 25 Atl. 1126 [1892].

¹⁴ *Sefton v. Board of Commissioners of Howard County*, 160 Ind. 357, 66 N. E. 891 [1903]; *Frederick Street, Hanover Burrough's Appeal*, 150 Pa. St. 202, 24 Atl. Rep. 669 [1892].

different times, are inconsistent, the one which is passed last must be given effect; and its enactment operates as an implied repeal of the earlier statutes.¹⁵ If inconsistent in part, the second statute operates merely as a repeal *pro tanto*.¹⁶ If two statutes, not inconsistent, are passed at different times, and the second statute contains no repealing clause, both statutes are in force, and the public corporation has a choice between the two methods of procedure,¹⁷ or it may add powers not before possessed.¹⁸ The enactment of a statute which contains a clause expressly repealing an earlier statute, ordinarily operates as a repeal of such earlier statute, even if the later statute is not otherwise inconsistent with the earlier one. When a statute has been repealed by the enactment of a later statute containing an express repealing clause, it ceases to have any effect, and it has been held that a subsequent amendment of such repealed statute, made inadvertently by the legislature, is itself of no validity.¹⁹ If, however, a statute purports to repeal an earlier statute, and then proceeds to re-enact it with an additional grant of power, rights existing under the earlier statute do not cease upon the enactment of the repealing statute.²⁰ A statute provided a method for discharging land from assessments levied by a drainage district where such lands were not subject to overflow. By the provision of such

¹⁵ *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034 [1893]; *The Louisville & Nashville Railway Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. Rep. 962 [1891]; *Shreve v. Town of Cicero*, 129 Ill. 226; *sub nomine Albertson v. Town of Cicero*, 21 N. E. 815 [1890]; *Turner v. Snyder*, — Minn. —, 112 N. W. 868 [1907]. (A home-rule charter adopted by a city operates as a repeal of general laws upon the subject of assessments); *State, Hoeltzel, Pros. v. Inhabitants of East Orange*, 50 N. J. L. (21 Vr.) 354, 12 Atl. 911 [1888]; *Widening of Burnish Street, Pottsville Borough*, 140 Pa. St. 531, 21 Atl. Rep. 500 [1891]; *City of Reading v. Savage*, 120 Pa. St. 198, 13 Atl. 919 [1888]; *Horiston v. City Council of Charleston*, 1 McCord (S. C.) 345 [1821].

¹⁶ *Chamberlain v. City of Evansville*, 77 Ind. 542 [1881].

¹⁷ *People ex rel. Gleason v. Yancey*, 167 Ill. 255, 47 N. E. 521 [1897]; *Enos v. City of Springfield*, 113 Ill. 65 [1886]; *Board of Commissioners of Montgomery County v. Fullen*, 111 Ind. 410, 12 N. E. Rep. 298 [1887]; *Silva v. City of Newport*, — Ky. —, 104 S. W. 314, 31 Ky. L. R. 314 [1907]; *Bradshaw v. Board of County Commissioners of Guilford County*, 92 N. C. 278 [1885].

¹⁸ *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886].

¹⁹ *The Louisville & Nashville Railway Company v. City of East St. Louis*, 134 Ill. 656, 25 N. E. Rep. 962 [1891].

²⁰ *Dashiell v. Mayor and City Council of Baltimore*, use of Hax, 45 Md. 615 [1876].

statute, a petition for the discharge of such land as not subject to overflow, must be filed within one year from the confirmation of the assessment. By a subsequent statute this earlier statute was repealed and re-enacted, with the addition of other and further grounds for discharging lands from assessment. In the later statute it was provided that a petition for the correction of any assessment heretofore made should be filed within one year after the later act took effect. It was held that this provision applied only to cases in which the right to file such petition had not yet been barred by the prior statute at the time that the later statute took effect.²¹ If a city, already incorporated, is authorized to adopt a general law for the incorporation and government of cities, and does so adopt it, its power to levy local assessments depends on the provisions of the law as thereafter amended, and not on its provisions as originally enacted.²² Under a constitutional provision, requiring the legislature to restrict the power of local assessments of public corporations, it has been held that statutory provisions upon the subject of assessment are to be regarded as restrictive in their nature, and not as conferring power unless such intention is clearly shown to exist.²³ The fact that some provisions of an ordinance are invalid does not defeat the validity of the remaining provisions, unless the connection between the two is such that it cannot be presumed that the city would have enacted the valid provisions without the invalid ones.²⁴ Thus, the invalidity of provisions for levying special taxes for paving alleys does not overthrow provisions otherwise valid for levying special taxes for improving streets.²⁵ If, by express constitutional provision, the voters of a city are authorized to adopt a charter, such charter, if adopted in conformity with such constitutional provision, has the force and effect of an act of the legislature.²⁶

²¹ *The Russel and Allison Drainage District v. Benson*, 125 Ill. 490, 17 N. E. 814 [1889].

²² *Guild, Jr. v. City of Chicago*, 82 Ill. 472 [1876].

²³ *Bailey v. City of Zanesville*, 20 Ohio C. C. 236 [1900]. This constitutional provision is said clearly to pre-suppose the existence of the power of local assessment. *Ridenour v. Saffin*, 1 Handy, 464.

²⁴ *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889].

²⁵ *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889].

²⁶ *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]. For similar home-rule provisions see *Turner v. Snyder*, 101 Minn. 481, 112 N. W. 868 [1907]; *State ex rel. Ryan v. District Court of Ramsey County*, 87 Minn. 146, 91 N. W. 300 [1902].

§ 777. Degree of compliance with statutes necessary.

Since a public corporation has no authority to levy a local assessment, except such as is conferred upon it by the legislature, such corporation is permitted to act only in compliance with the legislative authority thus given; and, accordingly, in levying local assessments, a public corporation which seeks to exercise that power, must do so in compliance with the statutory authority conferred upon it.¹ To what extent a literal compliance with the statutory provisions is necessary is a question upon which there is some divergence of judicial opinion. It is often said that a public corporation can levy local assessments only in strict compliance with the statutory authority which is given to it by the legislature.² If the legislature has prescribed a number of different

¹Smith v. Cofran, 34 Cal. 310 [1867]; Keifer v. Bridgeport, 68 Conn. 401, 36 Atl. 801 [1896]; Bacon v. Mayor and Aldermen of Savannah, 91 Ga. 500, 17 S. E. 749 [1893]; Gallaher v. Garland, 126 Ia. 206, 101 N. W. 867 [1904]; Preston v. Roberts, 75 Ky. (12 Bush.) 570 [1877]; Wreford v. City of Detroit, 132 Mich. 348, 93 N. W. 876 [1903]; City of Manistee v. Harley, 79 Mich. 238, 44 N. W. 603 [1890]; City of Kansas to the use of the Frear Stone & Pipe Mfg. Co. v. Swope, 79 Mo. 446 [1883]; City of St. Joseph ex rel. Danaher v. Wilshire, 47 Mo. App. 125 [1891]; State, White, Pros. v. Mayor and Council of the City of Bayonne, 49 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887]; McCarty v. Brick, 11 N. J. L. (6 Hals.) 27 [1829]; Farrington v. City of Mt. Vernon, 166 N. Y. 233, 59 N. E. 826 [1901]; In the Matter of the Second Avenue Methodist Episcopal Church, 66 N. Y. 395 [1876]; Adriance v. McCafferty, 25 N. Y. Sup. Ct. Rep. 153 [1864]; State ex rel. City of Columbus v. Mitchell, 31 O. S. 592 [1877]; Smith v. Minto, 30 Or. 351, 48 Pac. 166 [1897]; Appeal of Harper, 109 Pa. St. 9, 1 Atl. 791 [1885]; Allen v. City of Galveston, 51 Tex. 302 [1879]; City of New Whatcom v. Bellingham Bay Improvement Co., 9 Wash. 639, 38 Pac. 163 [1894]; Lie-

berman v. City of Milwaukee, 89 Wis. 336, 61 N. W. 1112 [1895]. See § 234.

²Pacific Paving Co. v. Geary, 136 Cal. 373, 68 Pac. 1028 [1902]; Ede v. Cuneo, 126 Cal. 167, 58 Pac. Rep. 538 [1899]; Kelso v. Cole, 121 Cal. 121, 53 Pac. 353 [1898]; N. P. Perine Contracting & Paving Company v. City of Pasadena, 116 Cal. 6, 47 Pac. 777 [1897]; Schweisau v. Mahon, 110 Cal. 543, 42 Pac. Rep. 1065 [1895]; Shipman v. Forbes, 97 Cal. 572, 32 Pac. Rep. 599 [1893]; Brock v. Luning, 89 Cal. 316, 26 Pac. Rep. 972 [1891]; City of San Luis Obispo v. Pettit, 87 Cal. 499, 25 Pac. Rep. 694 [1891]; Chambers v. Satterlee, 40 Cal. 497 [1871]; Hewes v. Reis, 40 Cal. 255 [1870]; Nicholson Pavement Co. v. Painter, 35 Cal. 699 [1868]; Himmelmann v. Danos, 35 Cal. 441 [1868]; Smith v. Davis, 30 Cal. 537 [1866]; Creighton v. Manson, 37 Cal. 614 [1865]; Blanchard v. Beideman, 18 Cal. 261 [1861]; Harris v. City of Ansonia, 73 Conn. 359, 47 Atl. Rep. 672 [1900]; District of Columbia v. Burgdorf, 6 App. D. C. 465 [1895]; Allman v. District of Columbia, 3 App. D. C. 8 [1894]; McLauren v. City of Grand Forks, 6 Dakota 397, 43 N. W. Rep. 710 [1899]; Holliday v. City of Atlanta, 96 Ga. 377, 23 S. E. 406 [1895]; McChesney v. The People ex

steps, which must be taken by the public corporation in levying local assessments, each of these successive steps must be taken,

rel. Kern, 148 Ill. 221, 35 N. E. Rep. 739 [1894]; Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563, 33 N. E. Rep. 888 [1893]; The City of Carlyle v. County of Clinton, 140 Ill. 512, 30 N. E. Rep. 782 [1893]; Workmen v. City of Chicago, 61 Ill. 463 [1871]; Scammon v. City of Chicago, 40 Ill. 146 [1866]; City of Chicago v. Wright, 32 Ill. 192 [1863]; Busenback v. Clements, 22 Ind. App. 557, 53 N. E. 665 [1899]; Martin v. City of Oskaloosa, 126 Ia. 680, 102 N. W. 529 [1905]; (opinion, 99 N. W. 557 [1904], withdrawn); Worthington v. City of Covington, 82 Ky. 265 [1884]; Town of Rayne v. Harrel, 119 La. 652, 44 So. 330 [1907]; Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. Rep. 70 [1899]; Whitney v. Common Council of Village of Hudson, 69 Mich. 189, 37 N. W. Rep. 184 [1888]; In the Matter of the Appeal of Powers, 29 Mich. 504 [1874]; M'Comb v. Bell, 2 Minn. 295 [1858]; City of Excelsior Springs to use of McCormick v. Ettenson, 120 Mo. App. 215, 96 S. W. 701 [1906]; City of Kirksville ex rel. Fleming Manufacturing Co. v. Coleman, 103 Mo. App. 215, 77 S. W. 120 [1903]; West v. Porter, 89 Mo. App. 150 [1901]; Guinotte v. Egelhoff, 64 Mo. App. 356 [1895]; Rose v. Trestrail, 62 Mo. App. 352 [1895]; City of St. Joseph to the use of the Saxton National Bank v. Landis, 54 Mo. App. 315 [1893]; Fruin-Bambrick Construction Company v. Geist, 37 Mo. App. 509 [1889]; Farmers Loan & Trust Co. v. Hastings, 2 Neb. Unofficial, 337, 96 N. W. Rep. 104 [1902]; State, White, Pros. v. Mayor and Council of City of Bayonne, 47 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887]; State, Terhune, Pros. v. City of Passaic, 41 N. J. (12 Vroom) 90 [1879]; State, Wilkinson, Pros. v. Inhabitants of the City of Trenton,

36 N. J. (7 Vroom) 499 [1873]; Carron v. Martin, 26 N. J. L. (2 Dutcher) 594, 69 Am. Dec. 584 [1857]; Town of Albuquerque v. Zeiger, 5 N. M. 674, 27 Pac. Rep. 315 [1891]; Stebbins v. Kay, 123 N. Y. 31, 25 N. E. Rep. 207 [1890]; In the Matter of Pennie, 108 N. Y. 364, 15 N. E. Rep. 611 [1888]; Meritt v. Village of Port Chester, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; Newell v. Wheeler, 48 N. Y. 486 [1872]; Felthousen v. City of Amsterdam, 69 Hun, 505, 23 N. Y. Supp. 424 [1893]; In the Matter of Van Buren, 17 Hun, 527 [1879]; Hopkins v. Mason, 42 Howard, 115 [1871]; People ex rel. Kerber v. City of Utica, 7 Abb. N. C. 414 [1879]; City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. Rep. 178 [1893]; Allen v. City of Portland, 35 Or. 420, 58 Pac. Rep. 509 [1899]; Ladd v. Spencer, 23 Or. 193, 31 Pac. Rep. 474 [1892]; Hawthorne v. City of East Portland, 13 Or. 271, 10 Pac. Rep. 342 [1886]; Culbertson v. City of Cincinnati, 16 Ohio 574 [1847]; City of Philadelphia v. Richards, 124 Pa. Ct. 303, 16 Atl. Rep. 602 [1889]; Whyte v. Mayor and Aldermen of Nashville, 32 Tenn. (2 Swan) 364 [1854]; Ardrey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. Rep. 726 [1896]; Breath, Guardian v. City of Galveston, 92 Tex. 454, 49 S. W. 575 [1899]; Connor v. City of Paris, 87 Tex. 32, 27 S. W. Rep. 88 [1894]; Flewellin v. Proetzel, 80 Tex. 191, 15 S. W. Rep. 1043 [1891]; Wood v. City of Galveston, 76 Tex. 126, 13 S. W. Rep. 227 [1890]; Frosh v. City of Galveston, 73 Tex. 401, 11 S. W. Rep. 402 [1889]; Violet v. City Council of Alexandria, 92 Va. 561, 53 Am. St. Rep. 825, 31 L. R. A. 382, 23 S. E. Rep. 809 [1896]; City of Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. Rep. 1077 [1891]. "The requirements of the statute are

and the omission of any one of them invalidates the assessment.³ The fact that the method of levying an assessment in disregard of statute is less expensive to the property owner than the method prescribed by statute does not render such assessment valid.⁴ In other cases, a less extreme rule has been stated as the true one; and that is, that a substantial compliance on the part of the public corporation levying the assessment, with the terms of the statute which authorizes it to levy such assessment, is, on the one hand, necessary, and, on the other hand, sufficient.⁵ If the part of the assessment which is levied in compliance with the statute, can be distinguished from that which is not levied in compliance with the statute, the invalidity of the latter provision does not invalidate the former.⁶ In the cases themselves, as distinguished from the abstract rules stated by the courts in deciding the cases, there is but little conflict. Certain of the steps to be taken are jurisdictional in their character, and are conditions precedent to the levying of the assessment. The omission of any one of these steps, or failure to comply with the statutory requirements in taking any one of these steps, renders the assessment invalid.⁷ If, on the other hand, the public corporation has performed the conditions precedent to requiring jurisdiction to levy the assess-

the very conditions upon which the owner is divested of his title and property, and it does not lie with the court to consider whether the statute was reasonable or whether the notice in this case nearly complied with the act; but whether the provisions of the statute have been literally pursued and strictly complied with." *Adriance v. McCafferty*, 25 N. Y. Sup. Ct. Rep. (2 Robertson) 153, 155 [1864].

³ *Hewes v. Reis*, 40 Cal. 255 [1870]; *Himmelman v. Danos*, 35 Cal. 441 [1868]; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. The Edward Jones Co.*, 20 Ind. App. 87, 50 N. E. Rep. 319 [1897]; *Preston v. Roberts*, 75 Ky. (12 Bush.) 570 [1877]; *Merritt v. Village of Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; *Breath, Guardian v. City of Galveston*, 92 Tex. 454, 49 S. W. 575 [1899].

⁴ *Allen v. City of Galveston*, 51 Tex. 302 [1879].

⁵ *San Diego Investment Company v. Shaw*, 129 Cal. 273, 61 Pac. Rep. 1082 [1900]; *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. Rep. 172 [1893]; *Churchman v. City of Indianapolis*, 110 Ind. 259, 11 N. E. 301 [1886]; *City of St. Joseph v. Anthony*, 30 Mo. 537 [1860].

⁶ *Johnson v. Duerr*, 115 Mo. 366, 21 S. W. 800 [1892].

⁷ *Dehail v. Morford*, 95 Cal. 457, 30 Pac. Rep. 593 [1892]; *Daly v. City and County of San Francisco*, 72 Cal. 154, 13 Pac. 321 [1887]; *Village of Western Springs v. Hill*, 177 Ill. 634, 52 N. E. 959 [1899]; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. The Edward Jones Co.*, 20 Ind. App. 87, 50 N. E. 319 [1897]; *State, Peckham, Pros. v. Mayor and Common Council of the City of Newark*, 43 N. J. L. (14 Vroom) 576 [1881].

ment, a less stringent rule applies and ordinarily only irregularities which affect the substantial rights of the property owner, can operate to render the assessment invalid.⁸ Formal provisions, which are not intended to protect the rights of the property owner, need not be followed as strictly or literally as either the provisions which are intended as conditions precedent to levying the assessment at all, or as protection to the rights of the property owners.⁹ Any provision, which is intended to protect the property owner, must, however, be complied with in at least a substantial manner.¹⁰ The courts cannot say that any one of such provisions is immaterial, or that a corresponding protection can be secured by other means.¹¹ The violation of any provision of the statute, which affects the substantial rights of the parties who are assessed, invalidates the assessment.¹² Since the legislature may grant or withhold the power of levying local assessments, it may impose such conditions upon the exercise of that power as it pleases, and, if it clearly appears to be the legislative intent that the omission of any step, however immaterial it may seem, shall invalidate the assessment, the courts have no right to substitute their idea of wise legislation for those of the legislature; and the omission of such a step will, therefore, invalidate the assessment. On the other hand, the legislature may confer the power of levying local assessment free from all restriction, except those imposed by the constitution.¹³ While the legislature

⁸ *Dehail v. Morford*, 95 Cal. 457, 30 Pac. Rep. 593 [1892]; *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899]; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. The Edward Jones Co.*, 20 Ind. App. 87, 50 N. E. 319 [1897]; *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882]; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. Rep. 819 [1891]; *Sanford v. Mayor, etc., of City of New York*, 12 Abb. 23 [1860].

⁹ *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Himmelman v. Danos*, 35 Cal. 441 [1868]; *Gray v. Town of Cicero*, 177 Ill. 459, 53 N. E. 91 [1899]; *Tucker v. People ex rel. Wall*, 156 Ill. 108, 40 N. E. 451 [1895]; *Barber Asphalt Paving Co.*

v. Edgerton, 125 Ind. 455, 25 N. E. Rep. 436 [1890]; *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *Burlington v. Quick*, 47 Ia. 222 [1877]; *Starr v. City of Burlington*, 45 Ia. 87 [1876]; *Caldwell v. Rupert*, 73 Ky. (10 Bush.) 179 [1873]; *City of Greensboro v. McAdoo*, 112 N. C. 359, 17 S. E. Rep. 178 [1893]; *Fell v. Philadelphia to the use of Cunningham*, 81 Pa. St. (31 P. F. Smith) 58 [1876].

¹⁰ *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. Rep. 207 [1890].

¹¹ *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. Rep. 207 [1890].

¹² *Lieberman v. City of Milwaukee*, 89 Wis. 336, 61 N. W. 1112 [1895].

¹³ See § 979 *et seq.*

cannot deprive the property owner of his constitutional rights, it may dispense with steps not necessary to protect such rights; or, if it requires additional steps, it may provide that the omission to take such additional steps as are required by statute shall not invalidate the assessment.¹⁴

§ 778. Assessment not resting on theory of quasi contract.

Since the right of levying a local assessment exists only by virtue of some statutory provision, the construction of a public improvement under circumstances which prevent a public corporation from levying an assessment therefor does not give to the public corporation the power of recovering from the property owner the value of the benefits conferred upon him by such improvement.¹ This is in accordance with the general rule of the common law, which denied recovery in quasi contract, as a general rule, to one who had increased the value of the land of another. Thus, it has been said, accordingly, that a suit against the property owner in assumpsit, on the common counts, "does not conform to any known principle of law."²

§ 779. Consent of property owners not necessary in absence of statute.

Property owners have no constitutional right to be consulted upon questions of local assessment to be imposed upon them, and their consent is not a constitutional pre-requisite to the validity of local assessments in the absence of some specific constitutional provision which requires such consent. The legislature may provide for levying and collecting an assessment which is not dependent at any stage of the proceedings upon the consent of the owners of property upon which such assessment is levied.¹ Accordingly, if it is not provided by statute that the consent of the

¹⁴ *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]. These questions are discussed in detail elsewhere. See § 979 *et seq.*

¹ *Allen v. City of Davenport*, 139 Fed. 209, 65 C. C. A. 641 [1904]; *Holliday v. City of Atlanta*, 96 Ga. 377, 23 S. E. 406 [1895]; *Carter v. Cemansky*, 126 Ia. 506, 102 N. W. 438 [1905]; *City of Manistee v. Harley*, 79 Mich. 238, 44 N. W. 603

[1890]; *Harmon v. City of Omaha*, 53 Neb. 164, 73 N. W. Rep. 671 [1897]; *Reilley v. City of Philadelphia*, 60 Pa. St. (10 P. F. Smith) 467 [1869]. See § 18.

² *City of Manistee v. Harley*, 79 Mich. 238, 240, 44 N. W. 603 [1890].

¹ *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904]; (modifying decree, 117 Fed. 925 [1902]); *Buchan v. Broadwell*, 88 Mo. 31 [1885].

property owners shall be obtained, the fact that an assessment is levied without obtaining the consent of the property owners constitutes no valid objection thereto.² A statute not providing for the consent of the property owners to a proposed road improvement has been held to be invalid.³ This was, however, a statute applying to a specifically named road in one county, under a constitution which forbade special acts conferring corporate power, and required laws of a general nature to be uniform throughout the state. While the Supreme Court of Ohio was not then ready to pronounce such legislation void on the latter account alone, it would undoubtedly do so now;⁴ and the addition of a provision requiring the consent of the property owners would not aid it. It has been suggested that the justification for the power of a public corporation to levy a local assessment without the consent of the owners of the property to be assessed, is to be found in the fact that such property owners are represented in the city council by the members thereof, and that the consent of their representatives is to be regarded as in legal effect their own consent.⁵ This theory is not, however, necessary, nor does it, in fact apply to all

²The Park Ecclesiastical Society v. City of Hartford, 47 Conn. 89 [1879]; City of Lexington v. McQuillan's Heirs, 9 Dana (Ky.) 513, 35 Am. Dec. 159 [1840]; Slack v. Maysville & Lexington R. R. Co., 52 Ky. (13 B. Mon.) 1 [1852]; Cheadey v. Hoover, 48 Ky. (9 B. Mon.) 350 [1848]; Munson v. Board of Commissioners, 43 La. Ann. 15, 8 So. 906 [1891]; Barber Asphalt Company v. Gogreve, 41 La. Ann. 251, 5 So. 848 [1889]; State, Provident Institution for Savings in Jersey City, Pros. v. Mayor, etc., Jersey City, 52 N. J. L. (23 Vr.) 490, 19 Atl. 1096 [1890]; State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886]; State, Malone, Pros. v. Mayor and Common Council of Jersey City, 28 N. J. L. (4 Dutcher) 500 [1860]; Jones v. Town of Tonawanda, 158 N. Y. 438, 53 N. E. 280 [1899]; (reversing Jones v. Town of Tonawanda, 35 App. Div. 151); Shufford v. Commis-

sioners of Gaston County, '86 N. C. 552 [1882]; *In re Greenfield Avenue*, Appeal of the City of Pittsburg, 191 Pa. St. 290, 43 Atl. 225 [1899]; Brienthall v. Philadelphia, 103 Pa. St. 156 [1884]; Spring Garden v. Wister, 18 Pa. St. (6 Harr.) 195 [1851]; Adams v. Fisher, 63 Tex. 651 [1885]; City of Galveston v. Heard, 54 Tex. 420 [1881].

³The court said: "This is a wide departure from the principles of local self-government; and so wide that it is not possible to sustain it by any latitude of construction. . . . The people interested have no control and they are deprived of the initiative in the matter which is the important point in the privilege of local self-government." State ex rel. v. Commissioners, 54 O. S. 333, 341, 432, 43 N. E. 587 [1896].

⁴See § 189.

⁵City of Lexington v. McQuillan's Heirs, 9 Dana (Ky.) 513, 35 Am. Dec. 159 [1840].

cases. Under our constitution it has never been assumed, in the absence of a specific provision requiring consent, that the consent of the specific individual to be taxed was a condition precedent to the right of the government to levy a tax. If the public officials, in whose hands is placed the control of public affairs, decide to levy a tax, and do so in compliance with the rules of law governing such levy, the inherent power of every government to levy taxes is sufficient to justify the exercise of such power. Indeed, the essential characteristic of the exercise of the taxing power, as distinguished from a request for voluntary contributions, is that the exercise of the taxing power does not in any way depend upon the consent of the specific individual who is to pay the tax. Furthermore, it is perfectly possible that the real estate upon which the assessment is to be imposed, is all of it owned by non-residents, who have no voice in the selection of the members of the council. While a non-resident, who lives outside of the boundaries of the city, may be free from personal liability in cases where personal liability may be imposed upon a resident,⁶ the property of a non-resident is subject to local assessment to the same extent that the property of a resident would be.⁷ It has been said that if an assessment district is to be created which is less in area than a legal subdivision of the state, the consent of the people of the district to the assessment must be secured in some way.⁸ The extent to which the legislature may create special taxing districts, without reference to the consent of the residents thereof, is discussed elsewhere.⁹ The necessity of the consent of the residents to the formation of the districts is, however, a different question from the necessity of the consent of the individual property holders to an assessment to be levied upon their property. The necessity of the consent of the property owners to a local assessment has been insisted upon where the power of constructing public improvements and levying assessments therefor has been conferred upon a private corporation with wide discretion as to the character of the improvement to be constructed; and with power, apparently, to decide what land should be improved, and with power to operate at a profit, paying annual dividends to its stockholders.¹⁰ Provisions of constitutions requiring the con-

⁶ See § 1043.

⁷ See § 649.

⁸ *Town of Macon v. Pattv*, 57 Miss. 378, 34 Am. Rep. 451 [1879].

⁹ See § 247 *et seq.*

¹⁰ *State, Kean, Pros. v. Driggs Drainage Co.*, 45 N. J. L. (16 Vr.) 91 [1883].

sent of property owners or voters to a "tax" are ordinarily held not to apply to local assessments.¹¹ The constitution of North Carolina provides: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."¹² Under this provision of the constitution of North Carolina, an assessment for the cost of fencing in districts under the stock law is not a "tax" within the meaning of such constitutional provision; even if the statute which authorizes such assessment denominates it a "tax;" and, accordingly, the assent of the qualified voters of the district in question is not necessary.¹³ So a statute which provides that no tax shall be levied unless the proposition to levy it has been submitted to the qualified electors, applies only to general taxes levied on an *ad valorem* basis, and not to local assessments levied on the theory of benefits.¹⁴ Under a constitutional provision which permits the legislature to authorize assessments to be based upon the consents of a majority in value of the property owners owning property adjoining the affected locality, a statute which authorizes an assessment, but does not provide for securing the assent of the property owners, is invalid.¹⁵

§ 780. Consent of property owners necessary by statute.

Since the legislature has the power to withhold the right of levying local assessments, it may, if it confers such rights, protect the property holder as much as it pleases over and above the rights which he possesses under the constitution. The legislature may, accordingly, provide that a local assessment cannot be levied without the prior consent of the owners of property assessed, or of a specified part thereof.¹ Under such statutes an assessment

¹¹ *Munson v. Board of Commissioners of the Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Shuford v. Commissioners of Gaston County*, 86 N. C. 552 [1882].

¹² Article VII., § 7, Constitution of North Carolina.

¹³ *Shuford v. Commissioners of Gaston County*, 86 N. C. 552 [1882].

¹⁴ *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. Rep. 790 [1895].

¹⁵ *Craig v. Board of Improvement of Russellville Waterworks*, 84 Ark. 390, 105 S. W. 867 [1907].

¹ *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. 659 [1877]; (reversing *Hitchcock v. Galveston*, 12 Fed. Cas. 218, 2 Woods, 272); *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. Rep. 234 [1894]; *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520

levied without such prior consent is invalid.² It is not necessary, however, that the consent of all the property owners should be obtained, if the statute merely requires the consent of a specific number thereof less than all.³ Under a statute, which provides that "when such improvement shall have been determined upon and ordered as aforesaid, the same shall have no force or effect until the consent in writing shall be obtained of the owners of at least one-half of the actual feet frontage of lands upon each side of any highway ordered as aforesaid to be improved," it has been held that an instrument which shows the consent of the property owner is sufficient, even though it was signed before the work was ordered.⁴ Statutes may provide that a provision for levying an assessment must first be submitted to the electors of the assessment district. Under such statutes an assessment cannot be levied, unless the provision therefor has first been submitted to the electors as required by statute, and has been acted upon favorably.⁵ Statutes of this sort are analogous to statutes which require propositions for certain kinds of general taxes to be submitted to the voters of the public corporation which proposes to levy such tax.⁶

§ 781. Necessity of petition of property owners.

Since the consent of the property owners is not necessary to the levying of a local assessment as a constitutional right, it follows that the petition of the property owner, requesting that a speci-

[1890]; *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *Howard v. The First Independent Church of Baltimore*, 18 Md. 451 [1862]; *Bouldin v. Mayor and City Council of Baltimore*, 15 Md. 18 [1859]; *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280 [1899]; *In the Matter of Buhler*, 32 Barb. 79; *Donovan v. City of Oswego*, 39 Misc. Rep. 291, 79 N. Y. S. 562 [1902].

² *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. Rep. 234 [1894]; *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520 [1890]; *Bouldin v. Mayor and City Council of Baltimore*, 15 Md. 18 [1859]; *In the Matter of Buhler*, 32 Barb. 79; *Donovan v. City of Oswego*, 39 Misc. Rep. 291, 79 N. Y. S. 562 [1902].

³ *Howard v. The First Independent Church of Baltimore*, 18 Md. 451 [1862].

⁴ *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280 [1899].

⁵ *Woodruff v. Perry*, 103 Cal. 611, 37 Pac. 526 [1894]; *Tregoe v. Owens*, 94 Cal. 317, 29 Pac. 643 [1892]; *Workman v. City of Worcester*, 118 Mass. 168 [1875].

⁶ *Holley v. County of Orange*, 106 Cal. 420, 39 Pac. Rep. 790 [1895]; *State of Kansas ex rel. Miller v. City of Kansas City*, 60 Kan. 518, 57 Pac. 118 [1899]; *Munson v. Board of Commissioners of the Atchafalaya Basin Levee District*, 43 La. Ann. 15, 8 So. 906 [1891]; *Bradshaw v. Board of Commissioners of Guilford County*, 92 N. C. 278 [1885].

fied public improvement be constructed and that local assessments be levied therefor, is not necessary as far as constitutional provisions are concerned; and, if the legislature does not require such petition, an assessment may be levied without such action on the part of the property owners.¹ Since the legislature may afford additional protection to the property owners over and above that which is secured to them by constitutional provisions, the legislature may require a petition as one of the steps in levying a local assessment.² The legislature has the power to make the petition a jurisdictional fact, and frequently the statutes so provide. Under such statutes further proceedings are a nullity, unless a petition has been presented as required by statute.³ If a

¹ *Spalding v. City and County of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *Givins v. City of Chicago*, 186 Ill. 399, 57 N. E. 1045 [1900]; *Rawson v. City of Chicago*, 185 Ill. 87, 57 N. E. 35 [1900]; *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191 [1896]; *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; *Board of Commissioners of Montgomery County v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883]; *Yeomans v. Riddle*, 84 Ia. 147, 50 N. W. 886 [1891]; *Tarman v. City of Atchison*, 69 Kan. 483, 77 Pac. 111 [1904]; *Wilkin v. Houston*, 48 Kan. 584, 30 Pac. 23 [1892]; *Wolfe v. City of Moorehead*, 98 Minn. 113, 107 N. W. 728 [1906]; *Diamond v. City of Mankato*, 89 Minn. 48, 61 L. R. A. 448, 93 N. W. 911 [1903]; *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895]; *Dennison v. City of Kansas*, 95 Mo. 416, 8 S. W. 429 [1888]; *City of St. Louis to use of Creamer v. Oeters*, 36 Mo. 456 [1865]; *Eyermann v. Provenchere*, 15 Mo. App. 256 [1884]; *State of Nebraska ex rel. City of Omaha v. Birkhauser*, 37 Neb. 521, 56 N. W. 303 [1893]; *People ex rel. Markey v. City of Brooklyn*, 65 N. Y. 349 [1875]; *City of Perry v. Davis & Younger*, 18 Okla. 427, 90 Pac. 865

[1907]; *Spring Garden v. Wistar*, 18 Pa. St. (6 Harr.) 195 [1852]; *Kersten v. City of Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900].

² *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; *Gately v. Leveston*, 63 Cal. 365 [1883]; *Blake v. People for use of Caldwell*, 109 Ill. 504 [1884]; *State of Kansas ex rel. Miller v. City of Kansas City*, 60 Kans. 518, 57 Pac. 118 [1899]; *City of Lexington v. McQuillan's Heirs*, 9 Dana (Ky.) 513, 35 Am. Dec. 159 [1840]; *City of South Omaha v. Tighe*, 67 Neb. 572, 93 N. W. 946 [1903]; *State ex rel. Pope v. Town of Union in the County of Hudson*, 32 N. J. L. (3 Vr.) 343 [1867]; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118, 36 N. E. 821 [1894].

³ *Zeigler v. Hopkins*, 117 U. S. 683, 29 L. 1019, 6 S. 919 [1886]; *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. Rep. 234 [1894]; *Rector v. Board of Improvement*, 50 Ark. 116, 6 S. W. Rep. 519 [1887]; *Mulligan v. Smith*, 59 Cal. 206 [1881]; *Brady v. Page*, 59 Cal. 52 [1881]; *Turrill v. Grattan*, 52 Cal. 97 [1877]; *Nicholson Pavement Co. v. Painter*, 35 Cal. 699 [1868]; *Rhodes v. Board of Public Works of the City of Denver*, 10 Colo. App. 99, 49 Pac. 430 [1897]; *Brookfield v. City of Sterling*, 214 Ill. 100, 73 N. E. 302 [1905]; *Taylor*

city has power by statutory grant to construct public improvements of certain kinds, and it is further provided that local assessments can be levied for such improvements only in case a

v. City of Bloomington, 186 Ill. 497, 58 N. E. 216 [1900]; Village of Hammond v. Leavitt, 181 Ill. 416, 54 N. E. 982 [1899]; Whaples v. City of Waukegan, 179 Ill. 310, 53 N. E. 618 [1899]; City of Bloomington v. Reeves, 177 Ill. 161, 52 N. E. 278 [1898]; Commissioners of Mason & Tazewell Special Drainage District v. Griffin, 134 Ill. 330, 25 N. E. 995 [1891]; Millisor v. Wagner, 133 Ind. 400, 32 N. E. 927 [1892]; McEneney v. Town of Sullivan, 125 Ind. 407, 25 N. E. Rep. 540 [1890]; Hobbs v. Board of Commissioners of Tipton County, 116 Ind. 376, 19 N. E. 186 [1888]; Patterson v. Baumer, 43 Ia. 477 [1876]; The Board of Commissioners of Wyandotte County v. Arnold, 49 Kan. 279, 30 Pac. 486 [1892]; Board of Commissioners of Wyandotte County v. Barker, 45 Kan. 699, 26 Pac. 591 [1891]; Board of Commissioners of Wyandotte County v. Hoag, 48 Kan. 413, 29 Pac. 758 [1892]; Sleeper v. Bulen, 6 Kan. 300 [1870]; City of Kansas City v. Breyfogle, 8 Kans. App. 276, 55 Pac. 508 [1898]; Steinmuller v. City of Kansas City, 3 Kans. App. 45, 44 Pac. 600 [1896]; McQuinn v. Peri, 16 La. Ann. 326 [1861]; Mayor and City Council of Baltimore v. Eschbach, 18 Md. 276 [1861]; Bouldin v. Mayor and City Council of Baltimore, 15 Md. 18 [1859]; Henderson v. Mayor and City Council of Baltimore, 8 Md. 352 [1855]; Frost v. Leatherman, 55 Mich. 33, 20 N. W. Rep. 705 [1894]; State v. Bury, 101 Minn. 424, 112 N. W. 534 [1907]; State ex rel. City of St. Paul v. District Court of Ramsey County, 89 Minn. 292, 94 N. W. 870 [1903]; State of Minnesota ex rel. Utick v. Board of Commissioners of Polk County, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902]; Dennison v. City of Kansas, 95 Mo.

416, 8 S. W. 429 [1888]; Roth v. Forsee, 107 Mo. App. 471, 81 S. W. 913 [1904]; City of South Omaha v. Tighe, 67 Neb. 572, 93 N. W. 946 [1903]; Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734 [1903]; Henderson v. City of South Omaha, 60 Neb. 125, 82 N. W. 315 [1900]; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524 [1898]; Von Steen v. City of Beatrice, 36 Neb. 421, 54 N. W. 677 [1893]; Darst v. Griffin, 31 Neb. 668, 48 N. W. Rep. 819 [1891]; Orr v. City of Omaha, 2 Neb. Unoff. 771, 90 N. W. 301; State, App. Pros. v. Town of Stockton in County of Camden, 61 N. J. L. 520, 39 Atl. 921 [1898]; State, Ogden, Pros. v. Mayor and Common Council of the City of Hudson, 29 N. J. L. (5 Dutcher) 104 [1860]; Carron v. Martin, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]; (reversing Martin v. Carron, 26 N. J. L. (2 Dutch.) 228 [1857]); Town of Roswell v. Dominice, 9 N. M. 624, 58 Pac. 342; Miller v. City of Amsterdam, 149 N. Y. 288, 43 N. E. 632 [1896]; Jex v. The Mayor, Aldermen and Commonalty of New York, 103 N. Y. 536, 9 N. E. 39 [1886]; In the Matter of Smith, 99 N. Y. 424, 2 N. E. 52 [1885]; In the Matter of Garvey, 77 N. Y. 523 [1879]; People ex rel. Hayes v. City of Brooklyn, 71 N. Y. 495 [1877]; Matter of the City of Buffalo, 78 N. Y. 362 [1879]; People ex rel. Rogers v. Spencer, 55 N. Y. 1; People ex rel. Green v. Smith, 55 N. Y. 135 [1873]; Litchfield v. Vernon, 41 N. Y. 123 [1869]; In re Banta, 60 N. Y. 165 [1875]; Sharp v. Spier, 4 Hill (N. Y.) 76 [1843]; Graves v. Otis, 2 Hill (N. Y.) 466 [1842]; Alexander v. Baker, 74 O. S. 258, 78 N. E. 366 [1906]; Lear v. Halstead, 41 O. S. 566 [1885]; Hays v. Jones, 27 O. S. 218 [1875]; Burgett v. Norris, 25 O. S. 308 [1874]; Corry v.

petition by the property owners to be assessed is presented therefor, the city may construct such improvements without a petition, but it cannot levy a local assessment therefor.⁴ A petition may be necessary, if the improvement is to be constructed entirely at the cost of the property owners, but not in other cases.⁵

§ 782. Specific provisions as to effect of omitting petition.

Since the legislature is not bound to require a petition, it may provide specifically what the effect of omitting such petition shall be.¹ Accordingly, if it is provided by statute that "no special tax bills shall be invalid or be affected by any defect in or objection to the petition," no defect in the petition can render a special tax bill invalid.² Where a special assessment is void for want of a petition, which, by statute, was jurisdictional, the legislature may provide for a re-assessment in which the necessity of such petition is dispensed with.³ If the legislature provides that objection to a petition must be taken in a specific way, such objection cannot be made in any way other than that pointed out by statute.⁴

§ 783. Petition as alternative method.

By statutory provision, alternative methods of proceeding to construct an improvement by local assessment may be provided,

Gaynor, 22 O. S. 584 [1872]; Pittsburgh v. Walter, 69 Pa. St. 365 [1871]; Dawley v. City of Antigo, 120 Wis. 302, 97 N. W. 1119 [1904]; Borgman v. City of Antigo, 120 Wis. 296, 97 N. W. 936 [1904]; Fass v. Seehawer, 60 Wis. 525, 19 N. W. 533 [1884]; Canfield v. Smith, 34 Wis. 381 [1874]; Blount v. City of Janesville, 31 Wis. 648 [1872]; Dampé v. Town of Dane, 29 Wis. 419 [1872]; Dean v. City of Madison, 9 Wis. 402 [1859]; Dancer v. Town of Mannington, 50 W. Va. 322, 40 S. E. 475 [1901]. The petition is said to be "a jurisdictional fact which may not be presumed or inferred upon which rested all the subsequent proceedings authorized by the statute." Mulligan v. Smith, 59 Cal. 206, 229 [1881].

⁴Orr v. City of Omaha, 2 Neb. Unoff. 771, 90 N. W. 301; Dancer v.

Town of Mannington, 50 W. Va. 322, 40 S. E. 475 [1901].

⁵State of Nebraska ex rel. City of Omaha v. Birkhauser, 37 Neb. 521, 56 N. W. 303 [1893].

¹Smith v. Tobener, 32 Mo. App. 601 [1888]; Frederick v. City of Seattle, 13 Wash. 428, 43 Pac. 364 [1896].

²Smith v. Tobener, 32 Mo. App. 601 [1888].

³Frederick v. City of Seattle, 13 Wash. 428, 43 Pac. 364 [1896].

⁴Ede v. Knight, 93 Cal. 159, 28 Pac. Rep. 860 [1892]; McManus v. People ex rel. Raymond, 183 Ill. 391, 55 N. E. 886 [1899]. Such an objection may be made in confirmation proceedings by motion to dismiss as well as by formal plea. Village of Hammond v. Leavitt, 181 Ill. 416, 54 N. E. 982 [1899].

in one of which methods a petition is necessary and in the other of which it is not necessary.¹ The common example of such provision is found in statutes which require a petition, except in cases where the city council by certain specified vote decides to construct such improvement.² The vote necessary in such case depends, of course, upon the statutory provisions and is generally more than a majority. A vote of two-thirds,³ or three-fourths⁴ of the council is frequently required. Sometimes it is provided that a petition can be dispensed with only upon a unanimous vote of the council.⁵ In some cases it is provided by statute that a petition of the property owners is necessary unless the city council or some corresponding body passes a formal resolution declaring

¹ *Kersten v. City of Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900].

² *Rich v. City of Chicago*, 59 Ill. 286 [1871]; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. Rep. 768 [1899]; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. Rep. 741 [1897]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883]; *City of Lafayette v. Fowler*, 34 Ind. 140 [1870]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Burris v. Baxter*, 25 Ind. App. 536, 58 N. E. Rep. 733 [1900]; *Tallant v. The City of Burlington*, 39 Ia. 543 [1874]; *City of Covington v. Casey*, 3 Bush. (Ky.) 698 [1868]; *City of Louisville v. Hyatt*, 41 Ky. (2 B. Monroe) 177, 36 Am. Dec. 594 [1841]; *In the Matter of Opening Locust Ave. in Village of Port Chester*, 185 N. Y. 115, 77 N. E. 1012 [1906]; (modifying and affirming, 97 N. Y. S. 508, 110 App. Div. 774 [1906]); *Metcalf v. Carter*, 19 Ohio C. C. 196 [1900]; *Jessing v. City of Columbus*, 1 Ohio C. C. 90 [1885]; (affirmed, 22 W. L. B. 453); *City of Spokane v. Preston*, — Wash. —, 89 Pac. 406 [1907]; *Dieckmann v. Sheboygan County*, 89 Wis. 570, 62 N. W. 410 [1895].

³ *Cason v. City of Lebanon*, 153

Ind. 567, 55 N. E. Rep. 768 [1899]; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. Rep. 741 [1897]; *City of Lafayette v. Fowler*, 34 Ind. 140 [1870]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Burris v. Baxter*, 25 Ind. App. 536, 58 N. E. Rep. 733 [1900]; *Metcalf v. Carter*, 19 Ohio C. C. 196 [1900]; *Jessing v. City of Columbus*, 1 Ohio C. C. 90 [1885]; (affirmed 22 W. L. B. 453); *City of Spokane v. Preston*, — Wash. —, 89 Pac. 406 [1907]. Two-thirds of the entire membership of the council held to be necessary and not merely two-thirds of those present. *Baker v. Tobin*, 40 Ind. 310 [1872].

⁴ *Rich v. City of Chicago*, 59 Ill. 286 [1871]; *Hager v. City of Burlington*, 42 Ia. 661 [1876]; *Tallant v. City of Burlington*, 39 Ia. 543 [1874]; *Dieckmann v. Sheboygan County*, 89 Wis. 570, 62 N. W. 410 [1895].

⁵ *City of Covington v. Casey*, 66 Ky. (3 Bush.) 698 [1868]; *City of Louisville v. Hyatt*, 41 Ky. (2 B. Monroe) 177, 36 Am. Dec. 594 [1841]; *In the Matter of Opening Locust Ave. in Village of Port Chester*, 185 N. Y. 115, 77 N. E. 1012 [1906]; (modifying and affirming, 97 N. Y. S. 508, 110 App. Div. 774).

the necessity of such public improvement.⁶ Under other provisions a petition of the property owners is necessary unless certain specified public officials make a formal recommendation that the improvement be constructed,⁷ or formally declare the necessity of such improvement.⁸ The city council may be empowered to make an improvement without any petition when, in its judgment, public necessity requires it. The determination of the council is final in such cases unless it is made to appear that its action is arbitrary or fraudulent.⁹ Under other statutes it may be provided that unless a petition for an improvement is presented by the property owners, a certain specified time must elapse between the presentation of a resolution for an improvement and the meeting at which such resolution is voted upon or passed.¹⁰ Under other statutes, it may be provided that an assessment cannot exceed a certain specified per cent. of the value of the property assessed, unless a petition is presented by the property owners.¹¹

§ 784. Necessity of petition in certain classes of improvements.

The legislature may provide that a petition shall be necessary in public improvements of certain types and not necessary in improvements of other types.¹ A petition may be necessary for assessing rural and urban property alike upon a basis of benefits, though not necessary for assessing urban property only according to the front foot rule.² A petition may be necessary for a street improvement in the improved part of the city, but not in

⁶ *Northern Railroad Co. of New Jersey, Pros. v. Mayor and City Council of Englewood*, 62 N. J. L. 188, 40 Atl. Rep. 653 [1898]; *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053 [1904]; *Boyd v. City of Milwaukee*, 92 Wis. 456, 66 N. W. 603 [1896].

⁷ *Spaulding v. Wesson*, 84 Cal. 141, 24 Pac. Rep. 377 [1890]; *Gately v. Leviston*, 63 Cal. 365 [1883]; *Dyer v. North*, 44 Cal. 157 [1872].

⁸ *Sheenan v. Martin*, 10 Mo. App. 285 [1881].

⁹ *Diamond v. City of Mankato*, 89 Minn. 48, 61 L. R. A. 448, 93 N. W. 911 [1903].

¹⁰ *Pittellkow v. City of Milwaukee*, 94 Wis. 651, 69 N. W. 803 [1897].

¹¹ *Hays v. City of Cincinnati*, 62 Ohio St. 116, 56 N. E. 658 [1900];

Baker v. Schott, Treasurer, 10 Ohio C. C. 81 [1894]; *Storer v. City of Cincinnati*, 4 Ohio C. C. 279 [1889].

¹ *Warner & Malley v. Russell*, 129 Cal. 381, 62 Pac. Rep. 75 [1900]; *Fanning v. Bohme*, 76 Cal. 149, 18 Pac. Rep. 158 [1888]; *Dyer v. Miller*, 58 Cal. 585 [1881]; *The People ex rel. Wood, Collector v. Jones*, 137 Ill. 35, 27 N. E. 294 [1892]; *Auditor General v. Chase*, 132 Mich. 630, 94 N. W. 178 [1903]; *Diamond v. City of Mankato*, 89 Minn. 48, 61 L. R. A. 448, 93 N. W. 911 [1903]; *In the Matter of Smith*, 99 N. Y. 424, 2 N. E. 52 [1885]; *In the Matter of Walters*, 83 N. Y. 538 [1881]; *In the Matter of Banta*, 60 N. Y. 165 [1875].

² *Hand v. Fellows*, 148 Pa. St. 456, 23 Atl. 1126 [1892].

the unimproved part.³ A petition may be necessary where a grade once fixed officially is to be changed, but not in other cases.⁴ A petition may, by statute, be unnecessary for street improvements except grading; and necessary for grading, except where the street has been graded, or graded and macadamized, or graded and paved, for the space of two or more blocks upon each side of one or more blocks, or crossing of a street which is not improved.⁵ A petition may be necessary for issuing bonds of a drainage district, which are to be payable more than one year after the maturity of the assessment, but not necessary if the bonds are to be payable within the year, are not to exceed ninety per cent. of the amount of the assessment and are not to bear more than six per cent. interest.⁶ Under a statute requiring a petition in case of a change of grade, property owners may be assessed for a repaving, though the improvement is made without their request, and, although a slight change of grade, incidental to the kind of paving material used, is made as a result of such repaving.⁷ A petition may be made necessary in case of repaving, though not in case of original construction.⁸ The construction of an additional width of pavement, leaving the original pavement undisturbed, is a repaving within the meaning of such statute.⁹ A petition may be necessary, if an established grade is to be changed, but not if a grade is to be established in the first instance.¹⁰ A statute which forbids the common council to change the grade of a street without the written consent of the owners of two-thirds in lineal feet in adjoining lots, does not prevent park commissioners from making such improvement without petition, where they have been given general power to make such improvements without any specific provision as to the necessity of such petition.¹¹ A petition may be necessary, if the city wishes to fill in lots or to dig them down.¹²

³ State, Malone, Pros. v. Mayor and Common Council of Jersey City, 28 N. J. L. (4 Dutcher) 500 [1860].

⁴ Warren & Malley v. Russell, 129 Cal. 381, 62 Pac. Rep. 75 [1900].

⁵ Fanning v. Bohme, 76 Cal. 149, 18 Pac. Rep. 158 [1888]. Under this statute no other exception exists to the necessity for a petition in case of grading. Dyer v. Miller, 58 Cal. 585 [1881].

⁶ The People ex rel. Wood v. Jones, 137 Ill. 35, 27 N. E. 294 [1892].

⁷ Auditor General v. Chase, 132 Mich. 630, 94 N. W. 178. [1903].

⁸ In the Matter of Smith, 99 N. Y. 424, 2 N. E. 52 [1885].

⁹ In the Matter of Smith, 99 N. Y. 424, 2 N. E. 52 [1885].

¹⁰ McQuiddy v. Vineyard, 60 Mo. App. 610 [1894].

¹¹ In the Matter of Walters, 83 N. Y. 538 [1881].

¹² In the Matter of Banta, 60 N. Y. 165 [1875].

A petition may be dispensed with in the case of repairs, though necessary in the case of other public improvements.¹³ It has been said to be improper for the legislature to require a petition in the case of all the streets of a city but one; and in the case of that street to provide that a petition is not necessary, if the council require the improvement by unanimous vote.¹⁴ This view was taken under a constitution which did not, at the time, restrict special legislation. It does not seem to be consistent with the general principles which determine the power of the legislature to require specific public improvements,¹⁵ and has not been adopted in other jurisdictions. Thus, in the absence of a constitutional provision forbidding special legislation, it has been held that a petition may be made necessary for grading the streets of a city west of a certain named street, but not for grading the other streets of said city.¹⁶ Under a constitutional provision forbidding local or special laws, a statute requiring a petition in cities having populations of less than fifty thousand or more than twenty-eight thousand; or requiring petitions in cities having a population of less than twenty-eight thousand and more than twenty thousand, has been held to be unconstitutional.¹⁷ A petition is frequently required in drainage¹⁸ or irrigation¹⁹ improvements.

§ 785. Class of persons eligible as petitioners.

The class of persons, a certain number of whom are required to sign the petition in order to render it valid, is usually pointed out by statute which prescribes the necessity of the petition. Such statutory provisions are, of course, controlling. Under a statute which provides a street shall not be altered or widened, except on application in writing of three-fourths of the owners of land lying on such road, it is not sufficient to show that all

¹³ *Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191 [1896]; *Farraher v. City of Keokuk*, 111 Ia. 310, 82 N. W. 773 [1900]; *State ex rel. City of St. Paul v. District Court Ramsey Co.*, 89 Minn. 292, 94 N. W. 870 [1903]; *City of Marionville to the Use of Ginbaugh v. Henson*, 65 Mo. App. 397 [1895].

¹⁴ *Howell v. Bristol*, 71 Ky. (8 Bush.) 493 [1871].

¹⁵ See § 241 *et seq.*

¹⁶ *Dyer v. North*, 44 Cal. 157 [1872].

¹⁷ *L'Hote v. Village of Milford*, 212 Ill. 418, 103 Am. St. Rep. 234, 72 N. E. 399 [1904].

¹⁸ *Driver v. Moore*, 81 Ark. 80, 99 S. W. 734 [1906].

¹⁹ *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891].

the owners of land to be appropriated for such improvement have agreed to take a specified compensation for their land, and have assented to such taking, since there may be a great many owners of land upon the road, whose land it is not necessary to take for such improvement, and, accordingly, one-fourth or more of them may not have assented in any way to such improvement.¹ The rule laid down by statute as to the number and qualifications of the signers of an improvement petition must be followed in determining the sufficiency of an improvement petition.² It may be provided by statute that the petition must be signed by a majority of those to be affected by the assessment.³ Under such statute, if a petition asks for work of two or more classes, one class of which can be made only upon petition, the petition must be signed not merely by a majority of those affected by any part of the work, but by a majority of those affected by that class of work for which the petition is necessary.⁴ The statute may provide that a petition is to be signed by a majority of those who are determined to be benefited upon a preliminary hearing.⁵ Under such a statute, a petition is sufficient if signed by a majority of those who are determined, upon a preliminary hearing, to be benefited, even if they are not a majority of those who are ultimately assessed for the improvement.⁶ Under a statute of this sort a petition for a public road may be signed by the owners of lots within the limits of a municipal corporation.⁷ Not infrequently, statutes limit the right of petition to resident land owners.⁸ Under a statute providing for a petition of "any ten resident owners of real property," non-resident owners cannot be counted.⁹ Under a statute providing for the improvement of a road by a county, "resident owners" means residents of the

¹ Carron v. Martin, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857].

² City of Atlanta v. Smith, 99 Ga. 462, 27 S. E. Rep. 696 [1896]; Whitney v. Common Council of Village of Hudson, 69 Mich. 189, 37 N. W. Rep. 184 [1888].

³ Lathrop v. City of Buffalo, 3 Abb. Ct. App. 30 [1861].

⁴ Lathrop v. City of Buffalo, 3 Abb. Ct. App. 30 [1861].

⁵ Thompson v. Love, 42 O. S. 61 [1884].

⁶ "It is not necessary that a majority of the resident land-holders

whose lands are finally assessed should have signed the petition in order to render the proceedings valid." Parker v. Burgett, 29 O. S. 513; (quoted, Thompson v. Love, 42 O. S. 61, 73 [1884]).

⁷ Commissioners of Putnam County v. Young, 36 O. S. 288 [1880]; Makemson v. Kauffman, 35 O. S. 444 [1880].

⁸ Wright v. City of Tacoma, 3 Wash. Ter. 410, 19 Pac. 42 [1888].

⁹ Board of Improvement District No. 60 v. Cotter, 71 Ark. 556, 76 S. W. 552 [1903].

county owning lands within the assessment district.¹⁰ The statute may provide that a petition, to be valid, must be signed by two-thirds of the resident owners.¹¹ The statute may provide that the petition is to be signed, in order to be valid, by residents of the ward owning a majority of the feet in front of which the improvement is to be constructed, and that, if a majority of a block is owned by non-residents of the ward, the work may be ordered upon the petition of the resident owners of a majority of the feet in front of any adjoining block or the block opposite. Under such a statute, it was held that an improvement in front of certain blocks having an aggregate frontage of eighteen hundred feet, thirteen hundred and fifty feet of which were owned by non-residents, could be ordered upon the petition of the resident owners of three hundred feet, although several of these blocks were owned entirely by non-residents, and there were no resident owners in the adjoining or opposite blocks.¹² A statute may provide that a petition, to be valid, must be signed by a majority of persons resident in the county, owning land adjacent to such improvement. Under such a statute, the majority necessary is the majority of the owners of land abutting the improvement, and not the majority of all the land owners within the congressional subdivision through which the improvement runs.¹³ The statute may provide for a signature by a majority of the owners of abutting property.¹⁴ The statute may provide for a double qualification in determining the number or sufficiency of the signers of a petition. Thus, it may be provided that a petition, to be valid, must be signed by the owners of one-half of the property abutting on the line of the proposed improvement, and by a majority of the resident property owners affected by the improvement.¹⁵ Since each block may be made an assessment district if the statute so provides,¹⁶ a petition signed by the owners of more than one-half of the property in a block may be sufficient for constructing a sidewalk along such

¹⁰ *Alexander v. Baker*, 74 O. S. 258, 78 N. E. 366 [1906].

¹¹ *Campbell v. Park*, 32 O. S. 544 [1877].

¹² *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

¹³ *Wormley v. Board of Supervisors of Wright County, Iowa*, 108 Ia. 232, 78 N. W. 824 [1899].

¹⁴ *State v. Bury*, 101 Minn. 424, 112 N. W. 534 [1907]; *Oil City v. Lay*, 164 Pa. St. 370, 30 Atl. 289 [1894].

¹⁵ *Trah v. Village of Grant Park*, 192 Ill. 351, 61 N. E. 442 [1901].

¹⁶ See § 628.

block by special assessment, although the rest of the sidewalk ordered by the council is constructed by special taxation.¹⁷ It may be provided that the owners of a majority of the property in every contiguous block must sign in order to make the petition valid.¹⁸

§ 786. Who may sign petition.—Owner.

It is usually provided by statute who must sign the petition required by statute. The usual provision is that such petition must be signed by a certain proportion of the owners of property upon such improvement. Under such statute, the persons who are to sign must be owners of land upon the street through or upon which the improvement is to be constructed.¹ Under a statute which provides that a street may be paved "when the person owning real estate, which has at least one-third of the fronting on the street or portion of the street the improvement of which is desired, shall in writing request the commissioners of streets and sewers to make such improvements," it has been held that the city cannot, as owner of property which fronts upon such street, be regarded as the owner of such property within the meaning of this statute, and that if the city signs, its property cannot be counted in determining whether one-third of the frontage is represented.² One who holds the legal title with power to improve is the owner within the meaning of a statute requiring a petition to be signed by the owner of abutting property.³ Under a statute requiring a signature by the holders of certificates of purchase, patent, or other evidences of title, a person, who is able to show a title recognized by the laws of that state, is an owner, as having other evidence of title, although he may not hold a certificate of purchase or a patent.⁴ If land has been conveyed by the owner thereof, title passes with the execution and delivery of the deed.⁵ While there is a *prima facie* presumption that the deed is delivered upon the day of its date, this presumption is overthrown by positive averments in

¹⁷ *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042 [1901].

¹⁸ *City of Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278 [1898].

¹ *In the Matter of Drake*, 69 Hun (N. Y.) 95, 23 N. Y. S. 264 [1893].

² *City of Atlanta v. Smith*, 99 Ga. 462, 27 S. E. Rep. 696 [1896].

³ *S. D. Mercer Co. v. City of Omaha*, — Neb. —, 112 N. W. 617 [1907].

⁴ *People of the State of California v. Hagar*, 52 Cal. 171 [1877].

⁵ *Henderson v. Mayor and City Council of Baltimore*, *Use of Eschbach*, 8 Md. 352 [1855].

the acknowledgment that it was executed at a later time.⁶ If the deed is delivered, the grantee is a freeholder, although the deed has not been recorded.⁷ The vendee in possession, under a valid and enforceable contract of sale, is the owner within the meaning of the statute, which provides that a petition is to be signed by the owners of the property to be assessed.⁸ Where one or more co-tenants sign a petition, but some of the co-tenants have not signed, there is a divergence of authority upon the question of the right to count such signature in determining whether the requisite number of owners have signed. It has been said to be proper to count such signature, but only as to the value of the share of the co-tenant who signs.⁹ In other cases it has been said to be improper to count the signature by one of several joint owners.¹⁰ Where minor co-tenants reside upon the land, and assent to the signature of their names by one who acts for them, it has been said to be proper to count their signature.¹¹ A husband, who occupies land under a contract which provides for the conveyance of such land to himself and his wife together, is not a resident property holder within the meaning of a statute providing that a petition is to be signed by a certain proportion of the resident property holders.¹² In order to count his signature among the signers of the petition, his wife must also sign.¹³ A tenant by entireties is a freeholder within the meaning of a statute which requires a petition to be signed by a certain number of freeholders.¹⁴ Whether a life tenant is to be regarded as an owner within the meaning of statutes providing that the petition for an improvement must be signed by the owners of land affected, is a question upon which there is a divergence of authority; it being held in some jurisdictions that the life tenant

⁶ *Henderson v. Mayor and City Council of Baltimore to Use of Eschbach*, 8 Md. 352 [1855].

⁷ *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908].

⁸ *Ahern v. Board of Improvement District, No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. Rep. 575 [1901]; *Thompson v. Love*, 42 O. S. 61 [1884].

⁹ *Ahern v. Board of Improvement District No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. Rep. 575 [1901].

¹⁰ *Brady v. Page*, 59 Cal. 52 [1881]; *Mulligan v. Smith*, 59 Cal. 206 [1881].

¹¹ *Campbell v. Park*, 32 O. S. 544 [1877].

¹² *Alpin v. Fisher*, 84 Mich. 128, 47 N. W. Rep. 574 [1890].

¹³ *Alpin v. Fisher*, 84 Mich. 128, 47 N. W. Rep. 574 [1890].

¹⁴ *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908]. [Estates of inheritance and for life were by statute denominated freeholds.]

is not an owner within the meaning of such statutes,¹⁵ and in others that he is such an owner.¹⁶ A lessee in possession under a lease for ninety-nine years, renewable forever, is the owner within the meaning of a statute providing for the signature of a petition for an improvement by the property owners.¹⁷ Even if the lessor does not sign, his interest is bound by an assessment levied in accordance with such petition. In this case, A owned the fee and leased to B for ninety-nine years, renewable forever. B opened streets across such property, laid out lots and signed petition for improvements, representing himself as the owner. B failed to pay his rent to A, and A brought suit for the arrearages for rent, as a result of which B's leasehold interest was sold and was bought in by A. It was held that in A's hands this property was subject to the lien of the assessment in the same way as it would have been if A also had signed.¹⁸ A mortgagor, whose interest has been foreclosed but who still has a right of redemption after foreclosure, may sign a petition for an improvement as owner of such realty.¹⁹ A stockholder in a corporation has no authority to bind the corporation by signing its name to an improvement petition, and, accordingly, such signature cannot be counted.²⁰

§ 787. Agent.

If the name of the property owner is signed by an agent, and such agent is duly authorized by the property owners, his signature on their behalf is sufficient.¹ Thus, a signature of the agent's name, followed by the words, "for the property owners,"

¹⁵ Ahern v. Board of Improvement District, No. 3 of Texarkana, 69 Ark. 68, 61 S. W. Rep. 575 [1901]; Mayor and City Council of Baltimore v. Boyd, 64 Md. 10, 20 Atl. 1028 [1885].

¹⁶ Thompson v. Love, 42 O. S. 61 [1884]. See also as to a tenant by entireties, Hinkley v. Bishop, — Mich. —, 114 N. W. 676 [1908].

¹⁷ Village of St. Bernard v. Kemper, 60 O. S. 244, 45 L. R. A. 662, 54 N. E. 267 [1899]; (reversing Kemper v. Village of St. Bernard, 14 Ohio C. C. 134 [1897]).

¹⁸ Village of St. Bernard v. Kemper, 60 O. S. 244, 45 L. R. A. 662,

54 N. E. 267 [1899]; (reversing, Kemper v. Village of St. Bernard, 14 Ohio C. C. 134 [1897]).

¹⁹ Ahern v. Board of Improvement District No. 3, of Texarkana, 69 Ark. 68, 61 S. W. Rep. 575 [1901].

²⁰ Rector v. Board of Improvement, 50 Ark. 116, 6 S. W. Rep. 519 [1887].

¹ Gleason v. Barnett, 115 Ky. 890, 61 S. W. 20 [1903]. Signature by a widow of a deceased owner with the consent of the children who are all of age is sufficient. Corry v. City of Cincinnati, 6 Ohio N. P. 325 [1899]. See to the same effect, Campbell v. Park, 32 O. S. 544 [1877].

has been held to be sufficient.² If an agent signs without authority from his principal, and such principal does not ratify such act of the agent, the signature of the agent cannot be counted in determining the number of the petitioners.³ Thus, if the president of a private corporation signs without any authority from the board of directors, his act does not bind the corporation, and the corporation cannot be counted among the number of signers.⁴ It has been held that the mayor of the city cannot sign a petition as representing certain property, which, in fact, belongs to the county.⁵ In this case, however, an action to enjoin the collection of the assessment could be brought only within the period of thirty days fixed by statute, and after the expiration of such period was not subject to attack.⁶ If a petition purports to be signed by one who acts as agent for a land owner, it has been held that his agency and authority must be shown, or the signature of such land owner cannot be counted.⁷ If, however, the fact of a general agency is shown to exist, it may in some cases be presumed that the authority of the agent extends to signing his principal's name to improvement petitions. If the name of a corporation is signed by its president, it has been said that, in the absence of evidence to the contrary, his authority would be presumed;⁸ and the same view has been taken in the case of a signature by the general manager.⁹ If it is shown that the general manager of the corporation has signed several petitions for improvements, and that the corporation has acquiesced in such action, it is held that, in the absence of any evidence to the contrary, he is to be regarded as having authority to bind such corporation by such petition, and that, accordingly, such signature is to be counted.¹⁰ If an agent signs for his principal, when not authorized, and his principal subsequently rati-

² *Gleason v. Barnett*, 115 Ky. 890, 61 S. W. 20 [1903].

³ *Brady v. Page*, 59 Cal. 52 [1881]; *Mulligan v. Smith*, 59 Cal. 206 [1881]; *City of Kansas City v. Gray*, 62 Kan. 198, 61 Pac. 746 [1900].

⁴ *Brady v. Page*, 59 Cal. 52 [1881]; *Mulligan v. Smith*, 59 Cal. 206 [1881].

⁵ *City of Kansas City v. Gray*, 62 Kan. 198, 61 Pac. 746 [1900].

⁶ *City of Kansas City v. Gray*, 62 Kan. 198, 61 Pac. 746 [1900].

⁷ *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520 [1890].

⁸ *State, Day, Pros. v. Mayor and Council of the Borough of Fairview*, in *County of Bergen*, 62 N. J. L. 621, 43 Atl. Rep. 578 [1898].

⁹ *McVev v. City of Danville*, 188 Ill. 428, 58 N. E. 955 [1900].

¹⁰ *City of Kansas City v. Cullinan*, 65 Kan. 68, 69 Pac. 1099 [1902].

fies such act of the agent, the question arises whether the ordinary effect of ratification applies in such case and renders the petition valid. It has been said in some cases that a ratification can retroact, that it estops the principal from attacking the assessment subsequently, and that no third person can attack the assessment upon the ground of its original invalidity, since, after ratification, such third persons have all the rights which they would have had had the assessment been valid originally.¹¹ This view has been expressed in cases where the statute authorizing the assessment was invalid, or the property owners who petitioned therefor were held to be estopped from setting up the invalidity of the statute. Such estoppel was held to exist where a sufficient number of property owners had signed the petition, or had authorized agents in advance to sign it, or had ratified the unauthorized acts of their agents before the improvement was ordered and before the city had sold its bonds.¹² In other cases, it has been queried, but not decided, whether ratification could retroact so as to prevent third persons from attacking the sufficiency of the petition.¹³ It has been held that ratification cannot retroact so as to prevent third persons from showing that the petition, when presented, was not signed by a sufficient number of property owners.¹⁴

§ 788. Executor, administrator and guardian.

An executor or administrator¹ has no authority, arising out of his office, to sign a petition on behalf of the estate of his decedent, even if, as executor, he is given a power of sale over such property.² The mere addition of the word "administratrix" to the name of one of the signers does not show conclusively that the person so signing is not an owner, if the petition does not show on its face that such signer is acting as administratrix.³

¹¹ *State, Day, Pros. v. Mayor and Council of the Borough of Fairview*, in the County of Bergen, 62 N. J. L. 621, 43 Atl. Rep. 578 [1898].

¹² *City of Columbus v. Sohl*, 44 O. S. 479, 8 N. E. Rep. 299 [1886].

¹³ *City of Kansas City v. Cullinan*, 65 Kan. 68, 69 Pac. 1099 [1902].

¹⁴ *Minor v. Board of Control of the City of Hamilton*, 20 Ohio C. C. 4 [1899].

¹ *Rector v. Board of Improvement*, 50 Ark. 116, 6 S. W. Rep. 519 [1887]; *Brady v. Page*, 59 Cal. 52 [1881]; *Mulligan v. Smith*, 59 Cal. 206 [1881]; *Alpin v. Fisher*, 84 Mich. 128, 47 N. W. Rep. 574 [1890].

² *Ahern v. Board of Improvement District, No. 3, of Texarkana*, 69 Ark. 68, 61 S. W. Rep. 575 [1901].

³ *Reclamation District No. 537, of Yolo County, v. Burger*, 122 Cal. 442, 55 Pac. 156 [1898].

Accordingly, the question of the nature of the interest of such signer in the property represented by her is one of fact, upon which, by statute in this case, the determination of the board was conclusive.⁴ Failure to object to a signature by an executor may operate as a waiver of such defect.⁵ A signature by a guardian of an insane owner has been held to be sufficient;⁶ and so has a signature of a minor made by a third person at the direction of the guardian of such minor, and in the presence of such guardian.⁷ The fact that such third person is a road trustee in charge of the improvement for which the assessment is to be levied, does not invalidate such signature.⁸ If one who is a guardian of minor owners, signs as trustee, and is not, in fact, trustee, it has been held that the court cannot treat his signature as if it were the signature of their guardian.⁹

§ 789. Number of persons by whom petition must be signed.

It is usually provided by statute what number of property owners must sign a petition in order to render it valid, and such statutes must be complied with.¹ Questions of this sort are sometimes by statute referred to specified officers, who must find that the requisite number of owners have signed before they are authorized to take any steps in constructing the improvement.² If, however, the public corporation is authorized to make an improvement with or without a petition therefor, it is immaterial whether the number of property owners provided for by statute have signed or not.³ The number of property owners necessary to a valid petition is regulated entirely by statute. It may be provided that a petition for establishing a drain is to be signed by not less than five freeholders of the township or townships in which such drain or lands to be drained thereby and to be assessed therefor may be situated, one or more of whom shall be

⁴ Reclamation District No. 537, of Yolo County, v. Burger, 122 Cal. 442, 55 Pac. 156 [1898].

⁵ Stewart v. City of Detroit, 137 Mich. 381, 100 N. W. 613 [1904].

⁶ Thompson v. Love, 42 O. S. 61 [1884].

⁷ Campbell v. Park, 32 O. S. 544 [1877].

⁸ Campbell v. Park, 32 O. S. 544 [1877].

⁹ Mayor and City Council of Baltimore v. Boyd, 64 Md. 10, 20 Atl. 1028 [1885].

¹ Hawkins v. Horton, 91 Minn. 285, 97 N. W. 1053 [1904]; Canfield v. Smith, 34 Wis. 381 [1874].

² Commissioners of Mason & Tazewell Special Drainage District v. Griffin, 134 Ill. 330, 25 N. E. 995 [1891].

³ Givins v. City of Chicago, 186 Ill. 399, 57 N. E. 1045 [1900].

owners of land liable to be assessed for benefits.⁴ Under such statute, it is not necessary, in cases where a drain passes through more than one township, that five freeholders of each township should sign.⁵ It may, by statute, be provided that a petition is to be signed by one-sixth of the property owners,⁶ or by one-third,⁷ or by one-fourth,⁸ or by a majority,⁹ or by two-thirds,¹⁰ or by three-fourths.¹¹ It may be provided by statute that, in case of some kinds of improvement, a majority must sign, while in other classes of improvements all the property owners must sign.¹² Thus, it may be provided that where a street has been condemned, the signature of a majority of owners of front feet upon such street is sufficient, while, if it has not been condemned, the signature of all the owners of land fronting on such street is necessary.¹³

§ 790. Combination of improvements.

If two or more improvements are of such nature that they may be regarded as parts of an entire improvement, they may be combined in one petition, in order to count all the persons affected by either improvement as petitioning for both.¹ Thus, the

⁴ *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233 [1897].

⁵ *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233 [1897].

⁶ *State, App. Pros. v. Town of Stockton, in the County of Camden*, 61 N. J. L. (32 Vr.) 520, 39 Atl. 921 [1898].

⁷ *City of Atlanta v. Smith*, 99 Ga. 462, 27 S. E. Rep. 696 [1896].

⁸ *McGuinn v. Peri*, 16 La. Ann. 326 [1861].

⁹ *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042 [1901]; *Trah v. Village of Grant Park*, 192 Ill. 351, 61 N. E. 442 [1901]; *McVey v. City of Danville*, 188 Ill. 428, 58 N. E. 955 [1900]; *City of Louisville v. Hyatt*, 41 Ky. (2 B. Monroe) 177, 36 Am. Dec. 594 [1841]; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251, 5 So. 848 [1889]; *Bouldin v. Mayor and City Council of Baltimore*, 15 Md. 18 [1859]; *Henderson v. City of South Omaha*, 60 Neb. 125, 82 N. W. 315 [1900]; *State*

of Nebraska ex rel. City of Omaha v. Birkhauser, 37 Neb. 521, 56 N. W. 303 [1893]; *Moore v. Mayor, Aldermen and Commonalty of City of New York*, 73 N. Y. 238, 29 Am. Rep. 134 [1878]; *Alexander v. Baker*, 74 O. S. 258, 78 N. E. 366 [1906]; *Wright v. City of Tacoma*, 3 Wash. Ter. 410, 19 Pac. 42 [1888].

¹⁰ *Barkley v. Oregon City*, 24 Ore. 515, 33 Pac. Rep. 978 [1893]; *Campbell v. Park*, 32 O. S. 544 [1877].

¹¹ *Carron v. Martin*, 26 N. J. L. (2 Dutch) 594, 69 Am. Dec. 584 [1857]; (reversing *Martin v. Carron*, 26 N. J. L. (2 Dutch.) 228 [1857]).

¹² *Mayor and City Council of Baltimore v. Eschbach*, 18 Md. 276 [1861].

¹³ *Mayor and City Council of Baltimore v. Eschbach*, 18 Md. 276 [1861].

¹ *Stoddard v. Johnson*, 75 Ind. 20 [1881]; *Commissioners of Putnam County v. Young*, 36 O. S. 288 [1880].

improvement of an existing road, and the prolongation thereof by laying out and constructing a new road, may be combined in one petition.² If the procedure is different in the case of two different kinds of improvements, such improvements cannot be combined in one petition.³ If the improvements are in their nature distinct and confer benefits of different kinds or benefit different property, they cannot be combined in one petition.⁴ Thus, the improvement of two distinct streets cannot be combined.⁵ Under a statute requiring the owners of a majority of the property in every contiguous block to sign a petition in order to render it valid, a petition for constructing a continuous pavement on two streets at right angles to each other, which was not signed by the owners of a majority of property in every contiguous block on one of such streets, was held to be insufficient; and under such petition it was improper to provide for improving the other street, for the petition did not show that the two improvements were prayed for as separate improvements.⁶

§ 791. Methods of estimating majority.

Whether the number of signatures required by statute is to be determined by ascertaining if a sufficient proportion of the land owners have signed, or whether the owners signing must represent a certain proportion of frontage or area or value of land, is a question which depends upon the wording of the statute which requires the improvement. It is frequently provided that a petition to be valid must be signed by owners representing a majority of the front feet of the land fronting upon the improvement for which the assessment is levied.¹ Under a statute providing that a petition must be signed by the owners of

² Commissioners of Putnam County v. Young, 36 O. S. 288 [1880].

³ Hersie v. City of Buffalo, 1 Sheldon, 445 [1874].

⁴ Boorman v. City of Santa Barbara, 65 Cal. 313, 4 Pac. 31 [1884]; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218 [1897].

⁵ Boorman v. Santa Barbara, 65 Cal. 313, 4 Pac. 31 [1884]; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218 [1897].

⁶ City of Bloomington v. Reeves, 177 Ill. 161, 52 N. E. 278 [1898].

¹ Boorman v. Santa Barbara, 65

Cal. 313, 4 Pac. 31 [1884]; Mulligan v. Smith, 59 Cal. 206 [1881]; Taylor v. City of Bloomington, 186 Ill. 497, 58 N. E. 216 [1900]; Barber Asphalt Paving Co. v. Gogreve, 41 La. Ann. 251, 5 So. 848 [1889]; Bouldin v. Mayor and City Council of Baltimore, 15 Md. 18 [1859]; S. D. Mercer Co. v. City of Omaha, — Neb. —, 112 N. W. 617 [1907]; Henderson v. City of South Omaha, 60 Neb. 125, 82 N. W. 315 [1900]; Von Steen v. City of Beatrice, 36 Neb. 421, 54 N. W. 677 [1893].

one-half of the frontage, in order to be valid, the actual frontage upon the improvement must be measured.² The frontage cannot be measured in an irregular line so as to increase the number of lineal feet represented, and thus prevent a single owner of more than one-half of the actual frontage from defeating the improvement by refusing to sign the petition.³ The frontage created by the vacation of a street must be counted in determining whether owners of a majority of the frontage have signed or not.⁴ It may be provided by statute that a petition must be signed by the owners of the majority of the frontage in each contiguous block. Under such a statute, a petition signed merely by a majority of the frontage on the entire improvement is insufficient.⁵ It may be provided that a petition must be signed by the owners of the greater part of the frontage on both sides of the street between the cross streets between which the street is to be improved.⁶ A statute which requires a petition to be signed by the owners of two-thirds of the adjoining property, is not complied with by a petition signed by two-thirds of the owners of adjoining property, unless they also represent two-thirds of the adjoining property.⁷ Value, as well as frontage, may be taken as a basis for determining the number of signers necessary to a petition.⁸ In determining whether a majority in value of the property owners within a proposed improvement district have signed the petition, improvements which have been made upon the land since the last assessment for taxation and before the filing of the petition are to be estimated.⁹ The value of land which is not subject to assessment cannot be considered in determining whether a sufficient number of signatures have been attached to the petition.¹⁰ It may be provided that a petition

² *Taylor v. City of Bloomington*, 186 Ill. 497, 58 N. E. 216 [1900].

³ *Taylor v. City of Bloomington*, 186 Ill. 497, 58 N. E. 216 [1900].

⁴ *S. D. Mercer Co. v. City of Omaha*, — Neb. —, 112 N. W. 617 [1907].

⁵ *City of Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278 [1898].

⁶ *Dancer v. Town of Mannington*, 50 W. Va. 322, 40 S. E. 475 [1901].

⁷ *Barkley v. Oregon City*, 24 Ore. 515, 33 Pac. Rep. 978 [1893].

⁸ *Ahern v. Board of Improvement District, No. 3, of Texarkana*, 69 Ark. 68, 61 S. W. Rep. 575 [1901]; *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. Rep. 234 [1894].

⁹ *Ahern v. Board of Improvement District, No. 3, of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901].

¹⁰ *Ahern v. Board of Improvement District No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901].

is to be signed by the owners of the larger portion of the grounds within a square, in order to improve the streets in such square.¹¹

§ 792. Signatures obtained by fraud or mistake.

If signatures to a petition are obtained by the fraud of members of the council, such petition is said to be insufficient,¹ except where the action of the council in determining that the petition is sufficient, is conclusive.² If some property owners are induced to sign a petition by an agreement entered into by other property owners who wish the improvement constructed, whereby the latter owners agree to pay the assessments levied against the former, such contract is held to be fraudulent, as is a contract for obtaining the consent of property owners for a valuable consideration.³ Thus, A agreed, upon consideration that B would sign the petition now in circulation for the pavement of a certain street, to pay to B any excess over one dollar and fifteen cents per front foot on his property that such paving might cost, whenever B should be called upon by the proper party to pay such assessment. B was assessed in excess of one dollar and fifteen cents per front foot, and, accordingly, brought suit against A to recover such excess. It was held that this contract operated as a fraud upon the other property holders and could not be enforced.⁴ However, in this case it appeared that the improvement was not done in consequence of the petition referred to in this contract, but it was done under another application made two years later, which B did not sign. This case, furthermore, does not involve the question of the validity of a petition to which signatures have been procured by such means. Where this question has been involved, it has been held that in the absence of a showing that such a contract was entered into to buy off genuine opposition, a petition to which signatures have thus been obtained is valid.⁵ Accordingly, the fact that a property owner, who is unwilling to sign, not because he thinks the improvement unwise, but merely because he is unwilling to pay

¹¹ *City of Lexington v. McQuillan's Heirs*, 9 Dana (39 Ky.) 513, 35 Am. Dec. 159 [1840].

¹ *Blount v. City of Janesville*, 31 Wis. 648 [1872].

² *Blount v. City of Janesville*, 31 Wis. 648 [1872].

^{*} *Maguire v. Smock*, 42 Ind. 1, 13

Am. Rep. 353 [1873]; *Howard v. The First Independent Church of Baltimore*, 18 Md. 451 [1862].

⁴ *Howard v. The First Independent Church of Baltimore*, 18 Md. 451 [1862].

⁵ *Makemson v. Kauffman*, 35 O. S. 444 [1880].

for it, is induced to sign by an agreement on the part of others to pay his assessment for him, does not invalidate the petition, and his signature is to be counted thereto.⁶ If some of the freeholders sign under a mistake as to the effect of the petition, such mistake does not render the petition invalid, if it does not appear on the face thereof.⁷

§ 793. Form of signature.

It has been held that a petition must be signed unconditionally by the requisite number of property owners.¹ The fact that petitioners sign their christian name to a petition, not in full, but by initials only, does not render the petition invalid.²

§ 794. Withdrawal from petition.

Property owners who have signed a petition which has subsequently been filed, may withdraw their assent to such petition at any time before the public corporation has taken favorable action thereon.¹ It is said to be too late to withdraw after the commissioners' report is filed, the time for filing remonstrances has elapsed, and the case is ready for final judgment.² If the public corporation has taken favorable action, and has let a contract for the improvement which was petitioned for, the consent of the property owners cannot then be withdrawn.³ A petition which has not been withdrawn may be acted upon.⁴

§ 795. Determination of sufficiency of petition.

By some statutes, the council or other similar body is to hear and determine questions as to the sufficiency of the petition, and their decision is final and conclusive upon such questions.¹ If

⁶ Makemson v. Kauffman, 35 O. S. 444 [1880].

⁷ Hinkley v. Bishop, — Mich. —. 114 N. W. 676 [1908].

¹ Von Steen v. City of Beatrice, 36 Neb. 421, 54 N. W. 677 [1893].

² Sample v. Carroll, 132 Ind. 496, 32 N. E. 220 [1892].

³ Irwin v. Mayor, etc., of Mobile, 57 Ala. 6 [1876]; Crume v. Wilson, 104 Ind. 583, 4 N. E. 169 [1885].

⁴ Crume v. Wilson, 104 Ind. 583, 4 N. E. 169 [1885].

⁵ Irwin v. Mayor, etc., of Mobile, 57 Ala. 6 [1876].

⁶ Though indorsed "Filed until signers agree to paying deficiency." Bush v. City of Cincinnati, 18 Ohio C. C. 605 [1899].

¹ Chase v. Trout, 146 Cal. 350, 80 Pac. 81 [1905]; Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410 [1886]; Webber v. Gottschalk, 15 La. Ann. 376 [1860]; Roth v. Forsee, 107 Mo. App. 471, 81 S. W. 913 [1904]; In the Matter of Kiernan, 62 N. Y. 457 [1875]; Scranton v. Jermyn, 156 Pa. 107, 27 Atl. 66 [1893]; Olds v. Erie City, 79 Pa. St. (29 P. F. Smith) 380, [1875]; Erie v. Bootz, 72 Pa.

any petition has been filed, the determination of the council may be conclusive as to its sufficiency,² though such determination would not be conclusive if no petition at all were filed. In other jurisdictions the decision of the council or other similar body, as to the sufficiency of the petition, is final as against collateral attack;³ although such decision may not be final, if a direct attack as by appeal or the like is made upon such finding. Under other statutes, the fact that council has accepted a petition and acted upon it is *prima facie* evidence of its validity.⁴ In other jurisdictions, the existence of a petition is regarded as a condition precedent to the exercise of jurisdiction by the council or other corresponding body; and the principle applicable generally to a want of jurisdiction, which permits collateral attack, if no jurisdiction exists, permits collateral attack upon the validity of the assessment, in cases where the petition required by statute has not been filed.⁵ An objection to the sufficiency of a petition must ordinarily be made promptly.⁶ If objections are to be regarded as waived unless made within a certain time, objections upon the ground of the insufficiency of the petition must be made within such time.⁷ It is occasionally provided by statute that some body other than council, such as the board of commissioners or board of public works, shall pass upon the question of the sufficiency of the petition. Under some of these statutes, the finding of such board as to the sufficiency of the petition is final and conclusive,⁸ at least as against collateral attack.⁹ Statutes

St. (22 P. F. Smith) 196 [1872]; Blount v. City of Janesville, 31 Wis. 648 [1872].

²Scranton v. Jermyn, 156 Pa. 107, 27 Atl. 66 [1893].

³Spaulding v. North San Francisco Homestead and Railroad Ass'n., 87 Cal. 40, 25 Pac. Rep. 249, 24 Pac. 600 [1890]; Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531 [1891]; McEnery v. Town of Sullivan, 125 Ind. 407, 25 N. E. Rep. 540 [1890]; Hobbs v. Board of Commissioners, Tipton County, 116 Ind. 376, 19 N. E. 186 [1888]; Hume v. The Little Flat Rock Draining Association, 72 Ind. 499 [1880].

⁴Lenon v. Brodie, 81 Ark. 208, 98 S. W. 979 [1906]; City of Bloom-

ington v. Reeves, 177 Ill. 161, 52 N. E. 278 [1898].

⁵Morse v. City of Omaha, 67 Neb. 426, 93 N. W. 734 [1903]; Miller v. City of Amsterdam, 149 N. Y. 288, 43 N. E. 632 [1896]; McKeesport v. Busch, 166 Pa. St. 46, 31 Atl. 49 [1894].

⁶Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410 [1886].

⁷Union Pacific Railway Co. v. Kansas City, 73 Kan. 571, 85 Pac. 603 [1906].

⁸Reclamation District No. 537, of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156 [1898]; City of Denver v. Londoner, 33 Colo. 104, 80 Pac. 117 [1904].

⁹Tucker v. Sellers, 130 Ind. 514,

which make the decision of the city council final upon the question of the sufficiency of the petition are constitutional.¹⁰ If appeal to the common pleas court is provided as the method of determining the sufficiency of the number of petitioners, the question cannot be raised by exception to the report of the viewers.¹¹ Under other statutes, the approval of the city commissioners and the mayor is *prima facie* evidence of the sufficiency of the petition.¹² Under a statute providing that this question shall be referred to the city recorder, his report that a majority have not petitioned for the improvement makes the improvement impossible, unless three-fourths of the council vote for such improvement.¹³ Under other statutes, the finding of such board is not final and conclusive, and the assessment may be attacked for want of a sufficient petition.¹⁴ In the same state, statutes may make the decision of the board or other public officer final in some cases but not in others. Thus, where by statute the county judge was to give notice and take evidence as to the allegations of the petition, and he was to adjudge and determine as to the facts, and his judgment was given the same force and effect as other judgments in courts of record, it was held that if he had made a finding that the petition was sufficient, the assessment could not be set aside as long as his judgment was not attacked directly with success.¹⁵ Under a statute, which required a petition to be filed, and authorized council to proceed to construct the improvement, if such petition was filed, but which did not authorize the council to determine whether the statutory requirements concerning the petition had, in effect, been complied with, it was held that the approval of the petition by the council was not final.¹⁶ Where a council, or other body, is authorized to pass upon the sufficiency of a petition, the ques-

30 N. E. 531 [1891]; *Johnson v. State for Use of Davidson*, 116 Ind. 374, 19 N. E. 298 [1888]; *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499 [1880].

¹⁰ *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904].

¹¹ *In re Beechwood Avenue*, Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899].

¹² *Dashiell v. Mayor and City Council of Baltimore to Use of Hax*, 45 Md. 615 [1876].

¹³ *Hager v. City of Burlington*, 42 Ia. 661 [1876].

¹⁴ *Zeigler v. Hopkins*, 117 U. S. 683, 29 L. 1019, 6 S. 919 [1886]; *Brady v. Page*, 59 Cal. 52 [1881]; *Mulligan v. Smith*, 59 Cal. 206 [1881]; *Corry v. Gaynor*, 22 O. S. 584 [1872]; *Campbell v. Park*, 32 O. S. 544 [1877].

¹⁵ *Town of Cherry Creek v. Becker*, 123 N. Y. 161, 25 N. E. 369 [1890].

¹⁶ *Miller v. City of Amsterdam*, 149 N. Y. 288, 43 N. E. 632 [1896].

tion of what amounts to a finding that a petition is sufficient, is frequently presented. An express finding, in so many terms, that a petition is sufficient, clearly indicates council's determination.¹⁷ Such finding is not, however, indispensable. The adoption of a resolution of intention to construct the improvement petitioned for, ordinarily amounts to a finding that the petition is sufficient.¹⁸ If council has no power to enact an improvement ordinance, unless a proper petition is filed, the action of the council in enacting such ordinance amounts to a finding that the petition is sufficient.¹⁹ If the council has no authority to proceed in the construction of an improvement, unless a sufficient petition has been filed, the action of the council in making the improvement is equivalent to a formal resolution of intention, and is, in effect, a determination that the petition is sufficient.²⁰ If the petition is to be submitted to a court, its finding that the petition is sufficient raises, at least, a *prima facie* presumption of its validity.²¹ Where there is a provision for a formal confirmation of assessment proceedings, a decree of confirmation may cure defects in the number of signers to a petition,²² especially if a provision is made for a formal confirmation of an assessment at a hearing after due notice.²³

§ 796. Form of petition.

It is ordinarily provided that a petition must be in writing.¹ If two or more different petitions are presented, either at the same time or at different times, both asking for substantially the same improvement, and neither of them being withdrawn, the

¹⁷ *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]; *People ex rel. Crowell v. Lawrence*, 36 Barb. (N. Y.) 178 [1862]; *Campbell v. Park*, 32 O. S. 544 [1877].

¹⁸ *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *German Savings and Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902].

¹⁹ *In the Matter of Kiernan*, 62 N. Y. 457 [1875]; *Scranton v. Jermyn*, 156 Pa. 107, 27 Atl. 66 [1893]; *Old v. Erie*, 79 Pa. St. (29 P. F. Smith) 380 [1875]; *Erie v. Bootz*, 72 Pa. St. (22 P. F. Smith) 196 [1872].

²⁰ *DePuy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016 [1892]; *Hendrickson v. City of Toledo*, 23 Ohio Cir. Ct. R. 256 [1901] *Union Pacific Railway Co. v. Kansas City*, 73 Kan. 571, 85 Pac. 603 [1906].

²¹ *Stiewel v. Fencing District, No. 6, of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902].

²² *Conlin v. People ex rel. Lassig*, 190 Ill. 400, 60 N. E. 55 [1901].

²³ *McManus v. People ex rel. Raymond*, 183 Ill. 391, 55 N. E. 886 [1899].

¹ *Carron v. Martin*, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857].

two may be regarded in legal effect one petition, and the aggregate number of different signers to be taken as determining whether a sufficient number have signed.² So, if a supplemental petition is filed, asking for the improvement prayed for in the original petition, and expressly referring to such original petition, the two may be regarded as in legal effect one petition.³ If, however, a petition once presented has been subsequently abandoned, and later another petition for the same improvement is presented, the two petitions cannot be regarded as being in legal effect one petition.⁴

§ 797. Filing of petition.

If the statute requires it, the petition must be filed with the designated officer. If, by statute, a petition is to be presented to the town clerk and filed in his office, it is not sufficient if the petition is left in the office of the attorney of the petitioner until the time that the order organizing the district is entered.¹ A statute requiring a protesting petition to be canvassed by the board of public works does not require a petition for an improvement to be so canvassed.² The fact that a petition, which has been regularly filed with the proper board, and has not been withdrawn, is endorsed "filed until signers agree to pay deficiency," does not render such petition invalid.³

§ 798. Contents of petition.

The petition must describe the improvement with such degree of certainty that its location and general nature can be determined.¹ Accordingly, if the petition leaves it uncertain whether one or two drains are to be constructed, such petition is insufficient.² The petition need not, however, contain the particularity of description which is essential in an ordinance or in specifications.³ Thus, a description of an improvement as a "grav-

² *Campbell v. Park*, 32 O. S. 544 [1877].

³ *Commissioners of Putnam County v. Young*, 36 O. S. 288 [1880].

⁴ *Makemson v. Kauffman*, 45 O. S. 444 [1880].

¹ *Bishop v. People of the State of Illinois*, 200 Ill. 33, 65 N. E. 421 [1902].

² *Gilsonite Construction Co. v. Arkansas McAlester Coal Co.*, 205 Mo. 49, 103 S. W. 93 [1907].

³ *Bush v. City of Cincinnati*, 18 Ohio C. C. 605 [1899].

¹ *State of Minnesota ex rel. Utick v. Board of Commissioners of Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902].

² *West v. Bullskin, Prairie Ditching Company*, 32 Ind. 138 [1869].

³ *Stoddard v. Johnson*, 75 Ind. 20 [1881]; *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908].

eled road'' is sufficient.⁴ It is sufficient, if an application for a drain gives the beginning, the route, and the terminus thereof.⁵ It is not necessary that the petition should state in terms that the town as a whole would be benefited by a drainage improvement, where the city provides that the petition may contain such averments, but does not make them mandatory.⁶ Under such a petition, an assessment may be levied against the town as a whole, if it appears as a matter of fact that it is benefited. The fact that a petition is informal or that the improvement is not described definitely, cannot be a ground of objection after the improvement is constructed, by one who has had notice of the proceedings, and has appeared in person and made other objections to such proceedings.⁷ Under some statutes, the petition must show on its face that the petitioners are freeholders of the county.⁸ If the petition as filed lacks certain averments which are essential, the legal effect is the same as if no petition had been filed.⁹ A petition that the board of public improvements should recommend to the municipal assembly an ordinance providing for a certain improvement, is a request for a valid ordinance and not one which might be passed under an unconstitutional statute.¹⁰

§ 799. Necessity that petition appear of record.

In some jurisdictions the ordinance, or the record of the proceedings, must show affirmatively that a petition was filed in compliance with the statute providing therefor.¹ If the record of the council shows that a petition was filed, signed by a majority of the property owners, it is not necessary that the resolution or the record thereof should show or refer to the fact that such petition was filed.² If the petition is filed properly, and the improve-

⁴ *Stoddard v. Johnson*, 75 Ind. 20 [1881].

⁵ *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908].

⁶ *Town of Muskego v. Drainage Comrs.*, 78 Wis. 40, 47 N. W. 11 [1890].

⁷ *Rowe, Pros. v. Commissioners of Assessments of East Orange*, 69 N. J. L. (40 Vr.) 600, 55 Atl. 649 [1903].

⁸ *Township of Whiteford v. Phinney*, 53 Mich. 130, 18 N. W. Rep. 593 [1884].

⁹ *Turrill v. Grattan*, 52 Cal. 97 [1877]; *Township of Whiteford v. Phinney*, 53 Mich. 130, 18 N. W. 593 [1884].

¹⁰ *Perkinson v. Hoolan*, 182 Mo. 189, 81 S. W. 407 [1904].

¹ *State ex rel. Pope, Pros. v. Town of Union, in the County of Hudson*, 32 N. J. L. (3 Vr.) 343 [1867].

² *Hardwick v. City of Independence*, — Ia. —, 114 N. W. 14 [1907].

ment is ordered by the court, and the assessment is levied, the proceedings are not rendered invalid by the fact that the petition is lost subsequently.³

§ 800. Petition as restricting kind of improvement.

Under a petition for an improvement of a given kind the public corporation cannot proceed to construct an improvement of a different kind.¹ In so doing they are, in effect, denying the petition which is presented, and constructing an improvement without any petition therefor. If the petition asks that a street should be "graded, rolled, shaped and graveled," the board of improvements cannot improve such street by macadamizing it and building stone curbs and gutters.² If, however, the property owners are by statute given the right to select the material to be used within a certain time, and they fail to make such selection, the public corporation has a right then to proceed to make such selection.³ The proper officers of the public corporation may reject the petition on the ground that the material petitioned for is unfit.⁴ If the petition designates a certain grade as that to which the improvement is to be constructed, the public corporation cannot subsequently change such grade and then act under such petition.⁵ This rule applies where the grade has been fixed by an ordinance, and the petition asks that the street be brought to grade, and subsequently the grade is reduced by the public corporation.⁶ If, however, the petition states the initial point, angle of inclination of the grade desired, and the point where it would strike the surface, the city may act on the grade as determined by the initial point and angle of inclination, though by the mistake of the property owners it strikes the surface at a point different from that designated by them, and results in a

³ *Driver v. Moore*, 81 Ark. 80, 98 S. W. 734 [1906].

¹ *Rhodes v. Board of Public Works of the City of Denver*, 10 Colo. App. 99, 49 Pac. 430 [1897]; *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897]; *State, App., Pros. v. Town of Stockton, in the County of Camden*, 61 N. J. L. 520, 39 Atl. 921 [1898].

² *Watkins v. Griffith*, 59 Ark. 344, 27 S. W. Rep. 234 [1894].

³ *State of Nebraska ex rel. City of*

Omaha v. Birkhauser, 37 Neb. 521, 56 N. W. 303 [1893].

⁴ *Rhodes v. Board of Public Works, of the City of Denver*, 10 Colo. App. 99, 49 Pac. 430 [1897].

⁵ *Whaples v. City of Waukegan*, 179 Ill. 310, 53 N. E. 618 [1899]; *Brady v. Rogers*, 63 Mo. App. 222 [1895].

⁶ *Whaples v. City of Waukegan*, 179 Ill. 310, 53 N. E. 618 [1899]; *Brady v. Rogers*, 63 Mo. App. 222 [1895].

deeper cutting than they desire.⁷ If the petition specifies the part of the street or road which is to be improved, the public corporation cannot, while acting under such petition, improve more or less than the part specified in the petition.⁸ Under a petition which asks for two several improvements, the public corporation may construct one of such several improvements and refuse to construct the other.⁹ Thus, under a petition for constructing a sidewalk upon the west side and also upon the north side of certain lots the public corporation may construct one of such walks and refuse to construct the other.¹⁰ Under a petition for the construction of a sewer upon a particular street, the public corporation cannot construct the sewer extending over a larger part of the proposed general sewer system than is asked for in the petition.¹¹ Under a petition for furnishing water to a camp to be used by a soldiers' reunion for less than a week's time, the public corporation cannot proceed to make a permanent extension of water mains.¹² If the improvement, as constructed, differs from that specified in the petition but the petitioners have acquiesced in such modification, it is equivalent in legal effect to an amendment of the petition, and the petitioners cannot object to such deviation.¹³ A variance between the petition and the improvement, which is immaterial, does not invalidate the assessment.¹⁴ Where the petition asked for "Trinidad sheet asphalt," the ordinance provided for paving with "asphaltum sheet pavement," the specifications provided that paving with "refined lake asphalt," and Trinidad asphalt was actually used, it was held that the assessment was not invalidated, even though the terms "lake asphalt" and "Trinidad asphalt" might not include the same kinds of asphalt in all cases.¹⁵ Where a number of distinct

⁷ *City of Burlington v. Gilbert*, 31 Ia. 356, 7 Am. Rep. 143 [1871].

⁸ *Robinson v. Logan*, 31 O. S. 466 [1877]; *Minor v. Board of Control of the City of Hamilton*, 20 Ohio C. C. 4 [1899].

⁹ *City of Marshall to the Use of Jacoby v. Rainey*, 78 Mo. App. 416 [1898].

¹⁰ *City of Marshall to Use of Jacoby v. Rainey*, 78 Mo. App. 416 [1898].

¹¹ *In Matter of Drake*, 69 Hun (N. Y.) 95, 23 N. Y. S. 264 [1893].

¹² *Gilman v. City of Milwaukee*, 61 Wis. 589, 21 N. W. 640 [1884].

¹³ *Stiewel v. Fencing District*, No. 6, of *Johnson Co.*, 71 Ark. 17, 70 S. W. 308 [1902].

¹⁴ *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903]; *State, Ogden, Pros. v. Mayor and Common Council of City of Hudson*, 29 N. J. L. (5 Dutcher) 104 [1860]; *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. Rep. 130 [1900].

¹⁵ *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. Rep. 130 [1900].

petitions were filed for the improvement of different sections of a street, and the public corporation provided for the improvement, as a whole, of all of the sections of the street provided for by the petitions, it was held that this was a substantial compliance with the petition.¹⁶ Where two petitions are presented, each asking for a main sewer in a given street, one of them asking for branches in two specified streets, and the other asking for branches in two other specified streets, it has been held that the public corporation may, by one ordinance, provide for constructing the main sewer with all the branches asked for by the two petitions.¹⁷ If the petition asks for an improvement in general terms, and the ordinance provides for substantially the same improvement, but in greater detail, the ordinance is valid.¹⁸ Thus, under a petition for grading and paving a street, an ordinance which provides in detail for filling, paving, curbing, guttering, laying the cross walks and intersections and flagging the sidewalks is not invalid.¹⁹ A petition for grading a street without mentioning the grading and paving of the intersections is not invalid by reason of such omission.²⁰ Where the petition and ordinance both provide for laying certain sidewalks, the fact that the title of the ordinance merely mentions grading the street does not invalidate the proceedings.²¹ If, in the petition, a maximum cost is fixed, the assessment cannot exceed the amount thus indicated.²² Where, by statute, the apportionment of the cost of the improvement between the property owners and the city is to be determined by the city, the prayer in the petition as to the method of paying for such improvement, is of no effect.²³ Where under a petition which asks that one-half of the expense of the improvement should be paid by the city and one-half by the property owners, the entire expense was charged upon the prop-

¹⁶ *State, Ogden, Pros. v. Mayor and Common Council of City of Hudson*, 29 N. J. L. (5 Dutcher) 104 [1860].

¹⁷ *Works v. City of Lockport*, 28 Hun (N. Y.) 9 [1882].

¹⁸ *Wahlgren v. Kansas City*, 42 Kan. 243, 21 Pac. 1068 [1889]; *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutcher) 500 [1860].

¹⁹ *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 28 N. J. L. (4 Dutcher) 500 [1860].

²⁰ *Wahlgren v. City of Kansas City*, 42 Kan. 243, 21 Pac. 1068 [1889].

²¹ *In re Beechwood Avenue, Appeal O'Mara*, 194 Pa. St. 86, 45 Atl. 127 [1899].

²² *Barber Asphalt Paving Company v. Watt*, 51 La. Ann. 1345, 26 So. 70 [1899].

²³ *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899].

erty owners, this was held not to be a "legal irregularity."²⁴ If the public corporation has power to construct an improvement with or without a petition, and a petition is filed for one kind of improvement, the fact that the public corporation proceeds to construct a different kind of improvement does not invalidate the assessment.²⁵

§ 801. Acting upon petition.

If a petition is made and executed in a proper form, the public corporation is under most statutes authorized to construct the improvement therein specified.¹ Thus, under a petition asking that grade of a street be changed and that after such change an order be made to improve the streets to a new grade, the public corporation may change the grade and order the improvements which are petitioned for.² A petition may ordinarily be acted upon at any time before it is withdrawn or abandoned.³ A delay of two years between the time that the petition is presented and the time that the council passes a resolution for the improvement, does not invalidate the proceedings, if the petition is not withdrawn or abandoned.⁴ If a petition has been acted upon by the public corporation, and the improvement constructed without objection from the property owners, it will be presumed, under the rule in force in most jurisdictions, that such petition was valid.⁵ In most cases a petition is but a condition precedent to the action of the public corporation in constructing the improvement at the expense of the property owners; and if the public corporation does not think it wise to grant the prayer of the petition, it has full power to refuse to construct the improvement, even if the property owners have petitioned therefor. The legislature may, however, make the petition mandatory, and may provide that in case the petition specified by statute is present-

²⁴ Rich's Case, 12 Abb. Pr. (N. Y.) 118 [1861].

²⁵ Rawson v. City of Chicago, 185 Ill. 87, 57 N. E. 35 [1900].

¹ German Savings and Loan Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66 [1906].

² German Savings and Loan Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902].

³ Bush v. City of Cincinnati, 18 Ohio C. C. 605 [1899].

⁴ Whipple v. City of Toledo, 29 Ohio C. C. 42 [1905].

⁵ Lenon v. Brodie, 81 Ark. 208, 98 S. W. 979 [1906]; State Provident Institution v. Jersey City, 52 N. J. L. (23 Vr.) 490, 19 Atl. 1096 [1890]; Tingle v. Village of Port Chester, 101 N. Y. 294, 4 N. E. 625 [1886].

ed, the public corporation is bound to construct the improvement therein petitioned for.⁶ If a petition has been filed and has been considered by the public corporation with unfavorable results, the refusal of the public corporation to grant such petition is final.⁷ The public corporation has no authority to proceed with such improvement unless a new petition is filed.⁸ If the objection that the petition under which the improvement in question is constructed, has been previously used as a basis for recommending certain ordinances which have been subsequently held invalid, is not interposed before confirmation, it cannot be used after confirmation as a ground for equitable relief.⁹

§ 802. Bond.

It may be provided that when a petition is filed for the construction of a public improvement a bond shall also be filed for the payment of all the expenses incurred, in case the trustees refuse to grant the prayer of the petition. If the statute requires such bond to be filed before any steps are taken by the public officials toward acting under such petition, the bond must be regarded as being jurisdictional, so that a failure to file such bond deprives the public officials of jurisdiction to order the public improvement.¹ So it may be provided, as a condition precedent to the levy of an assessment, that the board of directors of a ditching association shall execute a bond for the faithful application of assessments collected by them.²

§ 803. Remonstrance of property owners.

Remonstrances and protests are frequently filed, where property owners wish to resist the construction of local improvements and the levy of assessments therefor. A remonstrance or protest shows that a property owner does not assent to the improvement and assessment, and does not acquiesce therein, but otherwise it has no legal effect except as provided by statute.¹

⁶ *Givins v. City of Chicago*, 188 Ill. 348, 58 N. E. 912 [1900].

⁷ *Millisor v. Wagner*, 133 Ind. 400, 32 N. E. 927 [1892].

⁸ *Millisor v. Wagner*, 133 Ind. 400, 32 N. E. 927 [1892].

⁹ *Sumner v. Village of Milford*, 214 Ill. 388, 73 N. E. 742 [1905].

¹ *Darst v. Griffin*, 31 Neb. 668, 48

N. W. Rep. 819 [1891]; *Sessions v. Crunkilton*, 20 O. S. 349 [1870].

² *Cooper v. Arctic Ditchers*, 56 Ind. 233 [1877].

¹ *City Street Improvement Co. v. Rontet*, 140 Cal. 55, 70 Pac. Rep. 729 [1903]; *Nugent v. City of Jackson*, 72 Miss. 1040, 18 So. 493 [1895]; *Harrisburg v. Baptist*, 156 Pa. St. 526, 27 Atl. 8 [1893].

The right to file an operative remonstrance exists only by statute.² Provisions are frequently made, however, by statute for the filing of such remonstrance. Under a statute providing therefor, an opportunity for making a protest or remonstrance must be given in accordance with the terms of the statute.³ Since the right of stopping improvements by remonstrance or objection is purely one given by statute, the legislature may grant it or withhold it as they wish. They may, accordingly, allow it in some improvements but not in others.⁴ Thus, it may be allowed in paving streets, but not in constructing sewers.⁵ The city cannot, by combining two improvements, as to only one of which the right of remonstrance exists, deprive the property owner of the right to stop such improvement by remonstrance.⁶ In some states, statutes provide in considerable detail the right of property owners to stop the improvement of the block on which their property abuts. This right extends as far as the statute confers it, but is limited by the terms thereof.⁷ These provisions ordinarily apply to the improvement of a street in a given block, and have no application to paving street intersections.⁸ A statutory provision requiring the court to enter an order to abandon a drainage improvement, if a petition is filed to abandon such improvement, signed by not less than two-thirds of the land owners of such district owning more than one-half of the area thus assessed, whose aggregate assessment is not less than one-half of the proposed cost, does not apply to additional work to drain lands not sufficiently drained by the original system, but applies exclusively to the original system of drainage before any contracts are let therefor.⁹

² *City Street Improvement Co. v. Laird*, 138 Cal. 27, 70 Pac. 916 [1902].

³ *McLauren v. City of Grand Forks*, 6 Dakota, 397, 43 N. W. Rep. 710 [1889].

⁴ *City Street Improvement Co. v. Laird*, 138 Cal. 27, 70 Pac. 916 [1902]; *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891]; *Oregon Real Estate Co. v. Portland*, 40 Or. 56, 66 Pac. 442 [1901].

⁵ *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891].

⁶ *Gray v. Burr*, 138 Cal. 109, 70 Pac. 1068 [1902].

⁷ *City Street Improvement Co. v. Babcock*, 139 Cal. 690, 73 Pac. 666 [1903]; *City Street Improvement Co. v. Laird*, 138 Cal. 27, 70 Pac. 916 [1902]; *Pacific Paving Co. v. Sullivan Estate Co.*, 137 Cal. 261, 70 Pac. 86 [1902]; *Smith v. Hazard*, 110 Cal. 145, 42 Pac. Rep. 465 [1895]; *McDonald v. Dodge*, 97 Cal. 112, 31 Pac. Rep. 909 [1893].

⁸ *City Street Improvement Co. v. Rontet*, 140 Cal. 55, 70 Pac. Rep. 729 [1903].

⁹ *Soran v. Commissioners of Union Drainage District No. 1*, 215 Ill. 212, 74 N. E. 129 [1905].

§ 804. By whom remonstrance may be signed.

It is usually provided by statute by whom a remonstrance must be signed in order to be legally operative; and these provisions usually specify the class of persons from whom the signers must be taken, and the number of persons of that class who must sign in order to make the remonstrance valid. By statute, a property owner, whose land will be injured by the proposed improvement, may remonstrate, though no assessment is levied against his land.¹ If the name of an owner, who is a member of the class specified by statute, is signed to a remonstrance by an agent, such signature is ordinarily held to be sufficient.² The agent's authority need not be shown affirmatively on the face of such remonstrance.³ If a corporation owns land, it has been held that an officer of such corporation cannot sign a remonstrance on behalf of the corporation, unless he is authorized so to do by the directors.⁴ Under most statutes of descent and distribution, an executor does not take title to the real property of the decedent, and it is, accordingly, held that he has no implied authority by virtue of his position to sign a remonstrance on behalf of the estate of the decedent.⁵ By the provisions of a special statute, however, an executor is to be regarded as an owner within the meaning of the statute for the purpose of signing remonstrances.⁶ Parties who are brought into an assessment proceeding after a petition has been filed for the construction of such improvement and the levy of an assessment therefor, have the same right of remonstrance as those who are made parties by the petition itself.⁷ If, after a remonstrance has been made, a property owner upon a street conveys part of his property to grantees, without consideration, for the sole purpose of qualifying them to join with him in the remonstrance, and with the understanding that, after they have joined in such remonstrance, they are to reconvey to him, upon demand, such property owners cannot be counted in

¹ Reasoner v. Creek, 101 Ind. 482 [1884].

² Fruin-Dambrick Construction Co. v. Geist, 37 Mo. App. 509 [1889].

³ Los Angeles Lighting Company v. City of Los Angeles, 106 Cal. 156, 39 Pac. Rep. 535 [1895].

⁴ City of Sedalia ex rel. Gilsonite Construction Co. v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014 [1904].

⁵ City of Sedalia ex rel. Gilsonite Construction Co. v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014 [1904]; City of Sedalia ex rel. Gilsonite Construction Company v. Scott, 104 Mo. App. 505, 78 S. W. 276 [1903].

⁶ Los Angeles Lighting Company v. City of Los Angeles, 106 Cal. 156, 39 Pac. Rep. 535 [1895].

⁷ Zumbro v. Parnin, 141 Ind. 430, 40 N. E. 1085 [1895].

determining whether a sufficient number have signed the remonstrance.⁸ If, however, after such conveyance the original grantor and grantee have treated such conveyance as valid and binding, such grantees are to be regarded as the real owners with reference to their right to be heard upon the question of subsequent improvements.⁹ If the name of one co-tenant is signed to a protest by another co-tenant in the presence of the first co-tenant and at his request, it has been held that such signature is to be regarded, as in legal effect, the signature of both co-tenants to the protest against the improvement.¹⁰

§ 805. Number of remonstrants necessary.

Under some statutes a remonstrance must be signed by two-thirds of the class indicated by statute in order to be effective.¹ If the statute provides that the remonstrance must be signed by "two-thirds of the owners of the property resident in the city liable to taxation for the street improvement," it is sufficient and necessary for two-thirds of such owners to sign, without reference to the action of the owners of property liable to taxation for such improvement, who are not resident in the city.² Under a statute which provides that a remonstrance, to be effective, must be signed by two-thirds of the property owners who reside on lots abutting on the improvement, and who represent two-thirds of the number of lineal feet on the improvement, a remonstrance signed by two-thirds of the owners who represent two-thirds of the frontage, but some of whom did not reside on lots abutting, was held to be insufficient, where, after deducting the owners who did not reside on lots abutting, less than two-thirds of the owners had signed the remonstrance.³ Under a statute providing that a remonstrance is to be filed by "two-thirds of all the resident freeholders upon the street," a remonstrance must be signed by freeholders resident upon the street and not simply by residents of the city generally, who own property upon such

⁸ *Forbis v. Bardbury*, 58 Mo. App. 506 [1894].

⁹ *Forbis v. Bardbury*, 58 Mo. App. 506 [1894].

¹⁰ *Los Angeles Lighting Company v. City of Los Angeles*, 106 Cal. 156, 39 Pac. Rep. 535 [1895].

¹ *Kirkland v. Board of Public Works of the City of Indianapolis*,

142 Ind. 123, 41 N. E. 374 [1895]; *Maley v. Clark*, 33 Ind. App. 149, 70 N. E. 1005 [1903]; *Marshall v. City of Leavenworth*, 44 Kan. 459, 24 Pac. 975 [1890].

² *Marshall v. City of Leavenworth*, 44 Kan. 459, 24 Pac. 975 [1890].

³ *Maley v. Clark*, 33 Ind. App. 149, 70 N. E. 1005 [1903].

street.⁴ Under some statutes a remonstrance is to be signed by a majority of the class designated. The class, a majority of which is to sign the remonstrance in order to make it valid, consists ordinarily of the owners of the frontage.⁵ Under such a statute it is held that land owned by the city and used for city purposes exclusively should not be counted either way.⁶ It may be provided that owners of more than one-half of the property to be assessed may remonstrate against the improvement.⁷ The right of stopping the improvement by protest may be given to owners of the majority of the frontage.⁸ Under other statutes a remonstrance is sufficient if signed by one-third of the members of the class fixed by the statute.⁹

§ 806. Withdrawal from remonstrance.

A remonstrance may be withdrawn after it is filed and before it is acted upon.¹ One who signs his name to a remonstrance, but specifically files a written statement withdrawing from such remonstrance before it is filed, is not to be counted among the number of remonstrants.² It has been held, however, in some cases, that if the statute provides that the filing of a remonstrance signed by a sufficient number ousts the jurisdiction of a public corporation to make the improvement, and prevents it from

⁴Kirkland v. Board of Public Works of the City of Indianapolis, 142 Ind. 123, 41 N. E. 374 [1895].

⁵Pacific Paving Co. v. Gallett, 137 Cal. 174, 69 Pac. 985 [1902]; Pacific Paving Co. v. Geary, 136 Cal. 373, 68 Pac. 1028 [1902]; Thomason v. Carroll, 132 Cal. 148, 64 Pac. Rep. 262 [1901]; Pacific Paving Co. v. Mowbray, 127 Cal. 1, 59 Pac. Rep. 205 [1899]; Los Angeles Lighting Company v. City of Los Angeles, 106 Cal. 156, 39 Pac. Rep. 535 [1895]; Manley v. Emlin, 46 Kan. 655, 27 Pac. 844 [1891]; Hensley v. City of Butte, 33 Mont. 206, 83 Pac. 481 [1905]; Cook v. City of Portland, 35 Or. 383, 58 Pac. 353 [1899]; Armstrong v. Ogden City, 12 Utah 476, 43 Pac. 119 [1895].

⁶Armstrong v. Ogden City, 12 Utah 476, 43 Pac. 119 [1895].

⁷Nugent v. City of Jackson, 72 Miss. 1040, 18 So. 493 [1895]; Hensley v. City of Butte, 33 Mont. 206, 83 Pac. 481 [1905]; Portland v. Oregon Real Estate Co., 43 Or. 423, 72 Pac. 322 [1903]; Oregon Real Estate Co. v. Gambell, 41 Or. 61, 66 Pac. 441 [1901]; Oregon Real Estate Company v. Portland, 40 Or. 56, 66 Pac. 442 [1901]; Cook v. City of Portland, 35 Or. 383, 58 Pac. 353 [1899].

⁸City Street Improvement Co. v. Babcock, 139 Cal. 690, 73 Pac. 666 [1903].

⁹Burnett v. Mayor and Common Council of the City of Sacramento, 12 Cal. 76, 73 Am. Dec. 518 [1859].

¹City of New Orleans for the Use of Nicholson & Co. v. Stewart, 18 La. Ann. 710 [1866].

²City of Sedalia ex rel. Gilsonite Construction Co. v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014 [1904].

proceeding therewith, the filing of such remonstrance signed by sufficient number of property owners, puts an end to proceedings; and the subsequent withdrawal of names from the remonstrance is ineffectual to revive the proceedings which have thus been stopped.³

§ 807. Form of remonstrance.

Proceedings whereby property owners object to an improvement and assessment are to be construed liberally, in order that proper protection may be granted to such property owners.¹ The remonstrance must be in writing.² No particular formality is necessary.³ It is sufficient if the objection shows that the proposed improvement is objected to, by a sufficient number of the owners of the property.⁴ Reasons for objecting to the improvement need not be stated.⁵ If the statute requires a remonstrance to be verified, the verification, if defective, cannot be amended after the time limited for filing remonstrances.⁶

§ 808. Filing remonstrance.

It is ordinarily provided that a remonstrance must be filed within a certain space of time in order to be operative. In the absence of a specific statutory provision as to what shall constitute filing, however, it is ordinarily sufficient if the property owners deliver the remonstrance to the officer who is designated by statute as the one to whom the remonstrance shall be given.¹ It is not necessary that such official endorse the fact or time of filing upon such protest.² A remonstrance against a proposed improve-

³ City of Sedalia v. Scott, 104 Mo. App. 595, 78 S. W. 276 [1903]; Knoppi v. Gilsonite Roofing and Paving Company, 92 Mo. App. 279 [1901]; State, Lemon, Pros. v. Inhabitants of the City of Trenton, 47 N. J. L. (18 Vroom) 489, 4 Atl. Rep. 312; Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119 [1895].

¹ City Street Improvement Co. v. Babcock, 139 Cal. 690, 73 Pac. 666 [1903]; Stevens v. Templeton, — Ind. —, 84 N. E. 148 [1908].

² Hensley v. City of Butte, 33 Mont. 206, 92 Pac. 34 [1907]; Renard v. City of Spokane, — Wash. —, 93 Pac. 517 [1908].

³ Los Angeles Lighting Company v. City of Los Angeles, 106 Cal. 156, 39 Pac. Rep. 535 [1895].

⁴ Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535 [1895].

⁵ Hensley v. City of Butte, 33 Mont. 206, 92 Pac. 34 [1907].

⁶ Morgan Civil Township v. Hunt, 104 Ind. 590, 4 N. E. 299 [1885].

¹ Thomason v. Carrol, 132 Cal. 148, 64 Pac. Rep. 262 [1901].

² City Street Improvement Co. v. Babcock, 139 Cal. 690, 73 Pac. 666 [1903]; Pacific Paving Company v. Gallett, 137 Cal. 174, 69 Pac. 983 [1902]; Thomason v. Carrol, 132 Cal. 148, 64 Pac. Rep. 262 [1901].

ment is not part of the transcript.³ It is not sufficient to leave the remonstrance at the clerk's office, if personal appearance of the objectors is necessary in addition to written objections.⁴ If objections have been filed they must, under some statutes, be considered, even if the objector does not appear personally to argue them.⁵

§ 809. Time for presenting remonstrance.

The time within which the remonstrance is to be delivered is usually fixed by statute and such statutory provisions must be complied with in a substantial manner. A protest filed before the assessment roll is filed is premature.¹ Under a statute, which provides that property owners may make written objection "within ten days after the expiration of the time of the publication and posting," it has been held that the protest may be filed after the publication is begun, although the publication is not yet completed.² Accordingly, a protest filed before the time for publication and for posting notices has expired,³ as upon the last day for giving such notices,⁴ is not filed prematurely. If, however, the protest is not filed within the time specified by statute, but is filed at a day subsequent thereto, such protest has no legal effect.⁵ It is too late to object after contracts have been advertised for,⁶ or after the work has been done.⁷ Under a statute which provided that the resolution of council to improve a street should be published, and that protests should be made within ten days after such publication, it was held that equity would not interfere on behalf of a property owner who had made no protest until the work was partially completed, and until the city had become liable upon the contract for such improvement.⁸ If

³ *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872].

⁴ *Hensley v. City of Butte*, 33 Mont. 206, 92 Pac. 34 [1907].

⁵ *Granger v. City of Buffalo*, 6 Abb. N. C. 238 [1879].

¹ *Renard v. City of Spokane*, — Wash. —, 93 Pac. 517 [1908]; [Protest filed two months before assessment roll.]

² *Thomason v. Carrol*, 132 Cal. 148, 64 Pac. Rep. 262 [1901].

³ *Pacific Paving Co. v. Gallett*, 137 Cal. 174, 69 Pac. 985 [1902].

⁴ *Thomason v. Carrol*, 132 Cal. 148, 64 Pac. 262 [1901].

⁵ *Warren & Malley v. Russell*, 129 Cal. 381, 62 Pac. Rep. 75 [1900]; *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859]; *Wright v. City of Tacoma*, 3 Wash. Ter. 410, 19 Pac. 42 [1888].

⁶ *McKee v. Town of Pendleton*, 162 Ind. 667, 69 N. E. 997 [1904].

⁷ *Edwards House Co. v. City of Jackson*, — Miss. —, 45 So. 14 [1907].

⁸ *Wright v. City of Tacoma*, 3 Wash. Ter. 410, 19 Pac. 42 [1888].

land is added to a drainage district upon notice specified by statute, the owner of such land has the statutory time from the giving of such notice in which to remonstrate, and not merely the statutory time from the filing of the final report of the commissioners by which report his land was not included in the district.⁹ In the absence of some statutory provision therefor, an excuse for a failure to file a remonstrance within the time limited does not give any legal effect to remonstrances filed after the time limited.¹⁰ Thus, under a statute which provides that remonstrances may be filed within three days, the fact that sickness prevents the filing of such remonstrance within the time limited does not excuse the delay.¹¹

§ 810 Effect of remonstrance.

The statutes which confer the right of protest or remonstrance upon the property owners usually provide specifically what the effect of such remonstrance or protest shall be. It is frequently provided that the filing of a protest or remonstrance in compliance with the terms of a statute terminates the right of the public corporation to proceed with the improvement contemplated or to levy a local assessment therefor.¹ Under other statutes, a remonstrance suspends absolutely the right to proceed with such improvement for a certain period of time, such as six months; and makes it necessary, if the public corporation wishes to proceed with such improvement at the end of such time, that a new resolution of intention should be passed, and that the proceedings for the improvement be begun *de novo*.² It may be provided that the filing of a remonstrance shall suspend the right to proceed with

⁹ *Goodwine v. Leek*, 114 Ind. 499, 16 N. E. 816 [1887].

¹⁰ *Hays v. Tippy*, 91 Ind. 102 [1883].

¹¹ *Hays v. Tippy*, 91 Ind. 102 [1883].

¹ *Forbis v. Bardbury*, 58 Mo. App. 506 [1894]; *Portland v. Oregon Real Estate Co.*, 43 Or. 423, 72 Pac. 322 [1903]; *Oregon Real Estate Company v. Portland*, 40 Or. 56, 66 Pac. 442 [1901]; *Cook v. City of Portland*, 35 Or. 383, 58 Pac. Rep. 353 [1899]; *State, Simon, Pros. v. Inhabitants of the City of Trenton*, 47 N. J. L. (18 Vroom) 489, 4 Atl. Rep. 312.

² *City Street Improvement Company v. Babcock*, 139 Cal. 690, 73 Pac. 666 [1903]; *Pacific Paving Company v. Sullivan Estate Company*, 137 Cal. 261, 70 Pac. 86 [1902]; *Pacific Paving Co. v. Geary*, 136 Cal. 373, 68 Pac. 1028 [1902]; *Thomason v. Carrol*, 132 Cal. 148, 64 Pac. Rep. 262 [1901]; *Union Paving and Contracting Company v. McGovern*, 127 Cal. 638, 60 Pac. 169 [1900]; *City Street Improvement Company v. Babcock*, 123 Cal. 205, 55 Pac. 762 [1898].

the improvement for a certain period of time.³ The filing of a remonstrance may suspend certain proceedings until the objections contained in the remonstrance have been passed upon.⁴ It may be provided that if a remonstrance is filed, the proceedings cannot be continued unless by a vote larger than a majority, a two-thirds vote being usually specified by statute.⁵ Under such a statute, passage of an improvement resolution by a *viva voce* vote will not be presumed to be a compliance with the statute.⁶ In the absence of a statute which forbids the resumption of proceedings for an improvement after a protest has been filed, the filing of a remonstrance under one notice of intention of council to make a given improvement, has no effect where council subsequently rescinds such resolution of intention and orders a new notice of its intention to make the improvement to be given.⁷ If the improvement is not one which may be stopped by remonstrance, the adoption of a report that a remonstrance filed bars further proceedings for six months does not oust the board of jurisdiction.⁸ It may be provided by statute that the filing of a protest reverses the ordinary presumption of the validity of the acts of public officials, and throws upon the public corporation the burden of showing that the bar which was interposed by the objection has been overcome.⁹ The public corporation cannot deprive the property owners of the right to remonstrate either by separating or by combining public improvements. Thus, if, by separate resolutions of intention, it is ordered that sidewalks and curbs be constructed, such separation of these two improvements does not deprive the property owners of the right of protesting against either item, and if they protest against the laying of the curb, a subsequent assessment for both sidewalk and curb is invalid, although no objection is made to laying the sidewalk.¹⁰ Property owners may remonstrate against part of the work only and prevent its performance, even if it is included in one

³ Hensley v. City of Butte, 33 Mont. 206, 83 Pac. 481 [1905].

⁴ Gray v. Burr, 138 Cal. 109, 70 Pac. 1068 [1902].

⁵ Buckley v. City of Tacoma, 9 Wash. 269, 37 Pac. 446 [1894].

⁶ Buckley v. City of Tacoma, 9 Wash. 269, 37 Pac. 446 [1894].

⁷ Clinton v. Portland, 26 Ore. 410, 38 Pac. Rep. 407 [1894].

⁸ City Street Improvement Co. v. Laird, 138 Cal. 27, 70 Pac. 916 [1902].

⁹ Dougherty v. Harrison, 54 Cal. 428 [1880].

¹⁰ Gray v. Burr, 138 Cal. 109, 70 Pac. 1068 [1902].

paragraph of the resolution with other work against which no remonstrance is filed.¹¹

§ 811. Determination of sufficiency of remonstrance.

Since the right of protesting or remonstrating is conferred entirely by statute, the statute may provide who shall determine the genuineness of the signatures to such protests and whether a sufficient number have signed. The statute may provide that the trustees of the public corporation, which is constructing such improvement, shall pass upon such question.¹ Under other statutes, the question of the genuineness and sufficiency of the signatures is regarded as a question of fact to be determined by the courts, like other disputed questions of fact, and as being one upon which the finding of the public corporation is not conclusive.² The finding of the public corporation may, however, be *prima facie* valid,³ though not conclusive,⁴ under this theory. If the public corporation, or certain officers thereof, are to pass upon the sufficiency of the remonstrance, an express finding by them that such remonstrance is insufficient is, of course, the most apt and suitable method of expressing such determination. If a remonstrance is referred by a council to a committee which reports that so many of the remonstrants have withdrawn that the remonstrance is not filed by a sufficient number, and this report is adopted by the council, the record of the proceedings of the council shows sufficiently what action was taken upon such remonstrance.⁵ In the absence of such express finding, however, the order of such public corporation to proceed with the construction of the improvement is in legal effect a finding against remonstrance.⁶ An erroneous finding by a board of supervisors

¹¹ Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, 39 Pac. 535 [1895].

¹ Betts v. City of Williamsburg, 15 Barb. 255 [1853].

² Ogden City v. Armstrong, 168 U. S. 224, 42 L. 444, 18 S. 98 [1897]; (modifying, Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119 [1895]); City of Sedalia ex rel. Gilsonite Construction Co. v. Montgomery, 109 Mo. App. 197, 88 S. W. 1014 [1904]; Knoppi v. Roofing and Paving Co., 92 Mo. App. 279 [1901]; Fruin-Bambrick Construction Co. v. Geist, 37 Mo. App. 509 [1889].

³ McChesney v. City of Chicago, 205 Ill. 611, 69 N. E. 82 [1903].

⁴ Capron v. Hitchcock, 98 Cal. 427, 36 Pac. 431 [1893].

⁵ City of Sedalia ex rel. Gilsonite Construction Company v. Scott, 104 Mo. App. 595, 78 S. W. 276 [1903]; Knoppi v. Gilsonite Roofing and Paving Company, 92 Mo. App. 279 [1901].

⁶ Harney v. Heller, 47 Cal. 15 [1873]; McChesney v. City of Chicago, 205 Ill. 611, 69 N. E. 82 [1903].

that a remonstrance is sufficient, is not final and does not prevent such board from reconsidering its determination.⁷ On the other hand, if a protest is not disallowed, it is said to stop the jurisdiction of the board to proceed.⁸ If the assessment is made *prima facie* valid, the fact that a remonstrance is filed does not invalidate the proceedings, unless it is shown that such remonstrance is signed by the requisite number.⁹

§ 812. Effect of failure to remonstrate.

If an opportunity for filing objections is given, objections which are not filed in accordance with such opportunity are ordinarily to be regarded as waived.¹ A failure to make any objections is ordinarily regarded as a waiver of all objections existing at that time, which might have been interposed.² It has been held, however, that failure to make objection does not operate as a waiver where the proceedings of the council are in violation of constitutional rights.³ If the court, or other tribunal which is to pass upon the sufficiency and propriety of the remonstrance, shall find in favor of the remonstrants, the improvement proceedings should be terminated at that point.⁴ Persons who do not join in a remonstrance cannot take advantage of a remonstrance made by other property owners.⁵

§ 813. Necessity of estimate.

In many jurisdictions provision is made by statute for the preparation and filing of estimates, plans or specifications before the public improvement for which the assessment is to be levied

⁷ City Street Improvement Company v. Laird, 138 Cal. 27, 70 Pac. 916 [1902].

⁸ Pacific Paving Co. v. Geary, 136 Cal. 373, 68 Pac. 1028 [1902].

⁹ Pacific Paving Company v. Mowbray, 127 Cal. 1, 59 Pac. Rep. 205 [1899].

¹ Stewart v. City of Detroit, 137 Mich. 381, 100 N. W. 613 [1904]; Alexander v. City of Tacoma, 35 Wash. 366, 77 Pac. 686 [1904].

² Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661 [1904]; Harney v. Benson, 113 Cal. 314, 45 Pac. 687 [1896]; Spaulding v. North San Francisco

Homestead and Railroad Ass'n., 87 Cal. 40, 25 Pac. Rep. 249, 24 Pac. 600 [1890]; Lucas v. San Francisco, 7 Cal. 462, 65 Am. Dec. 523 [1856]; City of Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112 [1895]; Minneapolis & St. Louis Ry. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103 [1903].

³ Howell v. City of Tacoma, 3 Wash. 711, 28 Am. St. 83, 29 Pa. 447 [1892].

⁴ Dukes v. Working, 93 Ind. 501 [1883].

⁵ Harney v. Heller, 47 Cal. 15 [1873].

is undertaken. These requirements are made for several different reasons. The legislative intent in requiring estimates, plans and specifications is, in part, to make sure that the public officials who undertake the improvement will have before them an amount of information concerning the cost and character of the proposed improvement sufficient to enable them to decide intelligently upon the necessity therefor and the character thereof. An additional reason for requiring such estimates, plans and specifications is that the property owners may be advised of the character and probable expense of the proposed improvement, and have an opportunity for remonstrating against it, if they decide that the assessment will be greater than they care to pay for such improvement. By many statutes it is provided that estimates must be made and filed before the improvement is undertaken. Most of the statutes which make this requirement are mandatory, and the failure to file the estimate as required by such statute invalidates the subsequent proceedings and the assessment.¹ Under such statutes the making and filing of a proper estimate is

¹ *Crescent Hotel Co. v. Bradley*, 81 Ark. 286, 98 S. W. 971 [1906]; *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903]; *Bass v. City of Chicago*, 195 Ill. 109, 62 N. E. 913 [1902]; *Ware v. City of Jerseyville*, 158 Ill. 234, 41 N. E. 736 [1895]; *Clerk v. City of Chicago*, 155 Ill. 223, 40 N. E. 495 [1895]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. Rep. 688 [1894]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *Workman v. City of Chicago*, 61 Ill. 463 [1871]; *Fort Chartres & Ivy Land- ing Drainage & Levee District, No. 5 v. Smalkand*, 70 Ill. App. 449 [1897]; *Mills v. City of Detroit*, 95 Mich. 422, 54 N. W. 897 [1893]; *Butler v. Detroit*, 43 Mich. 552, 5 N. W. 1078 [1880]; *State v. Pillsbury*, 82 Minn. 359, 85 N. W. 175 [1901]; *Morrison v. City of St. Paul*, 5 Minn. 108 (Gil. 83) [1861]; *Weller v. City of St. Paul*, 5 Minn. 95 (Gil. 70) [1861];

Wheeler v. City of Poplar Bluff, 149 Mo. 36, 49 S. W. 1088 [1898]; *City of Kirksville ex rel. Fleming Manufacturing Company v. Coleman*, 103 Mo. App. 215, 77 S. W. 120; *City of De Soto v. Showman*, 100 Mo. App. 323, 73 S. W. 257 [1903]; *City of Rich Hill v. Donnan*, 82 Mo. App. 386 [1899]; *City of Trenton ex rel. Gardner v. Collier*, 68 Mo. App. 483 [1896]; *Moss v. City of Fairbury*, 66 Neb. 671, 92 N. W. 721 [1902]; *Doughty v. Hope*, 3 Denio (N. Y.) 249 [1846]; *The People ex rel. Moore v. The Mayor, etc., of the City of New York*, 5 Barb. 43 [1848]; *City of Erie City for Use v. Brady*, 127 Pa. St. 169, 17 Atl. Rep. 885 [1889]; *Frosh v. City of Galveston*, 73 Tex. 401, 11 S. W. 402 [1889]; *Ardrey v. City of Dallas*, 13 Tex. Civ. App. 442, 35 S. W. Rep. 726 [1896]; *City of Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895]; *Hall v. City of Chippewa Falls*, 47 Wis. 267, 2 N. W. 279 [1879]; *Massing v. Ames*, 37 Wis. 645 [1875]; *Myrick v. La Crosse*, 17 Wis. 456 [1863].

jurisdictional and without it the public authorities have no power to proceed with the improvement and levy an assessment.² Whether an estimate shall be required or not is, however, entirely within the power of the legislature to determine. The statute may be so framed as not to require an estimate.³ The statute may require the making and filing of an estimate only in cases where the work is to be done by the city and paid out of the city treasury.⁴ The statute requiring an estimate may be so worded as to be directory merely, the absence of the estimate being an irregularity but not rendering all subsequent proceedings invalid.⁵ Thus, where it is not necessary to make an estimate in advance, it is assumed that the making of such estimate is not jurisdictional, and a failure to make it will not invalidate subsequent proceedings.⁶ Under a statute requiring a board to make an estimate of expense and certify it to the common council, a resolution specifying the sum estimated, if acted upon by the common council, has been held to be equivalent to a certificate and a substantial compliance with such statute.⁷ The making of the estimate may, under the statute, be a step which is not jurisdictional in character.⁸ Since the legislature has power to require or dispense with an assessment, it may prescribe the effect which the omission to make the required assessment shall have,⁹ and such omission may not, *prima facie*, invalidate the assessment.¹⁰ A statutory provision requiring the city engineer to report the probable cost of a contemplated improvement, and give the names of the owners of property abutting on the street and the number

² Ware v. City of Jerseyville, 158 Ill. 234, 41 N. E. 736 [1895]; Moss v. City of Fairbury, 66 Neb. 671, 92 N. W. 721 [1902].

³ Sheenan v. Martin, 10 Mo. App. 285 [1881]; Laimbeer v. Mayor, Aldermen and Commonalty of the City of New York, 6 N. Y. Sup. Ct. Rep. 109 [1850].

⁴ State of Missouri to Use of Cavendar v. City of St. Louis, 56 Mo. 277 [1874]. See also on the same point Perkinson v. McGrath, 9 Mo. App. 26 [1880]; Seibert v. Cavender, 3 Mo. App. 421 [1877]; Perkinson v. Partridge, 3 Mo. App. 60 [1876].

⁵ Ronan v. People ex rel. Shafter, 193 Ill. 631, 61 N. E. 1042 [1901];

Dickinson v. City Council of Worcester, 138 Mass. 555 [1885]; Sheenan v. Martin, 10 Mo. App. 285 [1881]; Sorchan v. City of Brooklyn, 62 N. Y. 339 [1875].

⁶ Ronan v. People ex rel. Shafter, 193 Ill. 631, 61 N. E. 1042 [1901].

⁷ Sorchan v. City of Brooklyn, 62 N. Y. 339 [1875].

⁸ City of Toledo for the Use of Gates v. Lake Shore & Michigan Southern Railway Company, 4 Ohio C. C. 113 [1889].

⁹ Griggs v. City of St. Paul, 11 Minn. 308 [1866].

¹⁰ Griggs v. City of St. Paul, 11 Minn. 308 [1866].

of feet owned by each property owner, is mandatory.¹¹ In cases where the estimate cannot subserve the purpose for which an estimate is intended by statute, it is ordinarily held in the absence of a statutory provision requiring it even in such cases, that the legislature did not intend to require an estimate.¹² Thus, where an estimate is intended as a basis for letting contracts, under a statute authorizing the city to grade at its own expense and to assess the cost thereof in the same way, as in the case of an estimate and assessment before the work is done, an estimate is not necessary.¹³ Where the cost of an item of expense is fixed by another proceeding, an estimate is not necessary.¹⁴ Thus, where an assessment is levied to pay the damages and costs of a condemnation suit, no estimate is necessary, since the amount of the judgment is the amount to be raised.¹⁵ Items which cannot be approximated in advance,¹⁶ such as the damages from the future condemnation of land,¹⁷ need not be included in the assessment. In the absence of a statute specifically requiring it, it is not necessary that the estimate be formally approved.¹⁸ A statute requiring an estimate to be made does not apply to improvements which have already been commenced.¹⁹ A provision requiring estimates to be made does not necessarily require the letting of contracts upon bids.²⁰ Under such statutes it may be possible for the public corporation to construct the improvement itself.²¹ Since the legislature may dispense with an estimate in advance, it may dispense with an estimate after the assessment has been levied, and may authorize a re-assessment for such improvement,²² provided that the statute curing such defect does not con-

¹¹ *City of Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895].

¹² *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *In the Matter of Roberts*, 81 N. Y. 62 [1880].

¹³ *In the Matter of Roberts*, 81 N. Y. 62 [1880].

¹⁴ *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

¹⁵ *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

¹⁶ *Elwood v. City of Rochester*, 43 Hun (N. Y.) 102 [1887].

¹⁷ *Elwood v. City of Rochester*, 43 Hun (N. Y.) 102 [1887].

¹⁸ *City of Chicago v. Kerfoot and Company*, 208 Ill. 387, 70 N. E. 349 [1904].

¹⁹ *Smith v. Duck Pond Ditching Association*, 54 Ind. 235 [1876]. For the effect on prior legislation of such a constitutional amendment requiring an estimate see *McDonald v. Patterson*, 54 Cal. 245 [1880].

²⁰ *Yarnold v. City of Lawrence*, 15 Kan. 126 [1875].

²¹ *Yarnold v. City of Lawrence*, 15 Kan. 126 [1875].

²² *City of Chicago v. Gage*, 232 Ill. 169, 83 N. E. 663 [1908]; *City of Emporia v. Norton*, 13 Kan. 569 [1874].

flict with some other constitutional provision.²³ A curative act, which is itself invalid, as being special legislation, cannot dispense with the necessity of an estimate.²⁴

§ 814. By whom estimate to be made.

The statute providing for an estimate usually provides by whom such estimate is to be made. Such provision must be complied with. An estimate made by the designated officer is valid, if otherwise in conformity to statute,¹ while an estimate made by any other person has no legal effect. If the statute requires the city engineer to make the estimate, he cannot delegate such power to other persons.² If, however, the statute provides that the estimate is to be made by the city engineer "or other proper officer," and the ordinance provides that the street commissioner is regarded as a proper officer within the meaning of the statute,³ an estimate which is signed by such street commissioner is sufficient. If the estimate is signed by the proper officer, as his official act, it is immaterial by whom it was, in fact, prepared.⁴ The fact that the city engineer in signing an estimate for a street improvement adds an improper title after his name does not invalidate the estimate or the assessment.⁵ Under a statute providing that irregularities in proceedings shall not affect their validity, unless the court deemed the same willful or substantial, the fact that the engineer does not sign an estimate, although the statute provides for his signature, does not invalidate the same.⁶ So the fact that a preliminary list, from which an official estimate, duly signed, was made, was itself unsigned, does not invalidate the estimate.⁷ Under some statutes, the estimate must be made under oath.⁸

²³ *City of Erie for Use v. Brady*, 127 Pa. St. 169, 17 Atl. Rep. 885 [1889].

²⁴ *City of Erie for Use v. Brady*, 127 Pa. St. 169, 17 Atl. Rep. 885 [1889].

¹ *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. Rep. 688 [1894]; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Linville v. State ex rel.*, 130 Ind. 210, 29 N. E. 1129; *Van Sickel v. Belknap*, 129 Ind. 558, 28 N. E. 305 [1891]; *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721 [1886]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883].

² *City of Rich Hill v. Donnan*, 82 Mo. App. 386 [1899].

³ *City of Bevier v. Watson*, 113 Mo. App. 506, 87 S. W. 612 [1903].

⁴ *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752 [1905].

⁵ *Heiple v. City of Washington*, 219 Ill. 604, 76 N. E. 854 [1906].

⁶ *Ziegler v. City of Chicago*, 213 Ill. 61, 72 N. E. 719 [1904].

⁷ *Sorohan v. City of Brooklyn*, 62 N. Y. 339 [1875].

⁸ *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885].

§ 815. When estimate must be made.

The statute usually provides at what stage of the proceedings the estimate must be made and filed. In order to accomplish the purpose for which an assessment is intended, it is ordinarily provided that an estimate be made before the contract is let and the assessment is levied.¹ It has been held not necessary to file an estimate before the resolution declaring the intention of the public corporation to make an improvement, has been passed,² but that it is sufficient if such estimate is filed before liability is incurred.³ It need not be filed before appraisers are appointed.⁴ An estimate of the improvement contemplated may be made before the first declaratory resolution is passed, provided such estimate is acted upon by the public corporation, and, where required by statute, is made a part of the resolution presented at the public hearing.⁵ The estimate may be filed before the ordinance providing for the improvement is passed.⁶ An estimate made under a prior ordinance, however, has been held to be insufficient.⁷ Under a statute requiring specifications to be filed immediately, it has been held sufficient if the specifications were filed as soon as they could be prepared properly.⁸ In the absence of a statute specifically requiring estimates to be prepared in advance, it is not necessary that they be so prepared.⁹

§ 816. Contents of estimate.

If the statute merely requires that an estimate be made, it has been queried whether such estimate should be made by giving the gross cost of the improvement instead of giving the detailed

¹Fort Chartres & Ivy Landing Drainage & Levee District No. 5 v. Smalkand, 70 Ill. App. 449 [1897]; Weller v. City of St. Paul, 5 Minn. 70 [1861]; Wheeler v. City of Poplar Bluff, 149 Mo. 36, 49 S. W. 1088 [1898]; The People ex rel. Moore v. The Mayor, etc., of the City of New York, 5 Barb. 43 [1848]; Frosh v. City of Galveston, 73 Tex. 401, 11 S. W. 402 [1889]; Ardrey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. Rep. 726 [1896]; City of Dallas v. Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895]; Massing v. Ames, 37 Wis. 645 [1875].

²City of Kansas City v. Cullinan, 65 Kan. 68, 69 Pac. 1099 [1902].

³City of Kansas City v. Cullinan, 65 Kan. 68, 69 Pac. 1099 [1902].

⁴Slusser v. Ransom, 39 Ind. 506 [1872].

⁵Givins v. City of Chicago, 186 Ill. 399, 57 N. E. 1045 [1900].

⁶Gilmore v. Norton, 10 Kan. 491 [1872].

⁷People ex rel. Kochersperger v. Colvin, 165 Ill. 67, 46 N. E. Rep. 14 [1897].

⁸City of Galveston v. Heard, 54 Tex. 420 [1881].

⁹Ronan v. People ex rel. Shafter, 193 Ill. 631, 61 N. E. 1042 [1901].

cost of the various items thereof,¹ but it has finally been held that in the absence of a provision requiring a detailed estimate, a gross estimate is sufficient.² However, under a statute requiring "an estimate of the probable cost of opening, grading and construction," the particulars which make up the aggregate cost of the estimate must be given.³ It is specifically provided by some statutes that estimates must be made in detail.⁴ Under a statute requiring an estimate to be made in detail, the estimate must show the cost of the various items of work and material necessary for the proposed improvement.⁵ Under such a statute an estimate giving the gross cost of the work is insufficient.⁶ It is not necessary, however, that every minute item should be included in the estimate.⁷ It has been said to be sufficient if the estimate gives the property owners a general idea of the cost of the substantial elements of the improvement.⁸ An estimate is to be considered in connection with a resolution under which it is prepared in order to determine whether it is sufficiently specific or not.⁹ As the ordinance may refer to the plans and specifications, so as to incorporate them and make them a part thereof,¹⁰ the ordinance describing the improvement must be read in connection with the estimate, for the purpose of determining whether the latter is sufficiently specific.¹¹ Under a statute requiring a detailed estimate of the cost of paving and curbing the street to be improved, an estimate is sufficient which shows the area to be paved, the

¹ *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. Rep. 141 [1881].

² *Goodwillie v. City of Detroit*, 103 Mich. 283, 61 N. W. 526 [1894]; *City of Independence to the Use of Smith v. Briggs*, 58 Mo. App. 241 [1894]; *Wewell v. City of Cincinnati*, 45 O. S. 407, 15 N. E. 196 [1887].

³ *Friedenwald v. Shipley*, 74 Md. 220, 21 Atl. 790, 29 Atl. 156 [1891].

⁴ *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885].

⁵ *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161 [1903].

⁶ *City of Peoria v. Ohl*, 209 Ill. 52, 70 N. E. 632 [1904]; *Bickerdike v. City of Chicago*, 203 Ill. 636, 68 N. E. 161 [1903]; (overruling *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903]); *Friedenwald v. Shipley*, 74 Md. 220, 21 Atl. 790,

24 Atl. 156 [1891]; *Erie to Use v. Brady*, 150 Pa. St. 462, 24 Atl. 641 [1892].

⁷ *Connecticut Mutual Life Insurance Co. v. City of Chicago*, 217 Ill. 352, 75 N. E. 365 [1905].

⁸ *Doran v. City of Murphysboro*, 225 Ill. 514, 80 N. E. 323 [1907]; *Connecticut Mutual Life Insurance Co. v. City of Chicago*, 217 Ill. 352, 75 N. E. 365 [1905].

⁹ *McChesney v. City of Chicago*, 152 Ill. 543, 38 N. E. Rep. 767 [1894].

¹⁰ *The Louisville and Nashville R. Co. v. East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891].

¹¹ *McChesney v. City of Chicago*, 152 Ill. 543, 38 N. E. Rep. 767 [1894].

kind of pavement, its cost per yard, its cost thereof in the aggregate, the number of lineal feet of curbing, its cost per foot and the aggregate cost thereof, and which states that the paving is to be stone and asphalt.¹² An estimate giving the cost of curbing and guttering at a certain sum per lineal foot, and the cost of macadamizing at a certain sum per square yard, has been held to be sufficient.¹³ An estimate which gives the cost of the various parts of the improvement, without specifying grading, is sufficient, since the cost of grading must have been included in the cost of putting the various materials into place.¹⁴ An estimate which gives the cost of sewer pipe connections, but does not specify the necessary Y junctions, is sufficient, since such junctions are necessarily included in the connections.¹⁵ If the estimate includes unauthorized items of expense and does not state facts sufficient to enable the assessing body to separate the legal from the illegal items, the assessment is invalid.¹⁶ An error in the estimate of the quantity of work done, made innocently, does not amount to fraud.¹⁷ Accordingly, where by reason of such error a bid was accepted which was lowest with reference to the quantities as estimated, but which was not lowest with reference to the quantities of work actually to be done, it was held that such assessment should be reduced by the amount of the excess of such bid over the lowest bid and should not be vacated.¹⁸ If the preamble to the estimate mis-states the date of the ordinance, but the error is supplied in the assessment petition, the truth of such averment is regarded as admitted by a default on the part of the property owner.¹⁹ The preliminary estimate must give prices on a cash basis.²⁰ The officer making an estimate cannot give an estimate based on the assumption that payment will be made in city bonds at ninety cents on the dollar.²¹ If, however, the

¹² *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219 [1889].

¹³ *Gilmore v. Norton*, 10 Kan. 491 [1872].

¹⁴ *Chicago and W. I. R. Co. v. City of Chicago*, 230 Ill. 9, 82 N. E. 399 [1907].

¹⁵ *Village of Oak Park v. Galt*, 231 Ill. 482, 83 N. E. 212 [1907].

¹⁶ *City of Chicago v. Cummings*, 144 Ill. 446, 33 N. E. 34 [1893]; *Friedenwald v. Shiplev*, 74 Md. 220, 21 Atl. 790, 24 Atl. 156 [1891].

¹⁷ *In the Matter of Marsh*, 83 N. Y. 431 [1881].

¹⁸ *In the Matter of Marsh*, 83 N. Y. 431 [1881].

¹⁹ *Hull v. West Chicago Park Commissioners*, 185 Ill. 150, 57 N. E. 1 [1900].

²⁰ *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885]; *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. 542 [1896].

²¹ *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. 542 [1896].

cost in cash can be ascertained from such estimate, and the contract price for the work is less than such amount in cash, the assessments and the contract are valid.²²

§ 817. Estimate must refer to specific improvement.

To comply with the provisions of most statutes requiring estimates, it is necessary that an estimate be made for the specific improvement which is contemplated by the public corporation.¹ Accordingly, if an assessment proceeding has been dismissed, and a new ordinance passed, it is necessary that a new estimate be prepared.² So, if an estimate is made under a prior ordinance,³ as where such prior ordinance has been held to be void,⁴ a new estimate must be made under the ordinance subsequently passed. If the property owners consent to the reduction of the width of the street, for the improvement of which the assessment is levied, this does not dispense with the necessity of a new estimate for the reduced width.⁵ An estimate for the paving of one street is insufficient for the improvement of several streets.⁶ However, an estimate is sufficient, although minor changes are made in the improvement.⁷ A valid estimate cannot be made before the material of which the improvement is to be constructed is determined.⁸ An estimate made for a stone pavement is not sufficient, where the pavement is finally constructed of asphalt.⁹ If an estimate is for a continuous street improvement, and the ordinance provides for leaving certain sections thereof unimproved,¹⁰ or for

²² *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. 542 [1896].

¹ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903]; *Clarke v. City of Chicago*, 185 Ill. 354, 57 N. E. 15 [1900]; *Pells v. People ex rel. Holmgrain*, 159 Ill. 580, 42 N. E. 784 [1896]; *Clark v. City of Chicago*, 155 Ill. 223, 40 N. E. 495 [1895]; *Bass v. City of Chicago*, 195 Ill. 109, 62 N. E. 913 [1902]; *Kinealy v. Grady*, 7 Mo. App. 203 [1879].

² *Bass v. City of Chicago*, 195 Ill. 109, 62 N. E. 913 [1902].

³ *Clark v. City of Chicago*, 155 Ill. 223, 40 N. E. 495 [1895].

⁴ *Workman v. City of Chicago*, 61 Ill. 463 [1871].

⁵ *Pells v. People ex rel. Holmgrain*, 159 Ill. 580, 42 N. E. 784 [1896].

⁶ *Kinealy v. Grady*, 7 Mo. App. 203 [1879].

⁷ *Bambrick v. Campbell*, 37 Mo. App. 460 [1889].

⁸ *City of Kirksville ex rel. Fleming Manufacturing Co. v. Coleman*, 103 Mo. App. 215, 77 S. W. 120.

⁹ *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885]; *Sloan v. Beebe*, 24 Kan. 343 [1880].

¹⁰ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903]; *Chicago Terminal Transfer Ry. Co. v. City of Chicago*, 184 Ill. 154, 56 N. E. 410 [1900].

omitting a strip in the center to be paved by a street railway company,¹¹ such estimate is insufficient. If the ordinance provides for omitting curbing at street and alley intersections, and the estimate of the engineer specifies a certain number of lineal feet of curbing, it will be presumed that street and alley intersections are omitted.¹² If an estimate has been made under an ordinance for a street sixty-one feet wide, a subsequent ordinance for a pavement fifty-three feet wide is an abandonment of the former proceeding, and a new estimate is necessary.¹³ An estimate can not be removed from a defeated ordinance and attached to another one.¹⁴

§ 818. Presumption of sufficiency of estimate.

Since there is a presumption of the regularity of official acts, it will be presumed that, if an estimate appears to have been made, it was made and filed at the proper time and in the proper manner.¹ If the date of the estimate shows that it was made at a proper time, the recommendation of the improvement by the proper board is *prima facie* evidence that the estimate was made upon the date that it bears.² The fact that the estimate bears the date of the passage of the ordinance does not of itself show that such estimate was not made ten days before the public hearing provided for by statute.³ The fact that in the council's minutes the receipt and adoption of the engineer's report follows the adoption of a resolution declaring that certain improvements should be made, and upon the same day, does not show that such resolution was adopted before such estimate was considered.* If an estimate is shown to have been filed properly, it will be presumed that it was considered by the proper board in its action

¹¹ City of Trenton ex rel. Gardner v. Collier, 68 Mo. App. 483 [1896].

¹² Rollo v. City of Chicago, 187 Ill. 417, 58 N. E. 455 [1900]; Mead v. City of Chicago, 186 Ill. 54, 57 N. E. 824 [1900].

¹³ Pells v. People ex rel. Holmgren, 159 Ill. 580, 42 N. E. Rep. 784 [1896].

¹⁴ City of Reading v. O'Reilly, 169 Pa. St. 366, 32 Atl. 420 [1895].

¹ Madderom v. City of Chicago, 194 Ill. 572, 62 N. E. 846 [1902]; Berry

v. City of Chicago, 192 Ill. 154, 61 N. E. 498 [1901]; Yaggy v. City of Chicago, 192 Ill. 104, 61 N. E. 494 [1901].

² Yaggy v. City of Chicago, 192 Ill. 104, 61 N. E. 494 [1901].

³ Berry v. City of Chicago, 192 Ill. 154, 61 N. E. 498 [1901]; Madderom v. City of Chicago, 194 Ill. 572, 62 N. E. 846 [1902].

⁴ Davie's Executors v. City of Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145 [1897].

with reference to the public improvement.⁵ If the burden of proof as to the validity of an assessment is upon the party having the affirmative, the making and filing of a proper estimate must be proved.⁶ Under some statutes inquiry into the sufficiency of the estimate is precluded,⁷ as by lapse of time without filing objections,⁸ or by failure to make objection in the method prescribed by statute,⁹ or by a judgment of confirmation.¹⁰ Even if such estimate is jurisdictional, yet under a statute providing that in application for judgments of sale no defense can be made as to installments subsequent to the first, except as to the legality of the pending proceedings, the amount to be paid or actual payment, the question of the want of such estimate cannot be raised in an application on any installment after the first, if not raised on application for judgment on the first installment.¹¹

§ 819. Effect of estimate.

By the specific provisions of some statutes a contract cannot be let for a price exceeding that specified in the estimate, and an assessment cannot be levied in excess thereof.¹ Such provision, however, does not prevent the letting of a contract at a higher price, if it includes work not specified in the estimate.² Under

⁵ *City of Marshall to the Use of Jacoby v. Rainey*, 78 Mo. App. 416 [1898]; *City of Springfield to the Use of McEvilly v. Knott*, 49 Mo. App. 612 [1892]; *Sorchan v. City of Brooklyn*, 62 N. Y. 339 [1875].

⁶ *Petaluma Paving Co. v. Singley*, 136 Cal. 616, 69 Pac. 426 [1902].

⁷ *Treat v. City of Chicago*, 125 Fed. 644, 130 Fed. 443, 64 C. C. A. 645 [1903]; *Noonan v. People ex rel. Hanberg*, 221 Ill. 567, 77 N. E. 930 [1906]; *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886]; *City of Kansas City v. Gray*, 62 Kan. 198, 61 Pac. 746 [1900]; *M'Kusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890]; *Wright v. City of Tacoma*, 3 Wash. Ter. 410, 19 Pac. 42 [1888].

⁸ *City of Kansas City v. Gray*, 62 Kan. 198, 61 Pac. 746 [1900]; *Wright v. City of Tacoma*, 3 Wash. Terr. 410, 19 Pac. 42 [1888].

⁹ *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886]; *M'Kusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890].

¹⁰ *Noonan v. People ex rel. Hanberg*, 221 Ill. 567, 77 N. E. 930 [1906]; *Gage v. People ex rel. Hanberg*, 207 Ill. 61, 69 N. E. 635 [1904].

¹¹ *Treat v. City of Chicago*, 125 Fed. 644 [1903]; (affirmed, 130 Fed. 443, 64 C. C. A. 645 [1903]).

¹ *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885]; *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. 542 [1896]; *City of De Soto v. Showman*, 100 Mo. App. 323, 73 S. W. 257 [1903]; *City of Independence to Use of Smith v. Briggs*, 58 Mo. App. 241 [1894]; *Ireland v. City of Rochester*, 51 Barb. 414 [1868].

² *Ireland v. City of Rochester*, 51 Barb. 414 [1868].

most statutes, however, there is no restriction of the amount of the final assessment to the amount of the preliminary estimate. Under such statutes the estimate is advisory merely; and the assessment is valid, although the amount of the assessment exceeds the amount of the estimate, if the assessment is levied after the improvement is completed, and the actual cost thereof determined.³ Still less can an assessment be attacked because the amount of the assessment exceeds an informal estimate given by one of the directors of a levee district.⁴ The fact that the contract price is less than the estimate cannot be used to defeat the assessment.⁵ A property owner cannot complain if the assessment is based on the estimate, where the contract price exceeds the estimate.⁶ By some statutes it is provided that the estimates may be increased by the board of improvements or other public officials at a public meeting, as long as such change does not exceed a specific per cent of the estimate.⁷ A statute providing for such public hearing and for giving notice thereof provides due process of law, even though no right of appeal is given.⁸ Under such statutes the estimates may be decreased as well as increased.⁹ No new estimate is necessary where such change is made at a public meeting.¹⁰ A change cannot, however, be made after the public meeting, whereby the cost of the work is increased.¹¹

³ *McChesney v. City of Chicago*, 188 Ill. 423, 58 N. E. 982 [1900]; *Hammond v. People for Use, etc.*, 169 Ill. 545, 48 N. E. 573 [1897]; *City of Bloomington v. Blodgett*, 24 Ill. App. 650 [1886]; *Auditor General v. Chase*, 132 Mich. 630, 94 N. W. 178 [1903]; *Sheridan v. Fleming*, 93 Mo. 321, 5 S. W. 813 [1887]; *State, Moran, Pros. v. Mayor and Aldermen of Jersey City*, 58 N. J. L. (29 Vr.) 144, 35 Atl. 284 [1895]; *State, Kohler, Pros. v. Town of Guttenberg*, 38 N. J. L. (9 Vr.) 419 [1876]; *Ireland v. City of Rochester*, 51 Barb. 414 [1868].

⁴ *Overstreet v. Levee Dist. No. 1 of Conway County*, 80 Ark. 462, 97 S. W. 676 [1906].

⁵ *Danforth v. Village of Hinsdale*, 177 Ill. 579, 52 N. E. 877 [1899].

⁶ *Clark v. City of Cleveland*, 1 O. S. 139 [1853].

⁷ *City of Chicago v. Kerfoot & Co.*, 208 Ill. 387, 70 N. E. 349 [1904]; *Washburn v. City of Chicago*, 198 Ill. 506, 64 N. E. 1064 [1902].

⁸ *People ex rel. Hanberg v. Cohen*, 219 Ill. 200, 76 N. E. 388 [1906].

⁹ *McChesney v. City of Chicago*, 205 Ill. 611, 69 N. E. 82 [1903]; *Washburn v. City of Chicago*, 198 Ill. 506, 64 N. E. 1064 [1902].

¹⁰ *City of Chicago v. Kerfoot & Co.*, 208 Ill. 387, 70 N. E. 349 [1904].

¹¹ *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774 [1903]; *City of Chicago v. Wilder*, 184 Ill. 397, 56 N. E. 395 [1900].

§ 820. Estimate as part of record of resolution.

By some statutes it is provided that the estimate of the engineer or other proper official shall be made a part of the record of the resolution declaring the necessity of such improvement.¹ Under such statute it is not sufficient if the resolution states the gross amount of the estimate only.² On the other hand, a mere reference to the estimate on file is not a sufficient compliance with such statute.³ Failure to comply with such statute renders subsequent proceedings void.⁴ Such objection, however, must be made before confirmation.⁵ It cannot be raised for the first time to resist a judgment for the sale of the property for such assessment.⁶

§ 821. Necessity of plans.

Under many statutes it is provided that plans of proposed improvements must be prepared and filed before such improvements are undertaken. Such statutes are intended in part to give to the public officials in charge of such improvements the full and exact information which they should have before passing thereon. In part this requirement is imposed in order to enable the property owners who are to be assessed for the cost of the improvement, to know in advance the nature and character thereof, to enable them in determining whether they will encourage or oppose such improvement in the different ways provided for by law. Another reason for requiring the preparation and filing of plans is to enable prospective bidders to know the nature of the liability which they are invited to assume and to aid them in making their bids. Such statutes may be and often are mandatory. Failure to comply with such statutes and to prepare and file the plans as required by the statute renders the subsequent proceedings invalid.¹ Since the legislature may require

¹ City of Chicago v. Clark, 233 Ill. 404, 84 N. E. 363 [1908].

² Bickerdike v. City of Chicago, 203 Ill. 636, 68 N. E. 161 [1903]; (overruling McChesney v. City of Chicago, 201 Ill. 344, 66 N. E. 217 [1903]).

³ Kilgallen v. City of Chicago, 206 Ill. 557, 69 N. E. 586 [1904].

⁴ The Chicago Union Traction Co. v. City of Chicago, 209 Ill. 444, 70 N. E. 659 [1904]; Becker v. City of Chicago, 208 Ill. 126, 69 N. E. 748 [1904].

⁵ Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 842; Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904].

⁶ Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904]; Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904].

¹ Dickey v. Holmes, 109 Mo. App. 721, 83 S. W. 982 [1904]; Perkinson v. Partridge, 7 Mo. App. 584 [1879]; Perkinson v. Partridge, 3 Mo. App. 60 [1876]; Kneeland v.

the filing of plans or not in its discretion, it may require plans to be filed and provide expressly or impliedly what effect shall be given to failure to file them. Under some statutes, the provision requiring plans to be filed is regarded as merely directory, and an omission to file such plans does not invalidate subsequent proceedings,² at least in the absence of a showing that the property owners complaining of the assessment were injured by such omission.³ Those who are injured by the omission to file plans may complain of such omission. Thus, the owners of land which will be taken or damaged by the proposed extension of a drain are entitled to have plans and specifications prepared showing the actual condition of the old work and showing what land not already taken for such improvement is to be taken.⁴ If a plat and schedule have been filed in the office of the city recorder as required by statute, it is not necessary that a duplicate thereof be filed after the work is completed.⁵ In the absence of a statute specifically requiring it, the resolution of intention to construct the improvement need not contain complete plans and specifications.⁶ If not made by statute a part of the resolution they may be regarded as surplusage.⁷ An ordinance requiring the city engineer to make and keep on file plans and specifications for the work to be done does not conflict with a statute providing that the ordinance for the improvement must describe the character, material and dimensions thereof.⁸ A reference to plans as those on file in the office of the city engineer is sufficient.⁹ A resolution which orders an advertisement inviting proposals "in accordance with the plans and specifications therefor now on

Milwaukee, 18 Wis. 411 [1864]. The necessity of filing plans was queried in *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372 [1880].

² *Dickinson v. City Council of Worcester*, 138 Mass. 555 [1885]; In the Matter of *Upson*, 89 N. Y. 67 [1882]; (reversing, In the Matter of *Upson*, 24 Hun (N. Y.) 650 [1881]); In the Matter of *Mayor*, 50 N. Y. 504 [1872]; *Matter of Brainard*, 51 Hun 380, 3 N. Y. Sup. 889 [1889]; *Steese v. Oviatt*, 24 O. S. 248 [1873]; *Becher v. City of Columbus, Ohio*, 4 Ohio C. C. 305 [1890]; *City of Toledo for Use of Gates v. Lake Shore & Mich-*

igan Southern Railway Company, 4 Ohio C. C. 113 [1889].

³ *Steese v. Oviatt*, 24 O. S. 248 [1873].

⁴ *Iroquois & Crescent Drainage District v. Harroun*, 222 Ill. 489, 78 N. E. 780 [1906].

⁵ *Reed v. City of Cedar Rapids*, — Iowa, —, 111 N. W. 1013 [1907].

⁶ *Harney v. Heller*, 47 Cal. 15 [1873].

⁷ *Fitzhugh v. Ashworth*, 119 Cal. 393, 51 Pac. 635 [1897].

⁸ *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982 [1904].

⁹ *Roth v. Hax*, 68 Mo. App. 283 [1896].

file in the office of the city clerk," effects an adoption of such plans, although they were made without any formal order therefor.¹⁰ It may be provided that plans and specifications shall be made after the ordinance is passed and before bids are let.¹¹ A notice to prospective bidders that plans are on file in the office of the "city engineer" has been held to be sufficient, although no such officer is recognized by the law where there is in fact an engineer retained by the city, who keeps an office in the office of the county surveyor, which is open during business hours, and there is no showing that any bidders were misled by such notice.¹² Under a statute which makes an assessment or tax bill *prima facie* evidence of its validity it is *prima facie* evidence of the due preparation of plans.¹³ Whether statutes which require general plans of drainage, sewerage and the like to be constructed, are mandatory so that assessments levied without complying with such statutes are valid, is a question discussed elsewhere.¹⁴ It is sufficient if plans and specifications are adopted by a resolution signed by the president of the council. An ordinance signed by the mayor is not necessary.¹⁵ If plans have been filed in the office of the city recorder, as required by statute, such filing is not invalidated by the fact that the city engineer subsequently took the plans into his own office in the same building, which was accessible to the recorder's office.¹⁶

§ 822. Sufficiency and effect of plans.

It is sufficient if the statutes requiring the preparation of plans is complied with in a substantial, though not literal manner.¹ If plans are required as a basis for competitive bidding, they must describe the work and the material definitely.² Thus, if

¹⁰ City of Stockton v. Skinner, 53 Cal. 85 [1878].

¹¹ Gilsonite Construction Co. v. Arkansas McAlester Coal Co., 205 Mo. 49, 103 S. W. 93 [1907].

¹² Taylor v. Village of Wapakoneta, 26 Ohio C. C. R. 285 [1904].

¹³ Taber v. Grafmiller, 109 Ind. 206 9 N. E. 721 [1886]; Seibert v. Tiffany, 8 Mo. App. 33 [1879].

¹⁴ See on the same question Roosevelt Hospital v. Mayor of New York, 84 N. Y. 108 [1881]; In the Matter of the Protestant Episcopal New York Public Schools, 47 N. Y. 506 [1872];

In the Matter of the Protestant Episcopal Public School, 40 Howard, 198 [1870]; In the Matter of Williamson v. Mayor, etc., of the City of New York, 3 Hun, 65 [1874]. See § 855.

¹⁵ Santa Cruz Rock Pavement Co. v. Heaton, 105 Cal. 162, 38 Pac. 693 [1894].

¹⁶ Reed v. City of Cedar Rapids, — Iowa, —, 111 N. W. 1013 [1907].

¹ Rogers v. City of St. Paul, 22 Minn. 494 [1876].

² Wells v. Burnham, 20 Wis. 112 [1865].

details such as man-holes and alley crossings are left by the plans to be determined thereafter at the discretion of the street commissioners, such plans are insufficient.³ If plans are made and filed before the original assessment is levied, it is not necessary that they be made and filed again when a supplemental assessment is levied.⁴ Plans may be made in the alternative for two distinct forms of improvement.⁵ Thus, plans may be made in the alternative for paving a street thirty-six feet in width, with railroad tracks on each side, or for paving fifty-two feet in width with single or double tracks in the center.⁶ If plans are prepared before the bids are let, showing the width of the street as finally ordered, it is sufficient, though the original estimate was for a narrower street.⁷ A change in the plans under statutory authority, lessening the cost to the property owners, does not invalidate the assessment.⁸ After plans have been made and approved, and an ordinance has been passed authorizing the improvement shown by the plans, the city engineer has no authority to modify such plans,⁹ as by erasing certain proposed sewers therefrom on the ground that he does not think them necessary.¹⁰ The plans must be considered with the order of the council to do the work, in determining what is to be done.¹¹ In some jurisdictions, there seems to be no presumption that the plans have been filed as required by statute.¹² Items not in the plans, which are subsequently found during the progress of the work to be necessary, may be included in the improvement.¹³ Where the quantity of material to be used cannot be determined in advance, the plans need not show such quantity.¹⁴

§ 823. Specifications.

Under many statutes it is provided that specifications describing the public improvement contemplated, must be prepared be-

³ *Wells v. Burnham*, 20 Wis. 112 [1865].

⁴ *Commissioners of Fountain Head Drainage District v. Wright*, 228 Ill. 208, 81 N. E. 849 [1907].

⁵ *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841 [1892].

⁶ *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841 [1892].

⁷ *Davies v. City of Grand Rapids*, 105 Mich. 529, 63 N. W. 530 [1895].

⁸ *Lindenberger Land Co. v. R. B. Park & Co.*, 27 Ky. 437, 85 S. W. 213 [1905].

⁹ *In re Scranton Sewer*, 213 Pa. St. 4, 62 Atl. 173 [1905].

¹⁰ *In re Scranton Sewer*, 213 Pa. St. 4, 62 Atl. 173 [1905].

¹¹ *State ex rel. Lewis v. District Court of Ramsey County*, 33 Minn. 164, 22 N. W. 295 [1885].

¹² *Petaluma Paving Co. v. Singley*, 136 Cal. 616, 69 Pac. 426 [1902].

¹³ *Longworth v. City of Cincinnati*, 34 O. S. 101 [1877].

¹⁴ *City of Cincinnati v. Anchor White Lead Co.*, 44 O. S. 243 [1886].

fore such improvement is undertaken. Such provisions are often mandatory, and a failure to prepare specifications in compliance with the terms of such statutes invalidates the subsequent proceedings and assessment.¹ Under other statutes, however, such provisions are directory merely.² Substantial compliance with the terms of such statute is sufficient, a literal compliance being unnecessary.³ The specifications must, however, so describe the work to be done that it can be constructed therefrom.⁴ Specifications which leave the nature and character of the work to be done to the determination of some public officer not authorized by statute to determine such questions, are invalid.⁵ If, however, the specifications are accepted by the body before which they are to be placed for acceptance and the resolution or ordinance ordering such assessment is sufficiently definite, the fact that such specifications are defective does not invalidate subsequent proceedings.⁶ If the specifications include more than one improvement, but each is separately described, such specifications are not invalid.⁷ If plans and specifications are made without authority by a public officer before the passage of a resolution directing him to prepare such plans and specifications, and he submits those already prepared, which are accepted by the proper officials, such plans and specifications are sufficient.⁸ If the assessment or the tax bills are *prima facie* evidence of their own validity, they are *prima facie* evidence of the making of the specifications.⁹ If specifications are filed properly, the fact that the plan or profile was not filed does not invalidate the assessment, if no injury is caused thereby.¹⁰

¹ Gray v. Richardson, 124 Cal. 460, 57 Pac. 385 [1899]; Wilkins v. City of Detroit, 46 Mich. 120, 8 N. W. 701 9 N. W. 427 [1881]; Perkinson v. Partridge, 7 Mo. App. 584; Kneeland v. Milwaukee, 18 Wis. 411 [1864].

² Harney v. Heller, 47 Cal. 15 [1873]; Becher v. City of Columbus, Ohio, 4 Ohio C. C. 305 [1890]; City of Toledo for Use of Gates v. Lake Shore & Michigan Southern Railway Co., 4 Ohio C. C. 113 [1889].

³ Voght v. City of Buffalo, 133 N. Y. 463, 31 N. E. 340 [1892].

⁴ Rogers v. City of St. Paul, 22 Minn. 494 [1876].

⁵ Grant v. Barber, 135 Cal. 188, 67 Pac. 127 [1901].

⁶ Haughwout v. Hubbard, 131 Cal. 675, 63 Pac. Rep. 1078 [1901].

⁷ Tingle v. Village of Port Chester, 101 N. Y. 294, 4 N. E. 625 [1886].

⁸ Baisch v. City of Grand Rapids, 84 Mich. 666, 48 N. W. 176 [1891].

⁹ Seibert v. Tiffany, 8 Mo. App. 33 [1879].

¹⁰ Warner v. Knox, 50 Wis. 429, 7 N. W. 372 [1880].

§ 824. Diagrams and plats.

Under some statutes, it is necessary to prepare and file a diagram or map showing the property to be assessed and the frontage thereof. This provision is usually intended for the purpose of advising the property owners to be assessed of the fact that their lands are included in the assessment district, and to advise them of the proportion of the total assessment that they will be called upon to bear. Such statutes are ordinarily so worded as to be mandatory, and omission to file such diagram renders the subsequent proceedings and the assessment invalid.¹ The diagram must describe the property to be assessed,² so that a lien could be enforced against it.³ This can be done only if the diagram so refers to the property that a proper description thereof can readily be made from such diagram.⁴ If the diagram is properly made, it may be included in the assessment by reference.⁵ If the frontage of a tract is correctly given, a diagram is valid, although the interior lines,⁶ or the back lines of the tract,⁷ are incorrectly given. If a lot number is given, but the frontage thereof is not shown on the diagram, such diagram is insufficient.⁸ The points of the compass may be indicated by a scroll as well as by the barb of an arrow.⁹ If the court can take judicial notice of the streets of a city, their relation to each other and the direction in which they run, it is sufficient if the street is named on the diagram, although there is no indication upon the diagram of the points of the compass.¹⁰ So, if the property is otherwise correctly described, an error in the direction of an arrow showing the points of compass has been held to be immaterial.¹¹ If, however, the diagram does not contain anything showing the points of compass, and the court cannot take judicial notice of facts which will enable it to supply such deficiency, the diagram is invalid.¹² The diagram must, in such cases, show the direction in which the

¹ Buckley v. City of Tacoma, 9 Wash. 253, 37 Pac. 441 [1894].

² Himmelmann v. Cahn, 49 Cal. 285 [1874].

³ Himmelmann v. Bateman, 50 Cal. 11 [1875].

⁴ People of the City and County of San Francisco v. Quackenbush, 53 Cal. 52 [1878].

⁵ Hewes v. Reis, 41 Cal. 255 [1870].

⁶ Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. Rep. 283 [1895].

⁷ Dorland v. McGlynn, 47 Cal. 47 [1873].

⁸ Dyer v. Harrison, 63 Cal. 447 [1883].

⁹ Whiting v. Quackenbush, 54 Cal. 306 [1880]; (followed in Williams v. McDonald, 58 Cal. 527 [1881]).

¹⁰ Brady v. Page, 59 Cal. 52 [1881].

¹¹ Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131 [1901].

¹² Labs v. Cooper, 107 Cal. 656, 40 Pac. Rep. 1042 [1895].

streets run.¹³ If the diagram shows the street on which the work is done, the lots to be assessed, and that such lots front on such street, it is not necessary that it show the part of the street on which the work was done.¹⁴ In the absence of a statute specifically fixing the time for filing the diagram or map, it has been held not to be necessary that the diagram be made before the work is let and performed.¹⁵ It is sufficient that it be made before the assessment is levied.¹⁶ Whether a year's delay in making a plat of a ditch would destroy jurisdiction to make such improvement has been queried but not decided.¹⁷ The acceptance of the report and list of property and owners to be affected by the assessment, may be made, by statute, a condition precedent to the letting of a contract.¹⁸ Whether the council can ratify the filing of the map after the time specified, where there has been no previous extension of time, has been doubted.¹⁹ If the map of the property is made and delivered to the proper officer at the time specified by law, it is sufficient, even though such map is not marked as filed.²⁰ If the map shows the location of the land and its dimensions and the direction of its lines, it is sufficient, even though there is no formal certificate that any one measured the land. Well recognized abbreviations of units of area may be employed.²¹ A plan of the property liable to assessment can not be detached from a former ordinance, which has failed to pass, and attached to a subsequent ordinance, without the authority of the council.²² The fact that a separate diagram has not been made for work on the street crossing, and that a lot has thus escaped assessment, cannot be complained of by the owner of such lot.²³ If the statute requires that the diagram be recorded, and that a certificate of record be attached thereto, such

¹³ *Norton v. Courtney*, 53 Cal. 691 [1879].

¹⁴ *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893].

¹⁵ *Banaz v. Smith*, 133 Cal. 102, 65 Pac. Rep. 309 [1901]; *In the Matter of Protestant Episcopal Public School*, 40 Howard, 198 [1870].

¹⁶ *Banaz v. Smith*, 133 Cal. 102, 65 Pac. Rep. 309 [1901].

¹⁷ *Wright v. Township Drain Commissioners*, 44 Mich. 557, 7 N. W. 235 [1880].

¹⁸ *City of Corsicana v. Kerr*, 89 Tex. 461, 35 S. W. 794 [1896].

¹⁹ *State, White, Pros. v. Mayor and Council of the City of Bayonne*, 49 N. J. L. (20 Vr.) 311, 8 Atl. 295 [1887].

²⁰ *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773 [1895].

²¹ *McCarty v. Brick*, 11 N. J. L. (6 Hals.) 27 [1829].

²² *City of Reading v. O'Reilly*, 169 Pa. St. 366, 32 Atl. 420 [1895].

²³ *Ede v. Knight*, 93 Cal. 159, 28 Pac. Rep. 860 [1892].

certificate is necessary.²⁴ A record of the diagram without such certificate is invalid.²⁵ If, however, the assessment is made *prima facie* evidence of its validity, it will be presumed that the diagram was recorded in a proper manner.²⁶ If a plan or plat is not required by statute, it may be regarded as surplusage, and the fact that it does not show the lots of a party objecting does not render invalid a judgment of confirmation.²⁷

§ 825. Determination of amount of benefits.

Unless the legislature has determined the existence and amount of benefits or has authorized the public corporation to make such legislative determination, it is essential that at some stage of the assessment proceedings, the amount of benefits and damages conferred by the improvement be determined as matters of fact. Accordingly, provision is generally made for a determination of the amount of benefits and damages and a report thereon.¹ The appraisers or other officials, who are to make such report, must determine not only what lands are benefited, but also what lands, if any, are damaged.² After an estimate of benefits and damages has been made, the location of the improvement cannot be changed without a new estimate of benefits and damages.³ Omission to assess damages has been said not to invalidate the assessment of benefits, where the property owner has a right of action against the city for such damages.⁴ Under some statutes, the determination of the amount of benefits and damages is one of the prelim-

²⁴ *Himmelman v. Danos*, 35 Cal. 441 [1868].

²⁵ *Himmelman v. Danos*, 35 Cal. 441 [1868].

²⁶ *Hadley v. Dague*, 130 Cal. 207, 62 Pac. Rep. 500 [1900].

²⁷ *Roberts v. City of Evanston*, 218 Ill. 296, 75 N. E. 923 [1905].

¹ *Thomas v. City of Chicago*, 204 Ill. 611, 68 N. E. 653 [1903]; *Bass v. The People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903]; *Huston v. Clark*, 112 Ill. 344 [1885]; *Gurnee v. City of Chicago*, 40 Ill. 165 [1866]; *Chicago v. Wright*, 32 Ill. 192 [1863]; *Alley v. City of Lebanon*, 146 Ind. 125, 44 N. E. 1003 [1896]; *Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735 [1885]; *Roberts v. Gierss*, 101 Ind. 408 [1884]; *Ban-*

nister v. Grassy Fork Ditching Association, 52 Ind. 178 [1875]; *In the Matter of the Appeal of Powers*, 29 Mich. 504 [1874]; *Cook v. Slocum*, 27 Minn. 509, 8 N. W. 755 [1881]; *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895]; *Riker v. Mayor, Aldermen and Commonalty of the City of New York*, 3 Daly (N. Y.) 174 [1869]; *Elwood v. City of Rochester*, 43 Hun (N. Y.) 102 [1887].

² *Bannister v. Grassy Fork Ditching Association*, 52 Ind. 178 [1875].

³ *City of San Antonio v. Sullivan*, 23 Tex. Civ. App. 658, 57 S. W. 45 [1900].

⁴ *McQuiddy v. Smith*, 67 Mo. App. 205 [1896].

inary steps in assessment proceedings, and it is provided by statute that the improvement is not to be constructed unless the estimated cost of the improvement is less than the amount of the estimated benefits.⁵ If the report shows that the amount of estimated benefits is slightly in excess of the estimated cost of the improvement, it is sufficient.⁶ Under such a statute, a positive statement in the report of the drainage commissioners that the estimated cost of the construction of the ditch is less than the estimated benefits has been held to be sufficient, although the tabulated statement which is attached to the report, shows that the estimated benefits and the estimated expense are equal.⁷ It may be provided that an assessment ordinance cannot be passed by the council until the council, acting as a board of equalization, has determined the sum to be assessed against the real property as benefits.⁸ Under such statutes a council cannot sit as a board of equalization until the report of the freeholders appointed to assess damages has been made and confirmed.⁹ If, by statute, an attempt to obtain a release of the damages caused by an improvement, is a condition precedent to making such improvement, the improvement is unauthorized in the absence of such attempt,¹⁰ and no assessment can be levied therefor.¹¹ A former attempt to obtain a release of damages, not connected with the particular proceeding, is ineffectual.¹²

§ 826. Determination of cost of improvement.

Under some statutes, it is provided that certain designated officials shall certify the amount of expense incurred in the public improvement for which the assessment is to be levied, and that the amount thus certified is to be the amount which is to be raised

⁵ *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907]; *Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735 [1885].

⁶ *Roberts v. Gierss*, 101 Ind. 408 [1884].

⁷ *Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735 [1885].

⁸ *Merrill v. Shields*, 57 Neb. 78, 77 N. W. 368 [1898]; *Medland v. Connell*, 57 Neb. 10, 77 N. W. 437 [1898]; *Equitable Trust Company v. O'Brien*, 55 Neb. 735, 76 N. W. 417 [1898].

⁹ *Merrill v. Shields*, 57 Neb. 78, 77 N. W. 368 [1898].

¹⁰ *Whisler v. Drain Commissioners of Lenawee County*, 40 Mich. 591 [1879]; *Arnold v. Decatur*, 29 Mich. 77 [1874]; *Chicago & Michigan Lake Shore R. R. Co. v. Sanford*, 23 Mich. 418 [1871].

¹¹ *Whisler v. Drain Commissioners of Lenawee County*, 40 Mich. 591 [1879].

¹² *Whisler v. Drain Commissioners of Lenawee County*, 40 Mich. 591 [1879].

by assessment. Under such statutes such certificate of expense is essential to the validity of the assessment, and without such certificate a valid assessment cannot be levied.¹ No other evidence of the amount of the expense can be substituted for such certificate.² The certificate need show only the gross amount of the expense. It is not necessary that items and details should be given.³ Where filing such certificate is necessary to start interest, omission to file such certificate is not prejudicial to a property owner who does not show from what time he is charged with interest.⁴ If the filing of such certificate is solely for the benefit of certain public officers, a property owner cannot complain if they waive such protection and act without waiting for such certificate to be filed.⁵ Under similar statutes, provision is made for certifying an estimate of the expense of the improvement, pending performance, and for levying partial assessments, in some cases, upon partial estimates. Under some of these statutes an assessment is levied by the act of the designated official in certifying such estimate, and the act of the council in ordering payment thereof.⁶ Under such statutes, the final assessment is to be levied upon the final estimate.⁷ It will be presumed that such final estimate is certified only upon full performance of the contract.⁸

§ 827. Necessity of ordinance or resolution.

Whether an ordinance or resolution is necessary, on the one hand, to enable a public corporation to construct an improvement and to levy an assessment therefor; or whether, on the other hand, the public officers who are placed in charge of improvements, may proceed to construct an improvement by virtue of the authority conferred upon them by statute, without either ordinance or resolution, depends upon the phraseology of the statute and the ex-

¹ *Tripler v. Mayor, Aldermen and Commonalty of New York City*, 125 N. Y. 617, 26 N. E. 721 [1891].

² *In the Matter of Cameron*, 50 N. Y. 502 [1872].

³ *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 125 N. Y. 617, 26 N. E. 721 [1891]; *In the Matter of O'Hare*, 5 Hun (N. Y.) 287 [1875].

⁴ *Gage v. People ex rel. Hanberg*, 219 Ill. 634, 76 N. E. 834 [1906].

⁵ *Sorchan v. City of Brooklyn*, 3 Hun (N. Y.) 562 [1875].

⁶ *City of Greenfield v. State ex rel. Moore*, 113 Ind. 597, 15 N. E. 241 [1887]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861].

⁷ *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788 [1888].

⁸ *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788 [1888].

tent to which it provides the details of the method of constructing the improvement and levying an assessment therefor. If, on the one hand, the statute confers general power upon the public corporation, leaving it to the public corporation to determine how such power shall be executed in detail, and if the power of acting on behalf of the public corporation in such matters is conferred upon the council or other similar body, it is ordinarily necessary that the council should act by means of either ordinances or resolution in order to prescribe necessary details.¹ If, on the other hand, the statute makes provision in detail with reference either to the construction of the improvement or the levying of the assessment, and authorizes the proper public officials to act under such grant of power, it is not necessary that the council should pass an ordinance or a resolution with reference to such matters.² Under such circumstances, if an ordinance or resolution were passed, it would be a repetition of the statutory provisions upon the subject.

§ 828. Recommendation of improvement by public officials.

In some jurisdictions it may be provided by statute that a recommendation by a public officer or board shall be necessary in order to enable the public corporation to construct the improvement and levy an assessment therefor.¹ Favorable action by such a board, followed by recommendation for delay, does not prevent the council from proceeding with the immediate construction of the improvement.² Such recommendation includes, by fair im-

¹ *People ex rel. Besse v. Village of Crotty*, 93 Ill. 180 [1879]; *Martin v. City of Oskaloosa*, 126 Ia. 680, 102 N. W. 529 [1905]; *Eckert v. Town of Walnut*, 117 Ia. 629, 91 N. W. 929 [1902]; *Cascaden v. City of Waterloo*, 106 Ia. 673, 77 N. W. 333 [1898]; *City of Muscatine v. Keokuk Northern Line Packet Co.*, 45 Ia. 185 [1876].

² *Martin v. City of Oskaloosa*, 126 Ia. 680, 102 N. W. 529 [1905]; *Quarles v. Town of Sparta*, 2 Tenn. Ch. App. 714 [1902].

¹ *Gately v. Leviston*, 63 Cal. 365 [1883]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *Jones v. City of Chicago*, 213 Ill. 92, 72 N. E. 798 [1904]; *Ziegler v.*

City of Chicago, 213 Ill. 61, 72 N. E. 719 [1904]; *McChesney v. City of Chicago*, 205 Ill. 611, 69 N. E. 82 [1903]; *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903]; *Dodge v. City of Chicago*, 201 Ill. 68, 66 N. E. 267 [1903]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. Rep. 688 [1894]; *Butler v. City of Detroit*, 33 Mich. 552, 5 N. W. 1078 [1880]; *Gilsonite Construction Company v. Arkansas McAlester Coal Co.*, 205 Mo. 49, 103 S. W. 93 [1907]; *Sheenan v. Martin*, 10 Mo. App. 285 [1881]; *Brophy v. Landman*, 28 O. S. 542 [1876].

² *Cuming v. Gleason*, 140 Mich. 195, 103 N. W. 537 [1905].

plication, such improvements as are reasonably necessary, as incidental to the improvement which is recommended specifically. If the board of improvements recommends to the council the improvement of the street by macadamizing it to the width of sixty feet, such recommendation implies a recommendation to widen such portion of the street as is less than sixty feet in width.³ In some jurisdictions it is held that if the board recommends a certain improvement, the public corporation may proceed to construct a part of such improvement. If the board recommends the improvement of a street between certain points, it has been held that the council may provide for the improvement of such street, beginning at a different point than that fixed by the board of improvements.⁴ An immaterial variance between the recommendation of the board and the ordinance, on the one hand, and the amended resolution for the improvement, on the other, does not invalidate the assessment.⁵ It has been held that a public corporation may order an improvement to be constructed before the necessary statutory recommendation has been made, on the theory that the recommendation is a condition precedent to the construction of the improvement, but not a condition precedent to the order for its construction.⁶ The validity of the final recommendation, on which the council acts, is not affected by the fact that the board had made a prior recommendation of a different material.⁷ By statute the recommendation of certain specified public officers may be *prima facie* evidence of the validity of the proceedings up to the time that such recommendation is made.⁸

§ 829. Option to property owners to construct improvement.

By many statutes it is provided that the property owner shall have an option to construct the specified improvement in front of his property, or to pay for the construction thereof by the public corporation. Under such statutes, the property owner must

³ Krumberg v. Cincinnati, 29 O. S. 69 [1875].

⁴ Reynolds v. Schweinfus, 27 O. S. 311 [1875]. (The depth to which gravel was to be laid was also changed from eight inches to twelve inches).

⁵ Field v. City of Chicago, 198 Ill. 224, 64 N. E. 840 [1902].

⁶ Hubbard v. Norton, 28 O. S. 116 [1875].

⁷ Gilsonite Construction Company v. Arkansas McAlester Coal Co., 205 Mo. 49, 103 S. W. 93 [1907].

⁸ Richards v. City of Jerseyville, 214 Ill. 67, 73 N. E. 370 [1905]; Berry v. City of Chicago, 192 Ill. 154, 61 N. E. 498 [1901]; Yaggy v. City of Chicago, 192 Ill. 104, 61 N. E. 494 [1901].

be given notice in time to enable him to construct such improvement, if he chooses to avail himself of the option to construct it,¹ or the ordinance, which provides for the construction of the improvement, must give the property owners a reasonable opportunity to construct such improvement before the public corporation is authorized to construct the same.² This right is waived, if the property owner does not exercise it promptly, and object to the action of the public corporation in constructing the improvement.³ Under a statute, however, which permits a city to require property owners to construct the improvements in front of their property, if the city sees fit, but which does not secure such property owners the right to construct such improvement independent of the action of the city, the city is not bound to give to such property owners an opportunity of constructing the improvement in front of their property.⁴ If work is begun by a property owner in time, in pursuance of the demand made upon him by the city, and the work is prosecuted with reasonable diligence, he may complete the improvement, even after the time specified by the notice given to him as that within which the improvement is to be constructed.⁵ On the other hand, it is usually provided by statute that if the property owners do not complete the improvement within a reasonable time, the city shall proceed to complete it at the cost of the property owner.⁶

§ 830. Resolution of intention.

It is sometimes provided by statute that the council or other corresponding body must make a formal declaration of its intention to construct a public improvement, or of the necessity of

¹ *City and County of San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. Rep. 396 [1896]; *Davison v. Campbell*, 28 Ind. App. 688, 63 N. E. 779 [1901]; *State v. Foster*, 94 Minn. 412, 103 N. W. 14 [1905]; *Griggs v. City of St. Paul*, 11 Minn. 308 [1866]; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118, 36 N. E. 821 [1894].

² *Huff v. City of Jacksonville*, 39 Fla. 1, 21 So. 776 [1897]; *Village of Western Springs v. Hill*, 177 Ill. 634, 52 N. E. 959 [1899]; *Mt. Pleasant Borough v. Baltimore & Ohio Railroad Co.*, 138 Pa. St. 365, 11 L.

R. A. 520, 20 Atl. 1052 [1890]; *Washington v. Mayor and Aldermen of Nashville*, 1 Swan (31 Tenn.) 177 [1851].

³ *Broadway Baptist Church v. McAttee*, 8 Bush. (71 Ky.) 508, 8 Am. Rep. 480 [1871].

⁴ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853].

⁵ *Heman v. St. Louis Merchants Land Improvement Company*, 75 Mo. App. 372 [1898].

⁶ *Morris v. Mayor and Council of the City of Bayonne*, 25 N. J. Eq. (10 C. E. Green) 345 [1874].

such improvement, as a condition precedent to constructing such improvement at the expense of the property owners. Under such statutes, the declaration of the necessity of the improvement, or of the intention of constructing the improvement, must be made as required by statute and a resolution of this sort is regarded as a condition precedent, and is jurisdictional in character.¹ If the legislature has not provided by statute in what form such declaration shall be made, it may be made by resolution, an ordinance not being necessary unless it is specifically required.² If such a resolution has once been passed and for some reason, such as a protest of a sufficient number of property owners, the proceedings must be begun *de novo*, another resolution of this kind must be passed.³ If, however, the proceedings are merely interrupted, or suspended, but do not need to be commenced *de novo*, a second resolution of intention need not be passed.⁴ Where a declaration is necessary by statute, it need go no farther than the statutory requirements. Thus, where a common council resolves to vacate public grounds, it is not necessary that they specify in the resolution the subsequent use to which they intend to put such grounds.⁵ Whether a preliminary declaration of the necessity of a public improvement is necessary is a question which has been raised in some cases but not decided.⁶ A resolution may be made necessary, not as a jurisdictional step, but as a means requiring the board of public works to submit a report with

¹ *Oakland Paving Company v. Rier*, 52 Cal. 270 [1877]; *McLauren v. City of Grand Forks*, 6 Dakota, 397, 43 N. W. Rep. 710 [1889]; *Zalesky v. City of Cedar Rapids*, 118 Ia. 714, 92 N. W. 657 [1902]; *Starr v. Burlington*, 45 Ia. 87 [1876]; *Hoyt v. City of East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76 [1869]; *In re Schreiber*, 3 Abb. N. C. 68 [1877]; *Smith v. City of Toledo*, 24 O. S. 126 [1873]; *Welker v. Potter*, 18 O. S. 85 [1868]; *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112 [1902]; *City of Waco v. Prather*, 90 Tex. 80, 37 S. W. Rep. 312 [1896].

² *City of Springfield to use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276

[1896]; *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407 [1894].

³ *Pacific Paving Co. v. Sullivan Estate Company*, 137 Cal. 261, 70 Pac. 86 [1902]; *Union Paving & Contracting Company v. McGovern*, 127 Cal. 638, 60 Pac. 169 [1900]; *City Street Improvement Co. v. Babcock*, 123 Cal. 205, 55 Pac. 762 [1898].

⁴ *Dougherty v. Foley*, 32 Cal. 403 [1867]; *City of Lexington ex rel. Menefee v. Commercial Bank*, — Mo. App. —, 108 S. W. 1095 [1908]; (where the city re-advertises after the successful bidder refuses to enter into a contract).

⁵ *Hinchman v. City of Detroit*, 9 Mich. 103 [1860].

⁶ *Frosh v. City of Galveston*, 73 Tex. 401, 11 S. W. 402 [1889].

maps.⁷ The council may by statute be merely required to give notice of their intention to make an improvement, if they determine that such improvement is necessary.⁸ What body must pass the resolution of intention or necessity depends upon the terms of the statute which provide for such resolution. Very frequently the common council is the body which is to act upon such matter.⁹ It may be some board, however, such as a board of public works or a board of supervisors, which is to make the preliminary declaration.¹⁰ If, by statute, it is necessary that a diagram or map be filed, the passage of a resolution is not sufficient, in the absence of such map or diagram.¹¹ If, however, the resolution described the assessment district, and the diagram was made in time to enable the property owner to suggest corrections, the fact that the resolution was passed before the diagram was made does not invalidate the assessment.¹² Where a resolution is to be passed after the engineer's estimate of the probable cost of the improvement is submitted to it, it will be presumed that the estimate was submitted to the council before its resolution was passed, even though it appears from the record that the report was made and the resolution passed upon the same day, and although the passage of the resolution is entered on the record before the adoption of the report.¹³ The city is not obliged to construct all of the work specified in its resolution of intention.¹⁴

§ 831. Contents of resolution.—Description of improvement.

The resolution must describe the improvement which it is intended to make.¹ This description must be in general terms, with such certainty as reasonably to advise the property owners of the nature of the improvement.² On the one hand, the resolution

⁷ *City of Spokane v. Preston*, — Wash. —, 89 Pac. 406 [1907].

⁸ *Lucas, Turner & Co. v. San Francisco*, 7 Cal. 463 [1857].

⁹ *Frosh v. City of Galveston*, 73 Tex. 401, 11 S. W. 402 [1889].

¹⁰ *Dyer v. North*, 44 Cal. 157 [1872].

¹¹ *Banaz v. Smith*, 133 Cal. 102, 65 Pac. Rep. 309 [1901].

¹² *Buckley v. City of Tacoma*, 9 Wash. 253, 37 Pac. 441 [1894].

¹³ *Davie's Executors v. City of Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145 [1897].

¹⁴ *Oakland Paving Co. v. Rier*, 52 Cal. 270 [1877].

¹ *Buckman v. Hatch*, 139 Cal. 53, 72 Pac. 445 [1903]; *Brady v. King*, 53 Cal. 44 [1878]; *Starr v. City of Burlington*, 45 Ia. 87 [1876]; *Coulter v. Phoenix Brick and Construction Company*, — Mo. App. —, 110 S. W. 655 [1908].

² *McLennan v. City of Chicago*, 218 Ill. 62, 75 N. E. 762 [1905]; *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588 [1904]; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886]; *Taber v. Grafmiller*, 109 Ind. 206,

cannot be drawn in such broad and vague language that some inferior officer is practically authorized to construct the public improvement according to his discretion.³ On the other hand, it is not necessary that the resolution should describe the improvement with the detail which would be necessary in specifications,⁴ or even in an ordinance.⁵ A description of an improvement as a sidewalk "upon the northeast side of" a given street, between two other named streets, is sufficient.⁶ The resolution must specify the materials to be used.⁷ If the work to be done is not described in the resolution, such resolution is of no validity.⁸ Only work which is described in the resolution can be done, where the resolution is a condition precedent to the jurisdiction of the public corporation to construct the improvement.⁹ If other work is done no assessment can be levied therefor.¹⁰ Defects in the description found in the resolution are not cured by specifications which are not made a part of the resolution of intention.¹¹ Less accuracy in description is necessary where the resolution does not declare the necessity of the improvement, or the intention of the city to construct it, but merely provides for an extension of time for completing an improvement already resolved upon.¹² A resolution need not specifically provide for work which is by implication included in the work ordered.¹³ Thus, a resolution to pave a street need not specifically provide for guttering and grading, as this is included in paving.¹⁴ A resolution may, of course, include two or more improvements, such as macadamizing and grading, which are in their nature so connected as to amount to one

9 N. E. 721 [1886]; *Coulter v. Phoenix Brick and Construction Co.*, — Mo. App. —, 110 S. W. 655 [1908].

³ *Haughawout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078 [1901].

⁴ *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886]; *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721 [1886]; *Davies v. City of Saginaw*, 87 Mich. 439, 49 N. W. 667 [1891]; *Cuming v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. Rep. 141 [1881].

⁵ *McLennan v. City of Chicago*, 218 Ill. 62, 75 N. E. 762 [1905]; *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588 [1904].

⁶ *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624 [1906].

⁷ *City of Kirksville ex rel. Fleming*

Manufacturing Company v. Coleman, 103 Mo. App. 215, 77 S. W. 120.

⁸ *Smith v. City of Westport*, 105 Mo. App. 221, 75 S. W. 725 [1904].

⁹ *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893].

¹⁰ *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808 [1895]; *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891].

¹¹ *Bay Rock Company v. Bell*, 133 Cal. 150, 65 Pac. 299 [1901]; *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927 [1900].

¹² *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899].

¹³ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

¹⁴ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

improvement.¹⁵ Whether a resolution may include more than one distinct improvement is a question on which there is some conflict of authority. Under many statutes, a resolution may include two or more distinct public improvements.¹⁶ It has been held, however, that a resolution authorizing an improvement of two or more distinct sidewalks is insufficient.¹⁷ If two or more distinct kinds of work are provided for in the resolution of intention and one is stopped by the protest of the property owners, the city may proceed with the rest of such improvements.¹⁸ The fact that two different resolutions are made for what is in legal effect one improvement has been held not to invalidate the assessment.¹⁹ Thus, where a continuous gutter was constructed upon two streets under different resolutions, it was held that the entire cost of constructing such gutter might be taken as a basis of assessment.²⁰ Work which is contained in one resolution of intention may be let by two or more contracts, unless the statute specifically requires such work to be let under one contract.²¹ However, a contract, made in accordance with the advertisement, for constructing a sewer a block shorter than the distance specified in the resolution of intention, has been held to be invalid.²² If the resolution does not describe the contemplated improvement with such certainty as to advise the property owners in a general way of the nature and kind thereof, the resolution is insufficient. Thus, a resolution of intention to construct sewers which does not specify the material to be used, or the number of branch sewers to be laid, or the character of the "automatic flushing apparatus" which is required, is insufficient.²³ A resolution that the contractor shall put in "such culverts as the street superintendents shall direct" is insufficient.²⁴ A resolution which follows

¹⁵ *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865].

¹⁶ *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023 [1902]; *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865]; (followed in *Dyer v. Hudson*, 65 Cal. 374, 4 Pac. 231 [1884]); *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899].

¹⁷ *Cist v. City of Cincinnati*, 8 Ohio N. P. 559 [1901].

¹⁸ *Los Angeles Lighting Co. v. City of Los Angeles*, 106 Cal. 156, 39 Pac. 535 [1895].

¹⁹ *Kendig v. Knight*, 60 Ia. 29, 14 N. W. 78 [1882].

²⁰ *Kendig v. Knight*, 60 Ia. 28, 14 N. W. 78.

²¹ *Ede v. Cogswell*, 79 Cal. 278, 21 Pac. 767 [1889]; *Oakland Paving Company v. Rier*, 52 Cal. 270 [1877].

²² *Dougherty v. Hitchcock*, 35 Cal. 512 [1868].

²³ *Williamson v. Joyce*, 137 Cal. 107, 69 Pac. 854 [1902].

²⁴ *Grant v. Barber*, 135 Cal. 188, 67 Pac. 127 [1901].

the language of the statute is not sufficient, unless the statute describes the improvement with sufficient accuracy.²⁵ Accordingly, a provision directing that "angular corners be constructed," without specifying dimensions, materials and the like, is insufficient.²⁶ A resolution of intention to macadamize and curb a street is not sufficient to authorize work on a sidewalk.²⁷ A resolution of intention to construct a street does not authorize the construction of a sewer for sewage purposes in such street.²⁸ A resolution to grade a street does not confer authority to curb the same.²⁹ A resolution to construct "granite or artificial stone curbing" is not sufficiently definite to authorize the improvement.³⁰ Slight inaccuracies, which do not mislead the property owner, do not, however, invalidate the resolution.³¹ A resolution for improving a street which has previously been graded and macadamized, which describes the previous work as "grading" and "macadamizing," instead of "regrading" and "remacadamizing," has been held to be sufficient.³² A resolution for improving a certain alley has been held to be sufficient, although the width of the alley is not given, or is given erroneously.³³ A resolution of intention to improve a certain street, "except that portion required by law to be kept in order by the railroad company having tracks thereon," is sufficiently certain.³⁴ So a resolution of intention to curb a street along a certain described part thereof, "where not already done," has been held to be sufficient.³⁵ A resolution authorizing the superintendent to use either class "A" or class "B" rock is not invalid, where the two classes of rock are of the same material, differ only in density, and are of substantially the same cost.³⁶ A resolution for paving a street from Forty-second to

²⁵ *Schwiesau v. Mahon*, 128 Cal. 114, 60 Pac. 683 [1900]; (overruling *Deady v. Townsend*, 57 Cal. 598 [1881]).

²⁶ *Schwiesau v. Mahon*, 128 Cal. 114, 60 Pac. 683 [1900]; (overruling *Deady v. Townsend*, 57 Cal. 298 [1881]).

²⁷ *Dyer v. Chase*, 52 Cal. 440 [1877]; *Himmelman v. Satterlee*, 50 Cal. 68 [1875]; *Beaudry v. Valdez*, 32 Cal. 269 [1867].

²⁸ *Peck v. City of Grand Rapids*, 125 Mich. 416, 84 N. W. 614 [1900].

²⁹ *Mason v. City of Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892].

³⁰ *San Jose Improvement Co. v. Auzerais*, 106 Cal. 498, 39 Pac. 859 [1895].

³¹ *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903].

³² *Wells v. Wood*, 114 Cal. 255, 46 Pac. Rep. 96 [1896].

³³ *Jones v. City of Chicago*, 213 Ill. 92, 72 N. E. 798 [1904].

³⁴ *Whiting v. Townsend*, 57 Cal. 515 [1881].

³⁵ *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899].

³⁶ *Lambert v. Marcuse*, 137 Cal. 44, 69 Pac. 620 [1902].

Eighty-sixth street, and for laying cross walks at the several intersecting streets and avenues, authorizes the paving of Eighty-sixth street as one of the intersecting streets.³⁷ Unless the statute specifically provides therefor, it is not necessary that, in the preliminary resolution of intention, it should be stated how the improvement is to be paid for.³⁸ This is ordinarily to be done later by ordinance. If the statute requires the resolution to show how the improvement is to be paid for, an assessment cannot be levied, if the resolution does not show that the property owners are to pay for the improvement.³⁹

§ 832. Declaration of necessity.

A formal finding or declaration of the necessity of improvement is not necessary unless the statute specifically requires the same.¹ Under a statute which provides that notice of the intended improvement shall be given, it has been held to be sufficient to direct the recorder to publish notices, without making any formal finding of the necessity of the improvement.² Ordering an improvement is in legal effect a declaration that it is necessary.³ A resolution ordering that certain work be done, without a formal finding that such work is necessary, is sufficient.⁴ Where the statute provides for a declaration of necessity, a reso-

³⁷ In the Matter of Murphy, 20 Hun, 346 [1880].

³⁸ Banez v. Smith, 133 Cal. 102, 65 Pac. Rep. 309 [1901]; Jones v. City of Chicago, 213 Ill. 92, 72 N. E. 798 [1904]; Zeigler v. City of Chicago, 213 Ill. 61, 72 N. E. 719 [1904]; Grimmell v. City of Des Moines, 57 Ia. 144, 10 N. W. 330 [1881].

³⁹ City of Greenville v. Harvie, 79 Miss. 754, 31 So. 425 [1901].

¹ Banaz v. Smith, 133 Cal. 102, 65 Pac. Rep. 309 [1901]; Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Town of Wolcott, 162 Ind. 399, 69 N. E. 451 [1903]; Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Fish, 158 Ind. 525, 63 N. E. Rep. 454 [1901]; Barber Asphalt Paving Co. v. Edgerton, 125 Ind. 455, 25 N. E. Rep. 436 [1890]; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551 [1900]; Willard v. Albertson, 23 Ind. App. 164, 53 N. E. Rep. 1077,

54 N. E. 403 [1899]; City of Joplin ex rel. Kee v. Freeman, 125 Mo. App. 717, 103 S. W. 130 [1907]; Elwood v. City of Rochester, 43 Hun (N. Y.) 102 [1887]; Krumberg v. City of Cincinnati, 29 O. S. 69 [1875]; Waln's Heirs v. City of Philadelphia to use of Armstrong, 99 Pa. St. 330 [1882]; Town of Elma v. Carney, 9 Wash. 466, 37 Pac. 707 [1894].

² Clinton v. City of Portland, 26 Or. 410, 38 Pac. 407 [1894].

³ Sheenan v. Martin, 10 Mo. App. 265 [1881]; Rector of Trinity Church v. Higgins, 27 N. Y. Sup. Ct. Rep. 1 [1866].

⁴ Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815 [1884]. For the form of a resolution showing the necessity of proceeding without a petition of the property owners, see Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603 [1896].

lution declaring the desirability of, and ordering the construction of a sewer, has been held to be a substantial compliance with the statute; since ordering the improvement is equivalent to declaring that the same is necessary.⁵ It is not necessary that council should determine the question whether a sidewalk would be a public convenience, separate from the question whether the benefits would justify the expense.⁶ A finding of the necessity of a public improvement must be made in some form, where the statute requires such finding. Under a statute, which requires a report by an engineer as to the availability and necessity for a ditch, and action thereon by the county commissioners, the record of the county commissioners must show that they found the ditch to be necessary and demanded by or conducive to public health, convenience or welfare.⁷ In jurisdictions in which the action of the public corporation is not final as to the necessity of the improvement, a resolution declaring the necessity of the improvement is not conclusive.⁸ Thus, under a statute authorizing the improvement of a street whenever it should be unsafe, the resolution of the council declaring the street to be dangerous was held not to be conclusive on the court, but the court was to inquire into the condition of such street as a question of fact.⁹

§ 833. Other questions as to contents of resolution.

If the statute requires it, the resolution should contain a finding as to the cost of the proposed improvement. Unless otherwise provided by statute, this may be contained in the resolution and need not be embodied in a separate ordinance.¹ It is not necessary that the resolution set out the cost of the prospective improvement, unless the statute specifically requires it. Under a charter which provides that before the common council of the city can levy a special assessment for an improvement costing more than three thousand dollars, it shall set forth its intention in the preceding annual appropriation bill, the council, having expressed such intention, may levy an assessment, even though the amount for which the assessment is levied exceeds the amount set

⁵ *Spaulding v. Baxter*, 25 Ind. App. 485, 58 N. E. Rep. 551 [1900].

⁶ *State of Minnesota v. Armstrong*, 54 Minn. 457, 56 N. W. 97 [1893].

⁷ *Miller v. Graham*, 17 O. S. 1 [1866].

⁸ *City of Binghampton v. B. & P.*

D. Ry. Co., 61 Hun, 479, 16 N. Y. Supp. 225 [1891]; *Smith v. Minto*, 30 Or. 351, 48 Pac. 166 [1897].

⁹ *Smith v. Minto*, 30 Or. 351, 48 Pac. 166 [1897].

¹ *Hadley v. Dague*, 130 Cal. 207, 62 Pac. Rep. 500 [1900].

forth in the appropriation bill.² A resolution which recites the fact that a certain expenditure in excess of a preliminary estimate has been made is *prima facie* evidence of such expenditure.³ If the statute requires the resolution to specify the exterior boundaries of the district benefited, an ordinance which describes the exterior boundaries as "the land fronting upon a given described street between two specified cross streets" is insufficient, as it does not show the depth of the improvement district from such street.⁴ Whether the resolution which fixes the boundaries of the assessment district is in compliance with statute is a state question, and not a Federal question; and the Supreme Court of the United States will not review the decision of the Supreme Court of a state upon such question.⁵ Under a statute which requires that a street improvement should be ordered by a resolution of a city council, a resolution declaring the intention of the council to improve the street, without ordering that such improvement should be made, was held to be insufficient.⁶ A resolution to the effect that "notice be given that the common council proposes to improve" was said to be inapt and ambiguous, but sufficient, since the intention appeared.⁷ It is not necessary that the resolution contain plans and specifications of the work, in the absence of specific statutory provision therefor.⁸ If the resolution specifically refers to certain plans on file, they become a part of the resolution for the purpose of showing the nature of the improvement,⁹ though not for the purpose of determining to whom compensation shall be made for drawing such plans.¹⁰ If the statute requires an estimate to be made a part of the resolution, it must be set out in full therein.¹¹ If the estimate is a part of the reso-

² Auditor General v. Chase, 132 Mich. 630, 94 N. W. 178 [1903].

³ Ireland v. City of Rochester, 51 Barb. 414 [1868].

⁴ Dehail v. Morford, 95 Cal. 457, 30 Pac. 593 [1892].

⁵ Goodrich v. Detroit, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255 [1900]).

⁶ Cline v. City of Tacoma, 11 Wash. 193, 39 Pac. 453 [1895]; (following Buckley v. City of Tacoma, 9 Wash. 253, 37 Pac. 441 [1894]).

⁷ Bank of Columbia v. Portland, 41 Or. 1, 67 Pac. 1112 [1902].

⁸ Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635 [1897]; Harney v. Heller, 47 Cal. 15 [1873]; Givins v. City of Chicago, 186 Ill. 399, 57 N. E. 1045 [1900].

⁹ City of Greensburg v. Zoller, 28 Ind. App. 126, 60 N. E. 1007 [1901].

¹⁰ Fitzhugh v. Ashworth, 119 Cal. 393, 51 Pac. 635 [1897].

¹¹ Bickerdike v. City of Chicago, 203 Ill. 636, 68 N. E. 161 [1903]; (overruling McChesney v. City of Chicago, 201 Ill. 344, 66 N. E. 217 [1903]).

lution presented at the public hearing, it need not be in existence when the first resolution is enacted.¹² Under a statute which provides that the record must show whether a petition for the improvement was filed or not, it is not necessary that the resolution should show that a petition has been filed.¹³ A resolution of the city council, finding that all previous steps have been taken in conformity with law, is not conclusive as to such fact,¹⁴ especially if the record shows a want of jurisdiction to make the assessment.¹⁵ If the resolution recites that it was passed "proceeding under" a certain section of the statutes, such section becomes a part of the resolution, as if it had been incorporated therein.¹⁶

§ 834. Record of resolution.

It is often provided by statute that the resolution must be recorded. Under such statute it is ordinarily necessary that the resolution be recorded in substantially the manner provided for by statute.¹ Where, however, the statute provided that the resolutions must be recorded in a separate book, it was held that, as to the necessity of such separate book, the statute was directory only; and that if the resolutions were recorded in the ordinary record of proceedings, such record was sufficient.² If a resolution has not been recorded in full, but can be identified, omission to record it at the time of its passage does not invalidate it.³ The record may be corrected subsequently, to show what in effect took place.⁴ If the resolution as recorded does not show an assessment against a certain property owner, but the engineer's plan, which has been adopted by the council, shows that he is

¹² *Givins v. City of Chicago*, 186 Ill. 399, 57 N. E. 1045 [1900].

¹³ *Hardwick v. City of Independence*, — Ia. —, 114 N. W. 14 [1907].

¹⁴ *Comstock v. Eagle Grove City*, 133 Iowa 589, 111 N. W. 51 [1907].

¹⁵ *Comstock v. Eagle Grove City*, 133 Ia. 589, 111 N. W. 51 [1907].

¹⁶ *Edwards House Co. v. City of Jackson*, — Miss. —, 45 So. 14 [1907].

¹ In the *Matter of Schreiber*, 3 Abb. N. C. 68 [1877]; *Waln's Heirs v. City of Philadelphia to use of Armstrong*, 99 Pa. St. 330 [1882]; *Mar-*

shall v. Mayor, etc., of Allegheny, 59 Pa. St. 455 [1868].

² *Uppington v. Oviatt*, Treasurer, 24 O. S. 232 [1873].

³ *Dowling v. Hibernia Savings & Loan Society*, 143 Cal. 425, 77 Pac. 141 [1904]; *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899].

⁴ *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690 [1885]. "The authority to keep a record carries with it the right to amend it." *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690 [1885].

owner, an assessment against him is not invalid because his name is omitted from the recorded resolution.³

§ 835. Method of enacting resolution.

In enacting a resolution, the public corporation which enacts the same must comply substantially with the statutes which authorize the improvement.¹ The vote which is necessary to pass such resolution depends upon statute. A provision that an ordinance can be passed only by a two-thirds vote does not apply to a preliminary resolution.² A resolution may ordinarily be passed at the same meeting as that at which it is introduced, without the delay necessary in the case of an ordinance.³ A preliminary resolution declaring a public improvement necessary,⁴ and a resolution awarding a contract for a public improvement,⁵ are neither of them resolutions of a "general or public nature" within the meaning of the statute, which requires resolutions of a general or public nature to be read on three successive days, unless such separate reading is dispensed with by a three-fourths vote. The enactment of several resolutions of necessity by one vote has been held to be improper, though cured by subsequent legislation.⁶ Under some statutes, a resolution is to be adopted by an improvement board, board of public works and the like. It may be provided by a statute that such resolution is to be enacted by a majority of such board;⁷ and authenticated by the signatures of a majority of such board.⁸ Under such statutes the signatures of the officers of the board are not necessary. Whether a resolution must be presented to the mayor, president of the board, or other

¹ *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

² *Waln's Heirs v. City of Philadelphia to use of Armstrong*, 99 Pa. St. 330 [1882]; *Gilman v. City of Milwaukee*, 61 Wis. 589, 21 N. W. 640 [1884].

³ *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259 [1903]; *City of Spokane v. Preston*, — Wash. —, 89 Pac. 406 [1907].

⁴ *Gleason v. Barnett*, 115 Ky. 890, 61 S. W. 20 [1903].

⁵ *Upton v. Oviatt*, 24 O. S. 232 [1873].

⁶ *City of Cincinnati for use of Ashman v. Bickett*, 26 O. S. 49 [1875].

⁷ *Bode v. City of Cincinnati*, 9 Ohio C. C. 382 [1895].

⁸ *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903]; *Dodge v. City of Chicago*, 201 Ill. 68, 66 N. E. 367 [1903]; *Gage v. City of Chicago*, 196 Ill. 512, 63 N. E. 1031 [1902]; *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184 [1902]; *Gage v. City of Chicago*, 192 Ill. 586, 61 N. E. 849 [1901].

⁹ *Dodge v. City of Chicago*, 201 Ill. 68, 66 N. E. 367 [1903]; *Gage v. City of Chicago*, 192 Ill. 586, 61 N. E. 849 [1901].

similar official, for his signature and approval, depends entirely upon the provisions of the statute under which such resolution is enacted.⁹ Under a statute which requires the signature of the mayor to all resolutions affecting the interests of the city, a resolution of the common council referring a petition for a sewer to the committee on sewerage, does not require the signature of the mayor.¹⁰ Under some statutes, it has been held that such a resolution must be presented to the superintendent of the board,¹¹ but not to the mayor.¹²

§ 836. Publication of resolution.

It is frequently provided by statute that a resolution of intention to construct a public improvement, or of the declaration of the necessity thereof, must be published. The object of such requirement is usually to advise the property owners of the nature of the improvement and of the fact that an assessment therefor is to be imposed upon them.¹ Accordingly, publication must be made in substantial compliance with the provisions of the statute.² By statute, publication must be dispensed with under certain circumstances; as where a petition for the construction of such improvement is presented.³ Publication for the statutory time is, of course, sufficient.* A substantial compliance with the statutory requirements as to publication is ordinarily sufficient.⁵ Thus, un-

⁹ That such resolutions need not be presented to the mayor; Taylor v. Palmer, 31 Cal. 240 [1866].

¹⁰ State, Jersey City & Bergen Railroad Co., Pros. v. Mayor and Common Council of Jersey City, 31 N. J. L. (2 Vr.) 575 [1865].

¹¹ Thompson v. Hode, 30 Cal. 180 [1866]; Creighton v. Manson, 27 Cal. 614 [1865].

¹² Cochran v. Collins, 29 Cal. 130 [1865]; Hendrick v. Crowley, 31 Cal. 471 [1866]; Beaudry v. Valdez, 32 Cal. 269 [1867].

¹ Nugent v. City of Jackson, 72 Miss. 1040, 18 So. 493 [1895].

² Oakland Paving Co. v. Rier, 52 Cal. 270 [1877]; Dyer v. North, 44 Cal. 157 [1872]; Zalesky v. City of Cedar Rapids, 118 Ia. 714, 92 N. W. 657 [1902]; Starr v. City of Burlington, 45 Ia. 87 [1876]; City of Du-

buque v. Wooten, 28 Ia. 571 [1870]; Eno v. Mayor, etc., 53 Howard (N. Y.) 382 [1877]; Jardine v. Mayor, Aldermen and Commonalty of the City of New York, 11 Daly, 116 [1882]; Welker v. Potter and Wife, 18 O. S. 85 [1868]; King v. Portland, 38 Or. 402, 52 L. R. A. 812, 63 Pac. 2 [1900]; Waln's Heirs v. City of Philadelphia to use of Armstrong, 99 Pa. St. 330 [1882]; Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119 [1895].

³ City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506 [1907].

⁴ Dyer v. North, 44 Cal. 157 [1872].

⁵ Chambers v. Satterlee, 40 Cal. 497 [1871].

der a statute which provides for publication of the notice of the intention of the public corporation to construct certain improvements for ten days from and after a specified date, a publication which is not commenced until two days after the time fixed by the resolution, but which is then made for the legal period of ten days, is a substantial compliance and is sufficient.⁶ If the statute provides for publishing a declaration of intention to do work for a certain number of days, Sundays are to be included unless the statute specifically provides for excluding Sundays.⁷ If the statute specifically provides for publishing the resolution for a certain number of days, exclusive of Sundays, Sunday cannot be counted.⁸ Accordingly, if the last of the five days falls on Sunday, the board does not acquire jurisdiction to make the improvement.⁹ A change in the name of the paper during the course of publication does not invalidate such publication, where the volume and number of the paper were not changed, and the publication was continued for the necessary time after such change of name.¹⁰ A notice which is not published for the number of days required by statute is insufficient.¹¹ Thus, under a statute requiring publication daily, Sundays excepted, for ten days, publication for eight out of ten consecutive days was not sufficient where the two days upon which publication was not made were not Sundays, but the paper was not issued upon such days.¹² Where the statute requires the publication on ten consecutive days, but such statute is subsequently amended by a provision that publication is to be made on week days only, a publication beginning May fourth and published daily thereafter, except Sundays, on which day there was no issue, to May fifteenth, inclusive, was held to be sufficient.¹³ Under a statute which provided that the notice posted must have a heading in type not less than one inch in length, a notice was posted with a heading in type which was only three-fourths of an inch in length. It was held that such notice was insufficient, since the

⁶ *Chambers v. Satterlee*, 40 Cal. 497 [1871].

⁷ *Taylor v. Palmer*, 31 Cal. 240 [1866]; *Miles v. McDermott*, 31 Cal. 271 [1866].

⁸ *The People v. McCain*, 50 Cal. 210 [1875].

⁹ *The People of the City and Council of San Francisco v. McCain*, 50 Cal. 210 [1875].

¹⁰ *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407 [1894].

¹¹ *Haskell v. Bartlett*, 34 Cal. 281 [1867].

¹² *Haskell v. Bartlett*, 34 Cal. 281 [1867].

¹³ *Bank of Columbia v. City of Portland*, 41 Or. 1, 67 Pac. 1112 [1902].

statute must be complied with in at least a substantial manner.¹⁴ If the statute provides specifically for publication of the notice in a newspaper, personal service does not dispense with publication according to statute.¹⁵ A statute, which provides that resolutions must be published in all the newspapers employed by the corporation, is directory only.¹⁶ Accordingly, publication in one paper was held to be sufficient.¹⁷ If the proof of publication filed by a paper is insufficient, defects therein may be supplied by oral evidence.¹⁸ Under some statutes, a notice of the pendency of the resolution must be published before the final vote upon such resolution. Omission to publish such notice in the manner and for the time prescribed by statute invalidates such resolution.¹⁹ A statute which provides that a resolution authorizing an assessment must be published, and that it cannot be passed until two days after the publication thereof, is mandatory, and a resolution passed without such publication is invalid.²⁰ If the common council consists of two houses, a separate notice of the introduction of the resolution into each house must be given.²¹ Unless an official paper has been designated, publication cannot be made in compliance with law.²² Under a statute requiring twenty days' notice of the passage and approval of a resolution, a single notice published twenty days before the passage and approval of the resolution is sufficient.²³ Under some statutory provisions, notice of the resolution of necessity, provided for by statute, is not necessary, if notice is given for the hearing of objections to the final estimates.²⁴ Under a statute making the signature of a contract

¹⁴ *Bank of Columbia v. City of Portland*, 41 Or. 1, 67 Pac. 1112 [1902].

¹⁵ *Zalesky v. City of Cedar Rapids*, 118 Ia. 714, 92 N. W. 657 [1902].

¹⁶ *In the Matter of Douglas*, 58 Barb. 174 [1870]; *People ex rel. Locke v. Common Council of the City of Rochester*, 5 Lansing, 11 [1871].

¹⁷ *In the Matter of Douglas*, 58 Barb. 174 [1870].

¹⁸ *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407 [1894].

¹⁹ *City and County of San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. Rep. 369 [1896]; *In the Matter of De Pierris*, 82 N. Y. 243 [1880]; *In the Matter of Little*, 60 N. Y. 343

[1875]; (reversing *In re Little*, 2 Hun, 215 [1874]).

²⁰ *In re Douglas*, 46 N. Y. 42 [1871]; *In the Matter of Bassford*, 63 Barb. 161 [1872].

²¹ *In the Matter of De Pierris*, 82 N. Y. 243 [1880]; *In the Matter of Little*, 60 N. Y. 343 [1875]; (reversing *In the Matter of Little*, 2 Hun, 215 [1874]).

²² *In Matter of Burmeister*, 76 N. Y. 174 [1879]; (reversing *In the Matter of Burmeister*, 9 Hun, 613 [1877]).

²³ *McGilvery v. City of Lewiston*, 13 Idaho 338, 90 Pac. 348 [1907].

²⁴ *Spaulding v. Baxter*, 25 Ind. App. 480, 58 N. E. 551 [1900].

for a public improvement by the mayor *prima facie* evidence of the due observance of all antecedent forms and requirements of law, such signature is *prima facie* evidence of the due publication of notice of the resolution to make the public improvement.²⁵ Where notice is to be given before the resolution is passed, the recital in the resolution that notice was given as required by law, has been held to be sufficient evidence of such fact.²⁶ In the absence of statutory prohibition, the council may set aside prior resolutions for a street improvement and order a new notice of its intention to make such improvement.²⁷

§ 837. Necessity of ordinance.

The method of levying an assessment depends entirely upon the provisions of the statute giving authority to the public corporation or quasi corporation to levy such assessment. As long as the constitutional rights of the property owners are respected, the legislature may make such provisions as to the manner of levying an assessment as it sees fit. Accordingly, we find the greatest dissimilarity in the statutory provisions upon this subject. The divergence is greater in matters of detail, however, than it is in the more general provisions. The greatest difference is to be noticed between municipal corporations having a council or other corresponding body, on the one hand, and such improvement districts, as drainage districts, irrigation districts, and the like, on the other, which frequently have neither a council nor any set of officials corresponding thereto. In municipal corporations, such as cities, villages and the like, which have councils or corresponding bodies, it is generally provided by statute that a public improvement is to be ordered and assessment proceedings commenced, by the enactment of an ordinance providing for such improvement. Under such statutes a valid ordinance is essential to the validity of further proceedings, and lies at the foundation of every valid assessment.¹ Under such statutes, a public cor-

²⁵ *Bruning v. Chadwick*, 109 La. 1067, 34 So. 90 [1903].

²⁶ *Owens v. City of Marion*, 127 Ia. 469, 103 N. W. 381 [1905].

²⁷ *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. Rep. 407 [1894].

¹ *City of Napa v. Easterby*, 61 Cal. 509 [1882]; *City of Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853

[1903]; *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901]; *Connecticut Mut. Life Ins. Co. v. City of Chicago*, 185 Ill. 148, 56 N. E. 1071 [1900]; *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747 [1898]; *Pells v. City of Paxton*, 176 Ill. 318, 52 N. E. 64 [1898]; *Thaler v. West Chicago*

poration cannot ratify and adopt an improvement made before the passage of an ordinance; and an ordinance passed after such improvement, attempting to recognize such improvement as one

Park Commissioners, 174 Ill. 211, 52 N. E. 116 [1898]; *Smith v. City of Chicago*, 169 Ill. 257, 48 N. E. 445 [1897]; *Culver v. People ex rel. Kochersperger*, 161 Ill. 89, 43 N. E. Rep. 812 [1896]; *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926 [1893]; *The Freeport Street R. R. Co. v. City of Freeport*, 151 Ill. 451, 38 N. E. 137 [1894]; *The City of East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934 [1894]; *Weld v. The People ex rel. Kern*, 149 Ill. 257, 36 N. E. 1006 [1894]; *City of Carlyle v. County of Clinton*, 140 Ill. 512, 30 N. E. 782 [1893]; *St. John v. The City of East St. Louis*, 136 Ill. 207, 27 N. E. 543 [1892]; *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889]; *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443 [1886]; *Jacksonville Railroad Co. v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886]; *Glos v. Collins*, 110 Ill. App. 121 [1903]; *City of Alton v. Foster*, 74 Ill. App. 511 [1897]; *Lux & Talbott Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *State ex rel. Keith v. Common Council of Michigan City*, 138 Ind. 455, 37 N. E. 1041 [1894]; *Martin v. City of Oskaloosa*, 126 Ia. 680, 102 N. W. 529 [1905]; (opinion 99 N. W. 557 [1904] withdrawn); *Crawford v. Mason*, 123 Ia. 301, 98 N. W. 795 [1904]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *Newman v. Emporia*, 32 Kan. 456, 4 Pac. 815 [1884]; *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901]; *Second Municipality of New Orleans v. Botts*, 8 Robinson (La.) 198 [1844]; *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86 [1907]; *City of Sedalia to use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 89 S. W. 386 [1905]; *Wheeler v. City*

of Poplar Bluff, 149 Mo. 36, 49 S. W. 1088 [1898]; *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895]; *The Town of Trenton v. Coyle*, 107 Mo. 193, 17 S. W. 643 [1891]; *City of Louisiana v. Miller*, 66 Mo. 467 [1877]; *Irvin v. Devors*, 65 Mo. 625 [1877]; *Kiley v. Craner*, 51 Mo. 541 [1873]; *Milligan v. City of Lexington*, — Mo. App. —, 105 S. W. 1104 [1907]; *The Dollar Savings Bank v. Ridge*, 62 Mo. App. 324 [1895]; *Keane v. Klausman*, 21 Mo. App. 485 [1886]; *City of St. Louis v. Cruikshank*, 16 Mo. App. 495 [1885]; *Stifel v. Dougherty*, 6 Mo. App. 441 [1879]; *Seibert v. Caven-der*, 3 Mo. App. 421 [1877]; *Burnett, Pros. v. Mayor, etc., of Town of Boonton*, — N. J. L. —, 70 Atl. 67 [1908]; *State, Gleason, Pros. v. Town of Bergen*, 33 N. J. L. (4 Vr.) 72 [1868]; *State, Ackerman, Pros. v. Town of Bergen, County of Hudson*, 33 N. J. L. (4 Vr.) 39 [1868]; *Folmsbee v. City of Amsterdam*, 142 N. Y. 118, 36 N. E. 821 [1894]; *Wilcox v. Mayor, etc., of the City of New York*, 53 N. Y. Sup. Ct. Rep. 436 [1886]; *Kennedy v. Newman*, 3 N. Y. Sup. Ct. Rep. 187 [1848]; *Brewer v. Incorporated Village of Bowling Green, Ohio*, 7 Ohio C. C. 489 [1893]; *Shiloh Street, Appeal of McCormick*, 165 Pa. St. 386, 44 Am. St. Rep. 671, 30 Atl. 986 [1895]; *City of Waco v. Prather*, 90 Tex. 80, 37 S. W. Rep. 312 [1896]; *In re City of Seattle*, — Wash. —, 94 Pac. 1075 [1908]; *Town of Hamilton v. Chopard*, 9 Wash. 352, 37 Pac. 472 [1894]; *Buckley v. City of Tacoma*, 9 Wash. 269, 37 Pac. 441 [1894].

"A valid ordinance is the foundation of every special assessment proceeding." *St. John v. City of East St. Louis* 136 Ill. 207, 213, 27 N. E. 543 [1892].

constructed by authority of the corporation, and to levy an assessment therefor, is invalid.² No assessment can be levied, if no proper order for constructing the improvement has ever been made.³ Under a statute which provides, as a condition precedent to certain improvements, that the grade must be established by ordinance, failure to enact a valid ordinance establishing such grade, invalidates subsequent proceedings.⁴ A provision that the city shall declare by ordinance what sewers are main public sewers and levy assessments accordingly, has been held, however, not to prevent a sewer from being made a public sewer by the way in which it was treated, although it was not originally so declared.⁵ A statute which provides "The city council may, by ordinance, prescribe general rules directing the superintendent of streets and the contractors as to the materials to be used and the mode of executing the work," is permissive and not mandatory, and the council is not bound to prescribe such general rules as a condition precedent to future public improvements.⁶ If a part of an ordinance is invalid, and the invalid part can be separated from that which is valid, so that it can fairly be presumed that the council would have passed the valid part without the invalid provisions, the valid provisions may be enforced and the invalid provisions may be rejected.⁷ Power to regulate the making of improvements by ordinance is not, however, power to assess for the cost thereof.⁸ Thus, power to regulate connections between premises abutting upon any street, and water mains therein, is not power to levy an assessment for cost of service connections.⁹ Since an ordinance is necessary simply because of

² *City of Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853 [1903]; *Connecticut Mut. Life Ins. Co. v. City of Chicago*, 185 Ill. 148, 56 N. E. 1071 [1900]; *Pells v. City of Paxton*, 176 Ill. 318, 52 N. E. 64 [1898]; *Thaler v. West Chicago Park Commissioners*, 174 Ill. 211, 52 N. E. 116 [1898]; *The City of East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934 [1894]; *Weld v. The People ex rel.*, 149 Ill. 257, 36 N. E. 1006 [1894]; *The City of Carlyle v. County of Clinton*, 140 Ill. 512, 30 N. E. 782 [1893]; *Dorathy v. City of Chicago*, 53 Ill. 79 [1869].

³ *Keyser v. District of Columbia*, 3 App. D. C. 31 [1894].

⁴ *City of Napa v. Easterby*, 61 Cal. 509 [1882].

⁵ *Akers v. Kolkmeier & Company*, 97 Mo. App. 520, 71 S. W. 536 [1902].

⁶ *Santa Cruz Rock Pavement Co. v. Heaton*, 105 Cal. 162, 38 Pac. 693 [1894].

⁷ *City of San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. Rep. 694 [1891].

⁸ *Alvord v. City of Syracuse*, 163 N. Y. 158, 57 N. E. 310 [1900]. See § 231.

⁹ *Alvord v. City of Syracuse*, 163 N. Y. 158, 57 N. E. 310 [1900].

statutory provisions, a statute which provides a method of levying an assessment without the enactment of an ordinance, is not on that account invalid, and, under such statutes, an ordinance is not necessary.¹⁰ If the statute provides in detail the method of procedure, an ordinance is not necessary,¹¹ and the fact that the city has, in fact, enacted an invalid ordinance does not make further proceedings invalid.¹²

§ 838. Effect of resolution instead of ordinance.

Cases are frequently presented, where the city has taken steps in levying an assessment by resolution, and the question presented is whether such steps should be taken by resolution or by ordinance. The difference between a resolution and an ordinance is that an ordinance "is passed with more deliberation and formality than a resolution."¹ Thus, it is often provided that an ordinance cannot be passed at the same meeting at which it is introduced, though such formality is not necessary in the case of a resolution.² So it may be provided that, in the case of an ordinance, there must be a delay of two weeks between its passage in the two houses of which the council is composed, while such formality is not necessary in case of a resolution.³ If, by statute, certain steps in an assessment proceeding must be taken by ordinance, and such steps are, in fact, taken by resolution, which is not passed with the formality necessary in the case of an ordinance, a resolution of this sort is, in such cases, insufficient; and the assessment is thereby rendered invalid.⁴ On the other hand.

¹⁰ In the Matter of Knaust, 101 N. Y. 188, 4 N. E. 338 [1886]; Board of Commissioners of Allen County v. Silvers, 22 Ind. 491 [1864].

¹¹ Hardwick v. City of Independence, — Ia. —, 114 N. W. 14 [1907].

¹² Hardwick v. City of Independence, — Ia. —, 114 N. W. 14 [1907].

¹ State, Gleason, Pros. v. Town of Bergen, 33 N. J. L. (4 Vr.) 72 [1868]. To the same effect see Gleason v. Barnett, 115 Ky. 890, 61 S. W. 20 [1903].

² State, Gleason, Pros. v. Town of Bergen, 33 N. J. L. (4 Vr.) 72 [1868].

³ Gleason v. Barnett, 115 Ky. 890, 61 S. W. 20 [1903].

⁴ Martin v. City of Oskaloosa, 126 Ia. 680, 102 N. W. 529 [1905]; McManus v. Hornaday, 99 Ia. 507, 68 N. W. 812 [1896]; Zelie v. City of Webster City, 94 Ia. 393, 62 N. W. 796 [1895]; Kepple v. City of Keokuk, 61 Ia. 653, 17 N. W. 140 [1882]; Barron v. Krebs, 41 Kan. 338, 21 Pac. 235 [1885]; Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815 [1884]; Williams v. Mayor, etc., of Detroit, 2 Mich. 560 [1853]; Heman Construction Co. v. Loevy, 179 Mo. 455, 78 S. W. 613 [1903]; The City of Nevada to use of Gilfillan v. Eddy, 123 Mo. 546, 27 S. W. 471

the council may take a step by what purports to be a resolution, which is, in fact, enacted with all the formalities necessary in case of an ordinance. In cases of this sort, the mere misnomer does not invalidate the proceedings; and the assessment is valid.⁵ Thus, it has been said that work must be ordered by ordinance or by resolution passed with the same formalities as those required to pass an ordinance.⁶ On the other hand, the statute may merely require the council or other corresponding body of a public corporation to take certain action without providing whether such action is to be taken by ordinance or by resolution. Under such statutes, if the required action is taken by the council by the passage of a resolution, this is sufficient.⁷ Thus, after the passage of a resolution, the city may advertise for bids and accept one of the bids offered.⁸

§ 839. Conformity of ordinance to preliminary resolution or to general ordinance.

If a preliminary resolution and an improvement ordinance are both required by statute, the ordinance must conform substantially to the preliminary resolution as to the matters which must be determined by the preliminary resolution. A wilful and sub-

[1894]; *The Town of Trenton v. Coyle*, 107 Mo. 193, 17 S. W. 643 [1891]; *City of Westport v. Whiting*, 62 Mo. App. 647 [1895]; *City of St. Joseph v. Wilshire*, 47 Mo. App. 125; *Graden v. City of Parkville*, 114 Mo. App. 527, 90 S. W. 115 [1905]; *State, Penwarden, Pros. v. Board of Commissioners of the Borough of Dunellen*, 50 N. J. L. (21 Vroom) 565, 15 Atl. Rep. 529 [1888]; *Buckley v. City of Tacoma*, 9 Wash. 253, 37 Pac. 441 [1894].

⁵ *Creighton v. Manson*, 27 Cal. 614 [1865]; *San Francisco Gas Co. v. City of San Francisco*, 6 Cal. 190 [1856]; *Gleason v. Barnett*, 115 Ky. 890, 61 S. W. 20 [1903]; *City of Springfield to use of McEvilly v. Knott*, 49 Mo. App. 612 [1892]; *Sower v. City of Philadelphia*, 35 Pa. St. (11 Casey) 231 [1860].

⁶ *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088 [1898].

⁷ *Atchison Board of Education v. De Kay*, 148 U. S. 591, 37 L. 573, 13 S. 706 [1893]; *Haughawout v. Raymond*, 148 Cal. 311, 83 Pac. 53 [1905]; *Santa Cruz Rock Pavement Co. v. Heaton*, 105 Cal. 162, 38 Pac. 693 [1894]; *City of Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253 [1888]; *Grimmell v. City of Des Moines*, 57 Ia. 144, 10 N. W. 330 [1881]; *Morrison v. Hershire*, 32 Ia. 271 [1871]; *National Tubeworks Co. v. Chamberlain*, 5 Dak. 54, 37 N. W. 761 [1889]; *Ashton v. Ellsworth*, 48 Ill. 299 [1868]; *City of Springfield to Use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; *City of Waco v. Prather*, 90 Tex. 80, 37 S. W. Rep. 312 [1896].

⁸ *City of Springfield to Use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896]; (overruling in part *Keene v. Cushing*, 15 Mo. App. 96 [1884]).

stantial variance between the ordinance and the preliminary resolution invalidates subsequent proceedings.¹ Thus, where the resolution provides that an entire roadway and all intersections thereof should be paved, and the ordinance provides that certain intersections should not be paved, such variance is wilful and material.² Where two resolutions have been passed, each for the appointment of a separate set of commissioners for opening different sections of the same street, it is error to treat this as an entire improvement, and appoint one set of commissioners for opening the street for the entire distance covered by the separate resolutions.³ If the variance between the resolution and the ordinance is not wilful or substantial, such variance does not invalidate subsequent proceedings.⁴ Where the resolution provided that the roadway of a street between certain specified points, together with the roadways of intersecting streets, extended from the curb line to the street line produced on each side of such street, should be improved by constructing a concrete curb and gutter, and the ordinance provided that a concrete curb and gutter should be constructed, except where a concrete curb existed, and except across the roadway of intersecting streets, it was held that there was no wilful or substantial variance between the ordinance and the resolution.⁵ Where the preliminary resolution, the recommendation, the estimate of the engineer and the ordinance describe the improvement as curbing, grading and paving the roadway of a certain named street, including curbing, grading and paving the roadway of intersecting streets within the street lines; and the final resolution, the notice of public hearing and the petition for an assessment describe the improvement as curbing, grading and paving the street named, such variance was held not to be fatal.⁶ If the resolution calls for paving a given street without specifying its width, and it is subsequently made four feet wider, it has been held that the change in width did not invalidate sub-

¹ *Smith v. City of Chicago*, 214 Ill. 155, 73 N. E. 346 [1905]; *In the Matter of Opening Orange Street*, 50 How. (N. Y.) 244 [1875].

² *Smith v. City of Chicago*, 214 Ill. 155, 73 N. E. 346 [1905].

³ *In the Matter of Opening Orange Street*, 50 How. (N. Y.) 244 [1875].

⁴ *Howe v. City of Chicago*, 224 Ill. 95, 79 N. E. 421 [1906]; *McChesney v. City of Chicago*, 201 Ill. 344, 66

N. E. 217 [1903]; *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903]; *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. Rep. 542 [1896]; *Fuller v. City of Grand Rapids*, 105 Mich. 529, 63 N. W. 530 [1895].

⁵ *Howe v. City of Chicago*, 224 Ill. 95, 79 N. E. 421 [1906].

⁶ *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903].

sequent proceedings.⁷ Where the ordinance calls for more work than was specified in the resolution of intention but such excess is comparatively small and can be easily separated, both as to quantity and cost, from the work ordered by the resolution, such excess is held not to invalidate the assessment.⁸ If a preliminary resolution or declaration of intention is not necessary by statute, but such a resolution is enacted, the fact that a subsequent ordinance varies from such resolution does not invalidate the proceedings.⁹ It is not necessary, in the absence of statute, that the council determine, in advance of the assessing ordinance, the proportion of the cost of the improvement which is to be borne by the property owners,¹⁰ and the Council may, in the assessment ordinance, impose a greater charge upon the property owners than that fixed in the resolution.¹¹ A general ordinance providing for certain kinds of improvements, must be considered as controlling where the ordinance for the specific improvement is in no way inconsistent therewith.¹² An assessment is invalid, if made under resolutions which differ materially from a general ordinance passed under statutory authority.¹³

§ 840. Improvement must conform to resolution or ordinance.

Since the sole authority, under most statutes, for the construction of a public improvement is the ordinance, or, in some cases, the resolution, the improvement, whether constructed by the city or constructed by letting contracts, must conform substantially to the terms of such ordinance or resolution.¹ Immaterial variance

⁷ *Fuller v. City of Grand Rapids*, 105 Mich. 529, 63 N. W. 530 [1895]. [In this case plans and specifications based on the increased width were filed before the contract was entered into and bids were solicited upon the basis of the increased width.]

⁸ *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. Rep. 542 [1896].

⁹ *Town of Elma v. Carney*, 9 Wash. 466, 37 Pac. 707 [1894].

¹⁰ *Lippert v. City of Toledo*, 29 Ohio C. C. 345 [1906]; (affirmed without report, *Lippert v. Parker*, 76 O. S. 568, 81 N. E. 1189 [1907]).

¹¹ *Acklin v. Parker*, 29 Ohio C. C. 625 [1907].

¹² *Philadelphia to Use v. Jewell*, 135 Pa. St. 329, 19 Atl. 947 [1890].

¹³ *Zelie v. City of Webster City*, 94 Ia. 393, 61 N. W. 796 [1895].

¹ *Kutchin v. Engelbret*, 129 Cal. 635, 62 Pac. 214 [1900]; *Fitzhugh v. Ashworth*, 119 Cal. 393, 51 Pac. 635 [1897]; *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893]; *Donnelly v. Howard*, 60 Cal. 291 [1882]; *City of Stockton v. Creanor*, 45 Cal. 643 [1873]; *Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37 [1906]; (affirming, *Case v. City of Sullivan*, 123 Ill. App. 671); *City of Chicago v. Ayers*, 212 Ill. 59, 72 N. E. 32 [1904]; *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075

does not, of course, invalidate the assessment.² If the improvement has been granted without conforming to the official grade, failure to make such objection by appeal operates as a waiver.³ In the absence of statutory provision, it does not seem to be necessary that a grade line should be established in advance.⁴ It will ordinarily be presumed that an improvement conforms to the established grade, where this is required by ordinance.⁵ It has been held that if only part of the work provided for by ordinance or resolution is done, such variance is fatal to the validity of the assessment levied therefor.⁶ If, however, the entire improvement described in the ordinance or resolution has been constructed, objection cannot be made to the assessments because two or more contracts were made for such improvement.⁷ If work not ordered by the ordinance or resolution is done, and the cost of such work cannot be separated from the cost of the rest of the improvement, the entire assessment is rendered invalid.⁸ If, on the other hand, the cost of such unauthorized work can be computed separately from the cost of the work which is authorized, the cost of the unauthorized work will be stricken out.

[1902]; *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747 [1898]; *Pells v. People ex rel. Holmgren*, 159 Ill. 580, 42 N. E. 784 [1896]; *Town of Greenwood v. State ex rel. Lawson*, 159 Ind. 267, 64 N. E. 849 [1902]; *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887]; *Taylor v. Brown*, 127 Ind. 293, 26 N. E. 822 [1890]; *Steffins v. Stewart*, 53 Kans. 92, 36 Pac. 55 [1894]; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304 [1885]; *Bowditch v. Boston*, 168 Mass. 239, 46 N. E. 1046 [1897]; *City of Boonville ex rel. Cosgrove v. Stephens*, — Mo. App. —, 95 S. W. 314 [1906]; *City of Louisiana v. Shaffner*, 104 Mo. App. 101, 78 S. W. 287 [1903]; *The King Hill Brick Manufacturing Company v. Hamilton*, 61 Mo. App. 120 [1892]; *Smith v. Small*, 50 Mo. App. 401 [1892]; *Eyeremann v. Provenchere*, 15 Mo. App. 256 [1884]; *State, Central Railroad Company, Pros. v. City of Bayonne*, 35 N. J. L. (6 Vr.) 332 [1872]; *Lutes v. Briggs*, 5 Hun, 67 [1875].

² *People ex rel. Raymond v. Church*, 192 Ill. 302, 61 N. E. 496 [1901]; *Angell v. Cortright*, 111 Mich. 223, 69 N. W. 486 [1896]. See also for the effect of failing to complete an entire system of sewers, *Wewell v. City of Cincinnati*, 45 O. S. 407, 15 N. E. 196 [1887].

³ *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781 [1895].

⁴ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

⁵ *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. Rep. 750 [1894].

⁶ *City of Stockton v. Whitmore*, 50 Cal. 554 [1875]; *St. John v. The City of East St. Louis*, 136 Ill. 207, 27 N. E. 543 [1892].

⁷ *Bates v. Twist*, 138 Cal. 52, 70 Pac. 1023 [1902]; *Ede v. Cogswell*, 79 Cal. 278, 21 Pac. 767 [1889].

⁸ *Piedmont Paving Company v. Allman*, 136 Cal. 88, 68 Pac. 493 [1902]; *Burnett, Pros. v. Mayor, etc., of Town of Boonton*, — N. J. L. —, 70 Atl. 67 [1908].

but the rest of the assessment will not thereby be rendered invalid.⁹ An immaterial variance between the description of the improvement in the ordinance or resolution and the improvement as constructed is inoperative.¹⁰ Thus, where the order is to construct a street between two specified intersecting streets and the improvement consists of constructing such street, except where it has already been constructed, the variance is immaterial.¹¹ The fact that a street improvement is extended a few feet in the cross streets, which extension is to be paid for by general taxation, does not amount to a material variance.¹² Where an ordinance provided for paving a street with "Nicholson or wooden block pavement," and the improvement as constructed consisted of "wooden block pavement," it was held that the variance was immaterial.¹³ Failure to improve the whole of that portion of the street, the improvement of which was provided for by ordinance, was held not to be fraud or substantial error within the meaning of a statute authorizing the assessment to be set aside for such ground.¹⁴ Since the improvement to be constructed must correspond substantially to the description in the ordinance or resolution, a substantial change in the nature and character of the improvement made after proceedings have been instituted, invalidates the proceedings and renders the assessment void;¹⁵ unless the power to make such modifications is reserved by statute.¹⁶

§ 841. At what session ordinance may be passed.

An ordinance must be enacted in the manner prescribed by statute. The enactment of an ordinance is often attended with more formality than the enactment of a resolution.¹ The meeting of the council at which an ordinance is passed must be regular

⁹ McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808 [1895].

¹⁰ City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713 [1892]; City of St. Louis to the Use of Saxton National Bank v. Landis, 54 Mo. App. 315 [1893].

¹¹ Emery v. San Francisco Gas Co., 28 Cal. 346 [1865].

¹² White v. City of Alton, 149 Ill. 626, 37 N. E. 96 [1894].

¹³ Martindale v. Palmer, 52 Ind. 411 [1875].

¹⁴ In the Matter of Pinckney, 22 Hun, 474 [1880].

¹⁵ Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214 [1900]; City of Paxton v. Bogardus, 201 Ill. 628, 66 N. E. 853 [1903]; McPike v. City of Alton, 187 Ill. 62, 58 N. E. 301 [1900]; Auditor General v. Stoddard, 147 Mich. 329, 110 N. W. 944 [1907].

¹⁶ In the Matter of Protestant Episcopal Public School, 40 Howard, 198 [1870].

¹ See § 838.

or the ordinance will be invalid.² In the absence of a showing to the contrary, it will be presumed that the meeting of the council at which the ordinance was passed, was held regularly and in compliance with the law.³ Thus, if no quorum was present at a regular meeting held on November second, and the ordinance was passed at a meeting held on November third, it was held that where it did not appear whether such meeting was an adjourned meeting, or one specially called by the mayor, it would be presumed that it was in compliance with law.⁴ If ten out of thirteen members of the council are present, and the president then excuses five of them and the remaining five adjourn to a special date, such adjourned meeting is valid, and it will not be presumed that members withdrew in order to enable the council to adjourn to a fixed day.⁵ If a majority of the council adjourn beyond one day, but to a day appointed for a regular meeting, an ordinance enacted at such latter meeting is not invalid.⁶ Under some statutes, the mayor may call a meeting of the council, at which a valid improvement ordinance may be passed.⁷ Under a statute which provided that the council should meet once a month and not oftener, unless specially convened by the mayor, who was given power to call special sessions by proclamation, which was to be published as provided by ordinance, the council failed to provide by ordinance how such proclamation should be published. The officers of this city had, however, for years acquiesced in the action of the mayor in calling special meetings. It was held that, where the mayor by proclamation convened the city council in special sessions, in accordance with such long established usage, such meeting was valid.⁸ The action of the city council at spe-

²The same rule applies to the action of drainage commissioners. An assessment levied at a meeting which was not a regular one and of which no record was kept as required by statute is void. *People v. Carr*, 231 Ill. 502, 83 N. E. 269 [1907].

³*People ex rel. Locke v. Common Council of the City of Rochester*, 5 Lansing, 11 [1871]; *Rackliffe v. Duncan*, — Mo. App. —, 108 S. W. 1110 [1908]; *City of Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002 [1893].

⁴*People ex rel. Locke v. Common*

Council of the City of Rochester, 5 Lansing, 11 [1871].

⁵*Rackliffe v. Duncan*, — Mo. App. —, 108 S. W. 1110 [1908].

⁶*People ex rel. Butts v. Common Council of the City of Rochester*, 5 Lansing, 142 [1871].

⁷*Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56 [1904].

⁸*Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56 [1904]; (following *Ferry v. Ridge*, 56 Mo. App. 615 [1893]; and *McQuiddy v. Vineyard*, 60 Mo. App. 610 [1894]); *McQuiddy v. Vineyard*, 60 Mo. App. 610 [1894].

cial session may be limited to matters called to their attention by the mayor.⁹ Where the mayor calls their attention to matters embraced within a specified section of the charter, which section authorizes the council to provide for street paving, an ordinance upon the subject of street paving passed at such session is not invalid because the mayor did not specifically call attention to another section relating to the method of exercising the power of paving the streets.¹⁰ Where the mayor called the attention of the council to an ordinance for paving a certain portion of the street, it was held that the council could act upon the question of paving such portion of the street, and was not limited to act upon such ordinance.¹¹ A message calling for the action of the council on an ordinance to establish a certain sewer district, authorizes an ordinance establishing such district and providing for the construction of a sewer therein.¹² If the statute contemplates separate action on the part of two or more boards or houses of the council, joint action is insufficient.¹³ Thus, if the power of assessing benefits and damages is conferred upon the common council, which consists of two boards meeting separately, a joint meeting of the two boards has no jurisdiction to assess benefits or damages.¹⁴

§ 842. Necessity of quorum.

Ordinarily a quorum must be present at the meeting at which the ordinance is passed.¹ The transcript of the proceedings must show that a quorum was present.² What constitutes a quorum depends upon the provision of the statute. It is usually provided that a majority of the members elected to the council constitutes a quorum.³

⁹ Dollar Savings Bank v. Ridge, 62 Mo. App. 324 [1895]; Smith v. Tobener, 32 Mo. App. 601 [1888]; Allen v. Rogers, 20 Mo. App. 290 [1885].

¹⁰ Allen v. Rogers, 20 Mo. App. 290 [1885].

¹¹ Smith v. Tobener, 32 Mo. App. 601 [1888].

¹² Dollar Savings Bank v. Ridge, 62 Mo. App. 324 [1895].

¹³ Harris v. City of Ansonia, 73 Conn. 359, 47 Atl. Rep. 672 [1900].

¹⁴ Harris v. City of Ansonia, 73 Conn. 359, 47 Atl. Rep. 672 [1900].

¹ Brookbank v. City of Jeffersonville, 41 Ind. 406 [1872].

² Brookbank v. City of Jeffersonville, 41 Ind. 406 [1872].

³ City of Covington v. Boyle, 69 Ky. (6 Bush.) 204 [1869]. A majority of the drainage commissioners constitutes a quorum if due notice of the meeting is given. People v. Carr, 231 Ill. 502, 83 N. E. 269 [1907].

§ 843. **Vote necessary to passage of ordinance.**

The vote which is necessary for the passage of an ordinance is determined by the statutory provisions upon the subject. Under some statutes, a three-fourths vote is necessary.¹ If an ordinance has been passed by the requisite three-fourths vote, and a subsequent ordinance is enacted containing substantially the same provisions as the prior ordinance, and not receiving a three-fourths vote, a failure to comply with the statute with reference to the enactment of the second ordinance does not invalidate the first.² Under other statutes a two-thirds vote is necessary.³ The vote of two-thirds of all the members elected may be necessary.⁴ If a two-thirds vote of all the members elected is necessary, a vote of six out of the nine members present, one member being absent, is not sufficient.⁵ If the record shows the names of the councilmen present and those absent, and only six councilmen are thus mentioned, an ordinance which receives the unanimous vote of those present, when only one member is absent, receives a two-thirds vote of the entire number elected.⁶ If the council consists of the president and six trustees, and two-thirds of the council must vote for an improvement ordinance in order to pass the same, a vote of five members is necessary to enact such ordinance.⁷ If unanimous consent is necessary to the passage of an ordinance by both boards of the council on the same day, this means unanimous consent of all members present.⁸ Where it was necessary that four members vote for a proposition, the vote of three of them in favor of such proposition, and the announcement by the president, who was one of the members of the council, that such proposition was carried, was held to be sufficient, as his announcement, in legal effect, expresses his concurrence in the vote.⁹ Under a statute, requiring that an improvement ordinance must be

¹ McDonald v. Dodge, 97 Cal. 112, 31 Pac. 909 [1893]; Dieckman v. Sheboygan County, 89 Wis. 570, 62 N. W. 410 [1895].

² Sands v. City of Richmond, 72 Va. (31 Grattan) 571, 31 Am. Rep. 742 [1879].

³ Cabell v. City of Henderson, — Ky. —, 88 S. W. 1095, 28 Ky. Law Rep. 89 [1905]; City of Logansport v. Legg, 20 Ind. 315 [1863]; Hersee v. City of Buffalo, 1 Sheldon, 445 [1874].

⁴ Young v. City of St. Louis, 47 Mo. 492 [1871].

⁵ City of Logansport v. Legg, 20 Ind. 315 [1863].

⁶ Fralich v. Barlow, 25 Ind. App. 383, 58 N. E. Rep. 271 [1900].

⁷ Whitney v. Village of Hudson, 69 Mich. 189, 37 N. W. Rep. 184 [1888].

⁸ In the Matter of Lewis, 35 Howard (N. Y.) 162 [1868].

⁹ State of Minnesota v. Armstrong, 54 Minn. 457, 56 N. W. 97 [1893].

passed by the unanimous consent of the mayor and councilmen in council, but not requiring the vote of the members to be taken separately, an ordinance which purports to be enacted by the mayor and the councilmen, and which is passed unanimously by the board of councilmen over which the mayor presides, is presumed to be passed in the manner prescribed by the charter.¹⁰ Extrinsic evidence as to whether the mayor assented to such ordinance or not is inadmissible. If the statute prescribes a specific vote by which an ordinance is to be passed, it has been held that such ordinance can be rescinded only by the same vote as that which was necessary for its adoption.¹¹ Under some statutes, a vote larger than the majority is necessary only in special cases. Thus, a two-thirds vote may be necessary, unless bids are advertised for.¹² So, a vote larger than the majority may be necessary where a petition for the improvement has not been filed. Such vote may be a two-thirds vote,¹³ a three-fourths vote,¹⁴ or an unanimous vote.¹⁵ The necessary vote may be two-thirds of all the members of the council, and not merely two-thirds of those present.¹⁶ If a three-fourths vote is necessary, in ordering a special improvement, a mere majority is sufficient to fix the time for considering the resolution of necessity.¹⁷ If the statute requires that the vote of the city council should be entered at large upon the minutes of the council, the record must show the names of those

¹⁰ *Lexington v. Headley*, 5 Bush. (Ky.) 508 [1869].

¹¹ *Naegely v. City of Saginaw*, 101 Mich. 532, 60 N. W. 46 [1894]; *Whitney v. Village of Hudson*, 69 Mich. 189, 37 N. W. Rep. 184 [1888].

¹² *Siegel v. City of Chicago*, 223 Ill. 428, 79 N. E. 280 [1906].

¹³ *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. Rep. 768 [1899]; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. Rep. 741 [1897]; *McEnaney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. Rep. 540 [1890]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883]; *Baker v. Tobin*, 40 Ind. 310 [1872]; *Burris v. Baxter*, 25 Ind. App. 536, 58 N. E. Rep. 733 [1900]; *Metcalf v. Carter*, 19 Ohio C. C. 196 [1900]; *Jessing v. City of Columbus*, 1 Ohio C.

C. 90 [1885]; (affirmed 22 W. L. B. 453).

¹⁴ *Rich v. City of Chicago*, 59 Ill. 286 [1871]; *Nixon v. City of Burlington*, — Ia. —, 115 N. W. 239 [1908]; *Hager v. City of Burlington*, 42 Ia. 661 [1876]; *Tallant v. City of Burlington*, 39 Ia. 543 [1874]; *Dieckman v. Sheboygan County*, 89 Wis. 570, 62 N. W. 410 [1895].

¹⁵ *City of Covington v. Casey*, 66 Ky. (3 Bush.) 698 [1868]; *City of Louisville v. Hyatt*, 2 B. Monroe (Ky.) 177, 35 Am. Dec. 594 [1841]; *City of Lexington v. McQuillan's Heirs*, 9 Dana (39 Ky.) 513, 35 Am. Dec. 159 [1840].

¹⁶ *Baker v. Tobin*, 40 Ind. 310 [1872].

¹⁷ *Nixon v. City of Burlington*, — Ia. —, 115 N. W. 239 [1908].

voting for and against the ordinance.¹⁸ A record showing that the vote was "adopted unanimously on calls," without showing the names of those voting, except by a statement of those who were present at the opening of the meeting, was held to be insufficient.¹⁹ Under a statute requiring the vote to be taken by yeas and nays, the vote must be so taken or the ordinance will be invalid.²⁰ If the statute requires the taking of the yeas and the nays on the passage of an improvement ordinance, objection to the ordinance can not be made after the work has been done.²¹ Under some statutes, a vote by yeas and nays is not necessary, unless provision for contracting the work is made.²² Unless the journal of the council showing the contrary is produced, it will be assumed that the ordinance was passed on the call of the yeas and noes, if required by statute.²³

§ 844. Time of enacting ordinance

It is sometimes provided by statute that an ordinance cannot be passed unless it was introduced at a meeting prior to that at which it is passed.¹ Under a statute which provides that an ordinance shall be read at two separate meetings, unless the provision be suspended by certain vote, the second reading of the ordinance may be dispensed with at the meeting of the council at which it is first read.² If the ordinance is carried unanimously, it may be passed at one meeting.³ Under such statute, it has been held that if an amendment to an ordinance is made, such ordinance must be laid over for one meeting after the making of such amendment.⁴ Under a statute, which provides that a resolution ordering the grading of a street, without a petition there-

¹⁸ *Steckert v. City of East Saginaw*, 22 Mich. 104 [1870].

¹⁹ *Steckert v. City of East Saginaw*, 22 Mich. 104 [1870].

²⁰ *Rich v. City of Chicago*, 59 Ill. 286 [1871].

²¹ *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886]; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886]; *Taber v. Grafmiller*, 109 Ind. 206, 9 N. E. 721 [1886].

²² *Grimmell v. City of Des Moines*, 57 Ia. 144, 10 N. W. 330 [1881].

²³ *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443 [1886].

¹ *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]; *State ex rel. Ackerman, Pros. v. Town of Bergen*, in the County of Hudson, 33 N. J. L. (4 Vr.) 39 [1868]; *Dieckman v. Sheboygan County*, 89 Wis. 570, 62 N. W. 410 [1895].

² *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887].

³ *Huesman v. Dersch*, — Ky. —, 109 S. W. 319 [1908]; *Hedges v. Roelke*, — Ky. —, 100 S. W. 267, 30 Ky. L. R. 1092.

⁴ *State, Ackerman, Pros. v. Town of Bergen*, 33 N. J. L. (4 Vr.) 39 [1868].

for, shall not be voted upon or passed at a meeting of the common council held within four weeks from the time of its presentation to the council, unless a petition therefor is filed, a resolution may be voted upon, the twenty-eighth day of its presentation, excluding the first day from such computation and including the last day.⁵ Under other statutes, it may be provided that a resolution for grading and graveling a street at the expense of the property owners cannot be adopted within fourteen days after its introduction. Failure to comply with such provision renders an assessment upon the abutting lots invalid.⁶ Delay may be necessary in certain kinds of improvement, but not in others. Under a statute requiring an adjourned meeting for the purpose of perfecting the formation of a drainage district, it is held that an adjourned meeting is not necessary in a proceeding for the annexation of territory to a drainage district already established.⁷ It will be presumed that an ordinance was twice publicly read, and passed at two sessions held on different days, if the statute so requires.⁸ Statutes providing for reading,⁹ or voting upon¹⁰ an ordinance upon two different dates, have been held not to apply to improvement ordinances. If such provisions do apply to improvement ordinances, error in failing to vote upon the ordinance upon two different days is cured by a statutory provision to the effect that "no error in the proceedings of the general council shall exempt from payment after the work has been done."¹¹ Such provisions cannot be evaded by dividing the improvement so that the cost of each part shall be below the amount for which such delay is necessary.¹² Under some statutes, it is provided that only one ordinance can be voted upon at a time. The object of such provision is to enable the members of the council to understand clearly what they are voting for and to prevent the passage of two or more ordinances by the combined votes of those who favor any of them, where such ordinances might each

⁵ *Pittelkow v. City of Milwaukee*, 94 Wis. 651, 69 N. W. 803 [1897].

⁶ *Hall v. City of Chippewa Falls*, 47 Wis. 267, 2 N. W. 279 [1879].

⁷ *The People ex rel. Samuel, Sr. v. Cooper*, 139 Ill. 461, 29 N. E. 872 [1893].

⁸ *Cabell v. City of Henderson*, — Ky. —, 88 S. W. 1095, 28 Ky. Law Rep. 89 [1903].

⁹ *Holt v. City Council of Somerville*, 127 Mass. 408 [1879].

¹⁰ *Broadway Baptist Church v. McAttee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871].

¹¹ *Broadway Baptist Church v. McAttee*, 71 Ky. (8 Bush.) 508, 8 Am. Rep. 480 [1871].

¹² *Nelson v. City of Chicago*, 196 Ill. 390, 63 N. E. 738 [1902].

separately fail to receive the required number of votes. An entry on the record of the city council, showing that the ordinances for the improvement of certain named streets were passed, does not show that they were voted upon separately as required by the charter.¹³ A passage of an ordinance along with several others, is a defect which, under some statutes, cannot be taken advantage of after the work is done.¹⁴ Under some statutes, it is provided that where the council consists of two houses or boards, a certain period of time must elapse between the passage of such ordinance by one board and its passage by another.¹⁵ Where such statute provides that two weeks must intervene between the passage of such ordinance in the one house and its passage in the other, an ordinance has been held valid which passes one board on March seventeenth, and the other board on March twenty-first;¹⁶ or which passes one board on April fifth and the other board April nineteenth;¹⁷ or which passes one board on September twenty-ninth and the other on October thirteenth.¹⁸ A statute, which provides that one board shall not pass on the ordinance on the same day as that on which the other board passes it, and also provides for three days' notice, has been construed so as to require three days' notice of the first vote only, in the house where the ordinance is introduced.¹⁹ Under a statute which provides that after an improvement is ordered an assessment for benefits shall be made at the first regular session thereafter, an assessment cannot be made, where an appeal has been taken from the order for the improvement, until the first regular session after the appeal has finally been disposed of.²⁰ Under this statute, the assessment may be made at the first regular session after the location has been made in fact; that is, at the regular session at which the location is filed, the object of the statute being to prevent the assessment from being made at an adjourned term of

¹³ *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887].

¹⁴ *Weatherhead v. Cody*, — Ky. —, 85 S. W. 1099, 27 Ky. Law Rep. 631 [1905].

¹⁵ *Thomas v. Woods*, — Ky. —, 108 S. W. 878 [1908]; *Gleason v. Barnett*, 115 Ky. 890, 61 S. W. 20 [1903]; *Gable v. City of Altoona*, 200 Pa. St. 15, 49 Atl. 367 [1901].

¹⁶ *City of Louisville v. Selvage*, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899].

¹⁷ *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125 [1896].

¹⁸ *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899].

¹⁹ *Matter of Depierris*, 20 Hun, 305 [1880].

²⁰ *Appleton v. County Commissioners*, 80 Me. 284, 14 Atl. 284 [1888].

such regular session.²¹ By statute this provision may be waived by unanimous consent.²² On the other hand, an ordinance is invalid which passes one house and then is delayed in passing the other house until a new council has been elected and has gone into office.²³ No subsequent amendment can give it legal effect.²⁴ Under some statutes, a certain period of time must intervene between the passage of the preliminary resolution and the passage of the ordinance. A resolution passed before such period has expired, has, however, been held to be valid, where it was not published and no steps were taken toward doing the work until after the statutory period had elapsed,²⁵ especially where no objection is made by the property owners until after the improvement is completed.²⁶ If a certain time is given for filing protests, the ordinance may be passed before the expiration of such time, as long as it is not acted upon until the time limit has passed and no valid protest has been filed.²⁷ A statute which provides for giving sixty days' notice of any application for the passage of an ordinance for opening a street, in at least two of the daily newspapers of the city in which said street is to be opened, requires notice in two of the daily newspapers; and requires that a period of at least sixty days shall elapse after such notice is published before such ordinance shall be passed.²⁸ Accordingly, under such statute, where a notice was given in two daily newspapers once a week for nine consecutive weeks, beginning December twenty-fourth of one year, and the application was not made until May twenty-second of the following year, such notice was held to be sufficient.²⁹ It was provided by statute that the council

²¹ *Mansur v. County Commissioners of Aroostook County*, 83 Me. 514, 22 Atl. 358 [1891].

²² *In the Matter of Lewis*, 35 Howard (N. Y.) 162 [1868].

²³ *In the Matter of Beekman*, 19 Howard (N. Y.) 518 [1860]; *In the Matter of Beams*, 17 Howard (N. Y.) 459 [1859]; *Beekman's Case*, 11 Abb. Prac. 164 [1860].

²⁴ *In the Matter of Beekman*, 19 Howard (N. Y.) 518 [1860]; *Beekman's Case*, 11 Abb. Prac. 164 [1860]; *Contra*, *Bennett's Case*, 12 Abb. Prac. 127 [1861].

²⁵ *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac.

542 [1896]; *City of Toledo for Use of Gates v. Lake Shore & Michigan Southern Railway Company*, 4 Ohio C. C. 113 [1889].

²⁶ *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. 542 [1896].

²⁷ *Burnett v. Mayor and Common Council of the City of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518 [1859].

²⁸ *Mayor and City Council of Baltimore v. The Little Sisters of the Poor*, 56 Md. 400 [1881].

²⁹ *Mayor and City Council of Baltimore v. The Little Sisters of the Poor*, 56 Md. 400 [1881].

should prescribe rules for transacting its business, and its operation, which rules were to have the effect of law. Acting under such statute, the council passed a rule that no resolution or proceeding imposing taxes or assessments, or requiring the expenditure or payment or disposition of money, or creating a debt, should be passed at the same meeting at which it was introduced, if objection was made by any member. A series of bonds aggregating two hundred thousand dollars had been authorized. The council, assuming improperly that a prior resolution limited the issue of such bonds to ninety thousand dollars, passed a resolution for issuing an additional number of bonds and within the total amount authorized. It was held that such resolution was not new business within the meaning of such rule.³⁰

§ 845. Effect of violation of rules of parliamentary law.

While it is, of course, desirable that council should regard parliamentary law in its proceedings, an ordinance is not rendered invalid because in enacting it council violated the rules of parliamentary law.¹ The fact that council has adopted a parliamentary code does not prevent council from disregarding such code in specific instances, if it sees fit to do so.² Thus, receiving the report of a committee to the effect that a remonstrance was insufficient, placing it on file and then passing an improvement ordinance was held to be in effect an adoption of such report, although the rules of the council contemplated a subsequent action thereon.³ A so-called amendment, which was in effect a substitute, was adopted. The original motion as amended was not then put to a formal vote, but the council treated it as carried by the vote adopting the amendment. It was held that such action, while contrary to the rules of parliamentary law, did not render the proceeding invalid.⁴ At parliamentary law a motion to reconsider must be made by one who had voted with the majority:

³⁰ *Naegely v. City of Saginaw*, 101 Mich. 532, 60 N. W. 46 [1894].

¹ *Landes v. State ex rel. Matson*, 160 Ind. 479, 67 N. E. 189 [1903]; *Davies v. City of Saginaw*, 87 Mich. 439, 49 N. W. 667 [1891]; *Whitney v. Common Council of Village of Hudson*, 69 Mich. 189, 37 N. W. Rep. 184 [1888]; *City of Sedalia ex rel. Gilsonite Construction Co. v. Scott*, 104 Mo. App. 595, 78 S. W. 276

[1903]; *People ex rel. Locke v. City of Rochester*, 5 Lansing, 11 [1871].

² *City of Sedalia ex rel. Gilsonite Construction Co. v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014 [1904].

³ *City of Sedalia ex rel. Gilsonite Construction Co. v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014 [1904].

⁴ *Davies v. City of Saginaw*, 87 Mich. 439, 49 N. W. 667 [1891].

If, however, council entertains a motion to reconsider, made by one who had voted with the minority, and such motion is carried, the courts cannot treat such action of the council as a nullity.⁵ While, however, strict parliamentary rules are not applicable to the conduct of public corporations, their official acts are to be gathered from what the record shows, and not from what the members understood to be the effect of the action which the record shows to have been taken.⁶ Accordingly, if a resolution for paving a street is reconsidered, and not passed again after such reconsideration, it has no legal effect, no matter what the members of the council considered its legal effect to be after such reconsideration.⁷

§ 846. Reconsideration.

Every organization or body possessing legislative powers possesses the inherent power of reconsidering lost measures.¹ Accordingly, an improvement ordinance which has been defeated, then reconsidered, and finally passed, is valid.² This is true, even if the reconsideration is had without complying with the rules of parliamentary law.³ Hence, a reconsideration of a negative vote which passes is not invalid, though the motion to reconsider was made by one who voted originally with the minority.⁴ If an ordinance is passed, the adoption of a resolution to reconsider it, passed over the veto of the mayor, does not of itself operate as a repeal.⁵

§ 847. Approval of ordinance by mayor or board.

In the absence of statute expressly providing therefor, it is not necessary that the mayor should approve or sign improvement ordinances.¹ If it is provided by statute that the consent of the mayor or other executive must be given to an ordinance in order to render it valid, such assent must be given or the ordinance will

⁵ *People ex rel. Locke v. Common Council of the City of Rochester*, 5 Lansing, 11 [1871].

⁶ *Whitney v. Common Council of the Village of Hudson*, 69 Mich. 189, 37 N. W. Rep. 184 [1888].

⁷ *Whitney v. Common Council of Village of Hudson*, 69 Mich. 189, 37 N. W. Rep. 184 [1888].

¹ *Mayor and Common Council of Jersey City v. State*, Howeth, Pros., 30 N. J. L. (1 Vr.) 521 [1863].

² *Mayor and Common Council of Jersey City v. State*, Howeth, Pros., 30 N. J. L. (1 Vr.) 521 [1863].

³ See § 845.

⁴ *People ex rel. Locke v. Common Council of City of Rochester*, 5 Lansing, 11 [1871].

⁵ *Ashton v. City of Rochester*, 60 Hun, 372, 14 N. Y. Sup. 855 [1891].

¹ *McDonald v. Dodge*, 97 Cal. 112, 31 Pac. 909 [1893]; *Martindale v. Palmer*, 52 Ind. 411 [1875].

be of no legal effect.² In the absence of an express statutory provision therefor, it is not necessary that the mayor perform a distinct and separate act in approving an order which is passed by the council, of which he is *ex officio* the presiding officer.³ If the original ordinance has been destroyed by fire, and the record of the ordinance in the ordinance book does not show that the mayor signed it, oral evidence may be admitted to show the fact of such signature.⁴ Under a statute providing that, if ordinances are published in book form, such books shall be received in evidence without further proof, it will be presumed that ordinances published therein were signed by the mayor.⁵ If, by statute, the mayor is given the right to veto ordinances or resolutions, they must be presented formally to the mayor, in order to give him an opportunity to veto them.⁶ In the event of his absence or disability, they should be presented to the person indicated by statute as the one who performs the duties of the mayor under such circumstances.⁷ Under a statute providing that an ordinance for the construction of a sewer should have the approval of the board of public works endorsed thereon, so as to show that the district laid out and the sewer to be constructed conform to the system already established by the board, a certificate "that the sewers proposed to be constructed by this ordinance conform to the system of sewers established by the board of public works," was held to be sufficient.⁸

§ 848. Publication of ordinance.

By some statutes it is provided that notice must be given of the pendency of an improvement ordinance, or that the ordinance must be published after it has been enacted. Provisions of this sort are mandatory, and an ordinance passed without substantial compliance therewith is invalid.¹ If a notice is to be given, it

² Saxton v. City of St. Joseph, 60 Mo. 153 [1875]; Saxton v. Beach, 50 Mo. 488 [1872]; Hendrickson v. Borough of Point Pleasant, 65 N. J. L. 535, 47 Atl. Rep. 465 [1900].

³ Fairbanks v. Mayor and Aldermen of Fitchburg, 132 Mass. 42 [1882].

⁴ City of Seattle v. Doran, 5 Wash. 482, 32 Pac. 105, 1002 [1893].

⁵ Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898].

⁶ The State, Tims, Pros. v. Mayor and Common Council of Newark, 25 N. J. L. (1 Dutcher) 399 [1856].

⁷ The State, Tims, Pros. v. Mayor and Common Council of Newark, 25 N. J. L. (1 Dutcher) 399 [1856].

⁸ Dollar Savings Bank v. Ridge, 79 Mo. App. 26 [1898].

¹ City of East St. Louis v. Davis, 233 Ill. 553, 84 N. E. 674 [1908]; Weld v. The People ex rel. Kern, 149 Ill. 257, 36 N. E. 1006 [1894]; The

must describe the improvement in such a way as to inform the property holders of the general nature and character thereof.² Thus, a description of a road as "an elevated roadway thirty-six feet wide, an elevated sidewalk twelve feet wide" was insufficient since it did not inform the property owners of the materials to be used or the character of the work proposed, and thus made an estimate of the probable cost impossible.³ If the statute provides that notice of the pendency of a sewer ordinance must state the size of the proposed sewer, a statement that it would be "of various diameters" was held to be insufficient.* The publication of the notice or ordinance must be made by authority of the proper officials.⁵ A publication without such authority is insufficient.⁶ Thus, a publication of the proceedings of a council as items of news and without the direction of the council was held to be insufficient.⁷ Under a statute which requires an ordinance to be passed at two meetings of the council, at least two weeks apart, and requires the ordinance as first passed to be published at least one week in some newspaper, it was held that a publication between the first and second passage of the ordinance was not required, but that a publication for one week after a second passage was sufficient.⁸ If an ordinance has been published while it is pending, an amendment thereto need not be published.⁹ In the absence of statute forbidding it, the fact that the last day of the publication falls on Sunday does not invalidate the publication, even if the statute provides that no person should serve or execute any writ or process on Sunday, since the statute refers to personal service only.¹⁰ If publication is necessary when the aggregate

Mayor of Baltimore v. The Grand Lodge of Maryland of the Independent Order of Odd Fellows, 44 Md. 436 [1875]; *Ladd v. Spencer*, 23 Ore. 193, 31 Pac. 474 [1892]; *Olds v. Erie City*, 79 Pa. St. (29 P. F. Smith) 380 [1875].

² *City of Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306 [1893]; *The Mayor of Baltimore v. The Grand Lodge of Maryland of the Independent Order of Odd Fellows*, 44 Md. 436 [1875].

³ *Ladd v. Spencer*, 23 Ore. 193, 31 Pac. 474 [1892].

⁴ *City of Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306 [1893].

⁵ *City of Napa v. Easterby*, 61 Cal. 509 [1882].

⁶ *City of Napa v. Easterby*, 61 Cal. 509 [1882]; *Olds v. Erie City*, 79 Pa. St. (29 P. F. Smith) 380 [1875].

⁷ *City of East St. Louis v. Davis*, 233 Ill. 553, 84 N. E. 674 [1908]; *Olds v. Erie City*, 79 Pa. St. (29 P. F. Smith) 380 [1875].

⁸ *Fox v. Middlesborough Town Co.*, 96 Ky. 262, 28 S. W. 776 [1894].

⁹ *In the Matter of Lewis*, 35 Howard, 162 [1868].

¹⁰ *Barber Asphalt Paving Company v. Muchenberger*, 105 Mo. App. 47, 78 S. W. 280 [1903].

estimate of cost exceeds a certain sum, and an improvement, which, in its nature, is one continuous and entire whole, is divided into sections, so that the cost of no one section will equal the statutory amount at which publication is necessary, such evasion has no legal effect, and such ordinances must be published or they will be inoperative.¹¹ Under a statute forbidding incurring expense, unless an appropriation was first made therefor, an ordinance might be published where an appropriation had been made for printing and enough of the appropriation remained unexpended to pay for the publication of such ordinance; even if debts subsequently contracted for printing, exceeded the appropriation.¹² It is sometimes provided by statute that an ordinance shall not take effect until a certain number of days after its passage, or until after its publication.¹³ Thus, it may be provided that an ordinance shall not take effect until ten days after the first publication thereof.¹⁴ Under some statutes, it is held that no proceedings can be had under an ordinance between the time that it is passed and the time that it takes effect.¹⁵ Under statutory authority a city passed a general ordinance with reference to the construction of gutters and the assessment therefor. Such ordinance provided that it should take effect five days after its publication, and also provided "the city council may at any time hereafter by resolution direct and provide for guttering any of the streets of said city." The word "hereafter" was held to refer to the date of the passage of the ordinance, and not to the date at which it took effect. Accordingly, a resolution, passed after the ordinance was passed and before it took effect, was held to be valid.¹⁶ Under a statute, which requires the publication of ordinances of a general nature, an assessment ordinance need not be published.¹⁷ By some statutes it is provided that ordinances involving the appropriation or expenditure of money must be published.¹⁸ Under such statutes, it is said that if such ordinance is not published an assessment levied for such improve-

¹¹ *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101 [1902].

¹² *Kimble v. City of Peoria*, 140 Ill. 157, 29 N. E. 723 [1893].

¹³ *City of Napa v. Easterby*, 61 Cal. 509 [1882].

¹⁴ *City of Napa v. Easterby*, 61 Cal. 509 [1882].

¹⁵ *Kean v. Cushing*, 15 Mo. App. 96 [1884].

¹⁶ *Kendig v. Knight*, 60 Ia. 29, 14 N. W. Rep. 78 [1882].

¹⁷ *Kohler Brick Co. v. City of Toledo*, 29 Ohio C. C. 599 [1907].

¹⁸ *Moore v. Mayor, Aldermen and Commonalty of the City of New York*, 73 N. Y. 238, 29 Am. Rep. 134 [1878].

ment would be invalid,¹⁹ but that the city would be estopped from denying its own liability.²⁰

§ 849. Incorporation in ordinance.

An ordinance may incorporate by reference provisions contained elsewhere, which are not set forth in full in such ordinance. Thus, by reference to plans and specifications, provisions therein contained may be incorporated in the ordinance in which such reference is made.¹ Under a statute specifically providing for reference to plans and specifications on file in the office of the "proper clerk," reference to plans and specifications on file in the office of the city engineer is insufficient.² An ordinance may adopt certain sections of the statutes by reference to their number.³ A prior general ordinance may be regarded as controlling an ordinance for a specific improvement, and as supplementing its deficiencies.⁴

§ 850. Amendment of ordinance.

It may be provided by statute that an ordinance may be amended and a re-assessment may be had.¹ An ordinance which provides for paving a street cannot be amended by certain so-called orders passed by council informally upon motion, so as to change

¹⁹ *Moore v. Mayor, Aldermen and Commonalty of the City of New York*, 73 N. Y. 238, 29 Am. Rep. 134 [1878].

²⁰ *Moore v. Mayor, Aldermen and Commonalty of the City of New York*, 73 N. Y. 238, 29 Am. Rep. 134 [1878].

¹ *Nicholas v. People ex rel. Kochersperger*, 171 Ill. 376, 49 N. E. 574 [1898]; *The Louisville and Nashville R. R. Co. v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891]; *Hutt v. City of Chicago*, 132 Ill. 352, 23 N. E. 1010 [1891]; *Higman v. Sioux City*, 129 Ia. 291, 105 N. W. 524 [1906]; *Edwards and Walsh Construction Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *Roth v. Hax*, 68 Mo. App. 283 [1896]; *Galbreath v. Newton*, 30 Mo. App. 381.

² *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926 [1895].

³ *City of San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. Rep. 694 [1891].

⁴ *City of Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253 [1888]; *Guyer v. City of Rock Island*, 215 Ill. 144, 74 N. E. 105 [1905]; *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367 [1898]; *City of Chardon v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882]; *Kendig v. Knight*, 60 Ia. 29, 14 N. W. Rep. 78 [1882]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *City of St. Joseph to Use of the Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893]; *Lowden v. City of Cincinnati*, 2 Disney, 203 [1858].

¹ *City of Fayette ex rel. Crews v. Rich*, 122 Mo. App. 145, 99 S. W. 8 [1907].

the character of the paving material to be used in the improvement.² If an amendment to a valid ordinance is illegal or inoperative, it does not invalidate the ordinance to which such amendment is made, as long as it is not shown that the original ordinance was not followed in making the assessment.³ An ordinance which directs tax bills to be issued in favor of the wrong person, may be corrected by a subsequent amendment directing that the tax bills be entered in favor of the right person.⁴

§ 851. Repeal of ordinance.

An improvement ordinance may be repealed by the public corporation by which it was enacted,¹ at least as long as such repeal does not divest the vested rights of the contractor or the property owner. Under a statute authorizing a city to repeal an improvement ordinance at any time before the parties who have been assessed for benefits have paid the amounts thus assessed, and providing that by such repeal a judgment for compensation and for benefits is rendered void, a city may repeal such ordinance, reenact a new one, and institute new proceedings to determine the value of the property taken.² The fact that the city repeals such ordinance in order to avoid the effect of a judgment for compensation which it thought excessive, does not prevent the repeal from having the effect specified by statute. Under other statutes it has been held that a city may repeal an improvement ordinance; and where the proceedings to open a street have been dismissed after verdict and before judgment, and the dismissal is conducted in good faith, the city may thereafter enact another improvement ordinance.³ After judgment of confirmation, the repeal of the improvement ordinance comes too late to affect the validity of the assessment.⁴ A resolution, however, merely requesting the executive officers of the city to suspend work on

² *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653 [1898].

³ *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653 [1898]; *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. Rep. 354 [1895]; *Sands v. City of Richmond*, 72 Va. (31 Grattan) 571, 31 Am. Rep. 742 [1879].

⁴ *City of Fayette ex rel. Crews v. Rich*, 122 Mo. App. 145, 99 S. W. 8 [1907].

¹ *City of Chardon v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882]; *Kansas City v. Mulkey*, 176 Mo. 229, 75 S. W. 973 [1903].

² *Kansas City v. Mulkey*, 176 Mo. 229, 75 S. W. 973 [1903].

³ *City of Chicago v. Goodwillie*, 208 Ill. 252, 70 N. E. 228 [1904]; (ordinance passed after a lapse of five years.)

⁴ *People ex rel. Raymond v. Fuller*, 204 Ill. 290, 68 N. E. 371 [1903].

the improvement, does not operate as a repeal.⁵ Where by statute a vote larger than a majority is necessary to pass a resolution or ordinance for a public improvement, the question is presented whether the repeal of such ordinance or resolution may be had by a majority, or whether the same vote is necessary for a repeal as is necessary for the original enactment of the ordinance or resolution. Upon this question there is a conflict of authority. In some jurisdictions, it is held that, even if a vote of three-fourths of the members of the council is necessary to order an improvement, such order may be repealed by a majority vote.⁶ In some jurisdictions, it is said that an ordinance or resolution which requires a certain vote to enact can be repealed only by the same vote.⁷ Even in these jurisdictions, however, only a majority vote is necessary where it is specifically provided by statute that the council may authorize a new assessment to be made in place of an invalid assessment.⁸ The decision of the presiding officer that a motion is lost, is not final nor conclusive and is not an adjudication which cannot be attacked collaterally.⁹ Accordingly, if a mere majority is necessary to repeal an ordinance, and the mayor declares the motion to repeal lost because it does not receive a three-fourths vote, such ordinance is nevertheless repealed.¹⁰

§ 852. Effect of repeal.

Under the statutes in force in most jurisdictions, power to act further under an improvement ordinance which is repealed ceases with the repeal.¹ Few questions, therefore, arise in such jurisdictions. Where, however, an assessment is levied and confirmed when the improvement ordinance is passed, the effect of the subsequent repeal of such ordinance upon the assessment which has been confirmed is a matter of some difficulty. If the improvement which has been contemplated is abandoned, the repeal of the ordinance prevents the enforcement of the assessment.²

⁵ *Young v. City of St. Louis*, 47 Mo. 492 [1871].

⁶ *City of Charton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

⁷ *Naegely v. City of Saginaw*, 101 Mich. 532, 60 N. W. 46 [1894]; *Whitney v. Common Council of the Village of Hudson*, 69 Mich. 189, 37 N. W. 184 [1888].

⁸ *Townsend v. City of Manistee*, 88 Mich. 408, 50 N. W. 321 [1891].

⁹ *City of Charton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

¹⁰ *City of Charton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

¹ *City of Charton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

² *Pells v. People ex rel. Holmgrain*, 159 Ill. 580, 42 N. E. Rep. 784 [1896].

If the judgment confirming the assessment has been reversed by a higher court, the city may then repeal the ordinance, vacate all proceedings thereunder and pass a new ordinance for a different kind of improvement.³ The mere repeal of the improvement ordinance without the abandonment of the improvement has been held not to justify the court in setting aside at a subsequent term a judgment of confirmation already entered.⁴ If the city, without intending to abandon an improvement, secures an order vacating a judgment of confirmation and repeals the improvement ordinance in the hope of obtaining confirmation judgment for a larger amount than that of the former judgment, the former judgment operates as a final adjudication of the amount of benefits.⁵ The passage of an ordinance which directs a stay of proceedings for a special assessment for a year, followed by the act of the council in subsequently directing the contracts to be let, does not prevent a judgment of confirmation and the enforcement of the assessment.⁶

§ 853. Record of ordinance.

It is sometimes provided by statute that an ordinance must be recorded. Under such statutes an ordinance does not become operative until it is recorded.¹ The existence of an ordinance is to be proved by the minutes of the council.² A statute which provides that by-laws, resolutions and ordinances are to be recorded in a separate book kept for that purpose has been held to be directory merely, as far as concerns the particular book in which the record is to be kept.³ Such a statute is substantially complied with by publishing the ordinances in book form.⁴ Since the duty of recording an ordinance exists because of legislative

³ *Gage v. City of Chicago*, 193 Ill. 108, 61 N. E. 850 [1901].

⁴ *People ex rel. McCornack v. McWethy*, 165 Ill. 222, 46 N. E. 187 [1897].

⁵ *McChesney v. City of Chicago*, 188 Ill. 423, 58 N. E. 982 [1900]; *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. Rep. 702 [1896].

⁶ *Wisner v. People ex rel. Kern*, 156 Ill. 180, 40 N. E. 574 [1895].

¹ In the *Matter of Deering*, 55 How. 296 [1878]; *Commonwealth to Use of Allegheny City v. Marshall*,

69 Pa. St. (19 P. F. Smith) 328 [1871].

² *Kennedy v. Newman*, 3 N. Y. Sup. Ct. Rep. 187 [1848]. The records of the clerk of a board of drainage commissioners must show the levy of the assessment in order to make it valid. *People ex rel. v. Warren*, 231 Ill. 518, 83 N. E. 271 [1907]; *People ex rel. v. Carr*, 231 Ill. 502, 83 N. E. 269 [1907].

³ *Upington v. Oviatt*, 24 O. S. 232 [1873].

⁴ *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

requirement, the legislature may, by subsequent statute, make valid an ordinance which was defective because not recorded as required by law.⁵

§ 854. Caption and subject of ordinance.

It is ordinarily provided that the caption of an ordinance must state the purposes thereof.¹ Under such statutory provision it is sufficient if the general purpose of the ordinance be indicated, although the details of such ordinance are not given.² Thus, the caption of an ordinance for constructing a sewer need not state that the purposes of the ordinance is in part to provide for house connections with the sewer.³ An order that certain street work should be done is said not to be technically an ordinance; and therefore it is held that it need not follow the form "The Board of Trustees of the city of — do hereby ordain."⁴ It is sometimes provided by statute that no by-law or ordinance shall contain more than one subject. The purpose of such statutory requirement is in part to enable the council to know clearly for what propositions it is voting; and in part to prevent the union in one ordinance of two or more different subjects, so that a majority can be secured for such ordinance, although a majority could not be secured for an ordinance upon each of such subjects separately.⁵ Under such a statute an ordinance for issuing bonds to pay the portion of cost to be paid by a city for improving certain streets and alleys by paving, repaving, grading and macadamizing, and by constructing sewers therein, and to pay the city's proportion of the cost and expense of constructing such sewer, has been held not to embrace more than one subject.⁶ Under some statutes an ordinance, though required to be on one subject, may include the grading of two or more streets as one improvement, when in the proper prosecution of the work material taken from one street may be used in filling the others.⁷

⁵ Commonwealth to Use of Allegheny City v. Marshall, 69 Pa. St. (19 P. F. Smith) 328 [1871].

¹ Village of Hinsdale v. Shannon, 182 Ill. 312, 55 N. E. 327 [1899].

² Village of Hinsdale v. Shannon, 182 Ill. 312, 55 N. E. 327 [1899].

³ Village of Hinsdale v. Shannon, 182 Ill. 312, 55 N. E. 327 [1899].

⁴ City of Napa v. Easterby, 76 Cal. 222, 18 Pac. 253 [1888]; (on former appeal, 61 Cal. 509 [1882]).

⁵ Heffner v. City of Toledo, 75 O. S. 413, 80 N. E. 8.

⁶ Heffner v. City of Toledo, 75 O. S. 413, 80 N. E. 8.

⁷ Mayall v. St. Paul, 30 Minn. 294, 15 N. W. 170 [1883].

§ 855. General plan of improvements.

By some statutes it is provided that in the case of public improvements of certain specified types a general plan for such improvements must be adopted before the specific improvements are constructed.¹ Under such statutes an assessment cannot be levied for an improvement which does not conform to the general plan.² If an improvement, such as a sewer, is laid out before the general plan of a system of sewers is adopted, but such plan is adopted before the assessment is levied, and the sewer as constructed is in conformity to such general plan, the assessment is valid.³ The adoption of a general plan or system of public improvements does not in the absence of specific statute prevent the public corporation from modifying such plan subsequently.⁴ Hence, the fact that the improvement constructed is not in conformity to the original plan as adopted does not show conclusively that such plan is unauthorized.⁵ Authority to adopt a general plan of public improvements is regarded as permissive merely, and not mandatory unless the statute shows the intention of requiring the adoption of a general plan as a condition precedent to the construction of an improvement and the levy of an assessment therefor.⁶ Thus, a statute providing that the board in charge of the construction of sewers is to file a copy of the map showing the plan of drainage of sewer districts has been held to be directory only, and not mandatory; and the omission to file such plan does not render the assessment invalid.⁷ By statute it may be provided that a sewer must be laid out before an assessment is levied therefor. Under such statute the sewer must be laid out with sufficient precision to show where it is to be located and its general character.⁸

¹ *Menefee v. Bell*, 62 Mo. App. 659 [1895].

² *In the Matter of Opening Lexington Avenue*, 50 Howard (N. Y.) 114 [1874].

³ *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690 [1885].

⁴ *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881].

⁵ *Roosevelt Hospital v. Mayor, Aldermen and Commonalty of the City of New York*, 84 N. Y. 108 [1881]; *In the Matter of the Petition of Will-*

iamson v. Mayor, etc., of New York City, 3 Hun (N. Y.) 65 [1874].

⁶ *In the Matter of the Application of the Protestant Episcopal Public School*, 40 Howard (N. Y.) 198 [1870]; *Hartwell v. Railroad Co.*, 40 O. S. 155 [1883].

⁷ *In the Matter of the Petition of the New York Public Schools*, 47 N. Y. 506 [1872]; *In the Matter of the Application of the Protestant Episcopal Public School*, 40 Howard (N. Y.) 198 [1870].

⁸ *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 2 N. E. 690

§ 856. Description of improvement in ordinance.

If an ordinance is enacted by which a public improvement is ordered, such ordinance must in some way indicate the nature, character and location of the improvement which is to be constructed. It is not necessary that the ordinance should describe the improvement with the detail, which would be necessary in specifications. It is sufficient, if the nature, character and locality of the improvement are described in general terms.¹ Where a second assessment was levied after the improvement was completed, the original assessment having been held to be invalid, it was held sufficient if the description of the improvement in the second assessment ordinance referred to the locality of the improvement so as to identify it with the improvement already completed.² On the other hand, the nature, locality and description of the improvement must be given in at least general terms. In case of total failure to describe the improvement in general terms at least, the ordinance is void.³ Work which is not described at all,⁴ or which is described ambiguously,⁵ cannot be the subject of a subsequent valid assessment. If a method is provided for fixing the material to be used, it is not necessary that the improvement ordinance should state the material of which the improvement is to be constructed.⁶ Where a general ordi-

[1885]; *Sheehan v. Fitchburg*, 131 Mass. 523 [1881]; *Bennett v. New Bedford*, 110 Mass. 433 [1870].

¹ *People ex rel. Price v. Wiemers*, 225 Ill. 17, 80 N. E. 45 [1907]; *Guyer v. City of Rock Island*, 215 Ill. 144, 74 N. E. 105 [1905]; *Gross v. People ex rel. Kochersperger*, 172 Ill. 571, 50 N. E. 334 [1898]; *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890]; *Martindale v. Palmer*, 52 Ind. 411 [1875]; *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86 [1907]; *City of St. Joseph to Use of Saxton National Bank v. Landis*, 54 Mo. App. 315 [1893]; *Galbreath v. Newton*, 30 Mo. App. 381 [1888].

² *Hull v. West Chicago Park Commissioners*, 185 Ill. 150, 57 N. E. 1 [1900].

³ *City of Paxton v. Bogardus*, 201

Ill. 628, 66 N. E. 853 [1903]; *Maxwell v. City of Chicago*, 185 Ill. 18, 56 N. E. 1101 [1900]; *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926 [1895]; *Washington Ice Company v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378 [1894]; *County of Jefferson v. City of Mt. Vernon*, 145 Ill. 80, 33 N. E. 1091 [1893]; *The Jacksonville Railroad Company v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886].

⁴ *Mason v. City of Sioux Falls*, 2 S. D. 640, 39 Am. St. Rep. 802, 51 N. W. 770 [1892].

⁵ *Piedmont Paving Company v. Allman*, 136 Cal. 88, 68 Pac. 493 [1902].

⁶ *Bacon v. Mayor and Aldermen of City of Savannah*, 86 Ga. 301, 12 S. E. 580 [1890]; *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. Rep. 1112 [1895]; *Galbreath v. Newton*, 30 Mo. App. 381 [1888].

nance prescribed the width of sidewalks and the materials of which they were to be constructed and the manner in which they were to be constructed, it was held not to be necessary to repeat such provisions in a resolution for building a specific sidewalk.⁷ After a number of streets have been repaved, the property owners benefited cannot avoid the assessment on the ground that the ordinance did not name the streets to be repaved and the sum to be spent on each.⁸ If the ordinance authorizes the grading of a specific street from one specific intersecting street to another, the improvement may begin at the center of the first named intersecting street where the street to be graded has already been graded up to such median line.⁹ If the ordinance provides for grading a street between a certain named railroad and a certain named intersecting street, and the assessment roll describes the work as extending from a railroad of a different name to a fair-ground, such variance is immaterial where it is shown that these boundary lines are in fact the same as though described by reference to different objects.¹⁰ The objection to an ordinance on the ground that the termini of the improvement are not described accurately must be made before confirmation. Failure to interpose such objection at confirmation operates as a waiver.¹¹ If an entire alley or street is to be paved, the width thereof need not be stated.¹² The width may be shown by numbers printed on an official map without any statement of the unit of distance which such number represented, if the scale of the map shows that such number was intended to represent feet.¹³ If a city orders an improvement and provides for levying an assessment therefor, it need not be stated explicitly that such improvement is within the limits of the city.¹⁴ It is not to

⁷ *City of Charton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

⁸ *State, Jelliff, Pros. v. Mayor and Common Council of the City of New-ark*, 48 N. J. L. (19 Vroom) 101, 2 Atl. Rep. 627 [1886].

⁹ *Pittsburg v. Cluley*, 74 Pa. St. (24 P. F. Smith) 259 [1873].

¹⁰ *City of Spokane v. Browne*, 8 Wash. 317, 36 Pac. 26 [1894].

¹¹ *Nicholes v. People ex rel. Kochersperger*, 171 Ill. 376, 49 N. E. 574 [1898]; *Steenberg v. People, Kochersperger*, 164 Ill. 478, 45 N. E. Rep. 970 [1897].

¹² *Jones v. City of Chicago*, 213 Ill. 92, 72 N. E. 798 [1904].

¹³ *Gafney v. City and County of San Francisco*, 72 Cal. 146, 13 Pac. 467 [1887].

¹⁴ *Philadelphia & Reading Coal & Iron Company v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Beach v. People ex rel. Kern*, 157 Ill. 659, 41 N. E. 1117 [1895]; *City of Chicago v. Silverman*, 156 Ill. 601, 41 N. E. 162 [1895]; *Wisner v. People, Kern*, 156 Ill. 180, 40 N. E. Rep. 574 [1895]; *Zeigler v. People ex rel. Kern*, 156 Ill. 133, 40 N. E. 607

be presumed that the city would order an improvement outside of its territorial limits and would attempt to levy an assessment therefor without legal authority. If the ordinance so located a sewer as to provide an outlet, it cannot be made invalid by showing that the outlet is in fact insufficient.¹⁵

§ 857. Ordinance must describe improvement with sufficient certainty.

In assessments by municipal corporations under the statutes in force in almost every state, a valid ordinance is essential as a basis for further proceedings.¹ Without such ordinance the subsequent proceedings and the assessment based thereon are all invalid.² There are several obvious reasons for this rule. It is ordinarily provided by statute that the council, or in some cases the board of public works or some set of officers corresponding thereto, are to determine the nature and character of the improvement which is to be constructed. It is necessary, therefore, that in order to be the basis for the levy of a local assessment the ordinance providing for the improvement must be sufficiently definite and certain in its statement of the nature and character of the contemplated improvement. If the ordinance does not state the nature and character of the contemplated improvement with sufficient certainty, it is either impossible to construct such improvement at all, or else the contractor or some public officer not authorized by statute must assume to determine the nature and character of such improvement. This is contrary to the spirit and often to the letter of the statute, which gives such discretion to the council or board of public works. Accordingly, it is well settled, that in order to be a basis for the levy of a local assessment, an ordinance must be sufficiently certain and definite.³

[1895]; *West Chicago Street Railroad Co. v. People*, Kern, 156 Ill. 18, 40 N. E. Rep. 605 [1895]; *West Chicago Street Railway Co. v. People*, Kern, 155 Ill. 299, 40 N. E. Rep. 599 [1895]; *Young v. People ex rel.*, Kern, 155 Ill. 247, 40 N. E. Rep. 604 [1895]; *Sargent v. City of Evans-ton*, 154 Ill. 268, 40 N. E. Rep. 440 [1894].

¹⁵ *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900].

¹ *City of Alton v. Middleton's*

Heirs, 158 Ill. 442, 41 N. E. 926 [1895].

² See § 837.

³ *Bay Rock Company v. Bell*, 133 Cal. 150, 65 Pac. 299 [1901]; *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927 [1900]; *Brady v. King*, 53 Cal. 44 [1878]; *McLennan v. City of Chicago*, 218 Ill. 62, 75 N. E. 762 [1905]; *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588 [1904]; *City of Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853 [1903]; *County of DeWitt v.*

An ordinance which is so uncertain and indefinite as to be unenforceable as a basis for a special assessment, has been said to be void as being unreasonable.⁴ Thus, where an ordinance contemplated the laying of a sewer in a trench below grade, but made no provision for the expense of filling up such trench to the proper grade, such ordinance was said to be void as being unreasonable.⁵ To what extent an ordinance must go in describing the improvement is difficult to state in abstract terms. It is said that it must specify the nature, character, locality and description of the contemplated improvement so that an intelligent estimate of the cost can be made,⁶ and so that an intelligent idea of the nature and character of such improvement can be obtained from the ordinance.⁷ A substantial compliance with this rule is, however, all that is necessary.⁸ It is not necessary that the ordinance should itself state all the details of the im-

City of Clinton, 194 Ill. 521, 52 N. E. 780 [1902]; *Peters v. City of Chicago*, 192 Ill. 437, 61 N. E. 438 [1901]; *Johnson v. People ex rel. Raymond*, 189 Ill. 83, 59 N. E. 515 [1901]; *Blount v. People ex rel. Raymond*, 188 Ill. 538, 59 N. E. 241 [1901]; *Lusk v. City of Chicago*, 176 Ill. 207, 52 N. E. 54 [1898]; *People ex rel. Kochersperger v. Warneke*, 173 Ill. 40, 50 N. E. 221 [1898]; *Holden v. City of Chicago*, 172 Ill. 263, 50 N. E. 181 [1898]; *Walker v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694 [1897]; *People ex rel. Kochersperger v. Hurford*, 167 Ill. 226, 47 N. E. 368 [1897]; *Cass v. People ex rel. Kochersperger*, 166 Ill. 126, 46 N. E. 729 [1897]; *People ex rel. Kochersperger v. Lingle*, 165 Ill. 65, 46 N. E. 10 [1897]; *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926 [1895]; *Vane v. City of Evanston*, 150 Ill. 616, 37 N. E. 901 [1894]; *Washington Ice Co. v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378 [1893]; *Callon v. City of Jacksonville*, 147 Ill. 113, 35 N. E. 223 [1894]; *Gage v. City of Chicago*, 143 Ill. 157, 32 N. E. 264 [1893]; *Steele v. Village of River Forest*, 141 Ill.

302, 30 N. E. 1034 [1893]; *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704 [1893]; *Kimble v. City of Peoria*, 140 Ill. 157, 29 N. E. 723 [1893]; *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 [1888]; *Bennett v. City of Emmetsburg*, — Ia. —, 115 N. W. 582 [1908]; *Hydes & Goose v. Joyce*, 4 Bush. (Ky.) 464, 96 Am. Dec. 311 [1868]; *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982 [1904].

⁴ *Title Guarantee & Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896]; *Village of Hyde Park v. Carton*, 132 Ill. 100, 23 N. E. 590 [1891].

⁵ *Title Guarantee & Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896].

⁶ *Lusk v. City of Chicago*, 176 Ill. 207, 52 N. E. 54 [1898].

⁷ *County of DeWitt v. City of Clinton*, 194 Ill. 521, 62 N. E. 780 [1902].

⁸ *Haughwout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078 [1901]; *Peters v. City of Chicago*, 192 Ill. 437, 61 N. E. 438 [1901]; *People ex rel. Kochersperger v. Warneke*, 173 Ill. 40, 50 N. E. 221; *Vane v. City of Evanston*, 150 Ill. 616, 37 N. E. 901 [1894].

provement which is to be made.⁹ If the nature and character of the improvement are shown with reasonable certainty, it is sufficient.¹⁰ It was at one time held in California to be sufficient if the resolution determining the nature of the materials to be used and character of the work to be done followed the language of the statute.¹¹ This result, however, was reached under a resolution which required a street to be "graded and macadamized," and in which the words of the statute were regarded as showing with sufficient certainty the nature of materials to be used.¹² The same rule was subsequently laid down where the resolution followed the wording of the statute, but neither showed the nature of the improvement or the character of the materials to be used.¹³ This latter case was subsequently overruled in a case in which the resolution under consideration followed the language of the statute in providing that "culverts be constructed therein and that curbing be constructed therein" without showing the materials to be used.¹⁴ In determining whether an ordinance is sufficiently definite or not, it must be considered as a whole.¹⁵ Two or more resolutions which are enacted with reference to the same improvement, and before it is constructed, are to be construed together.¹⁶ Accordingly, the first resolution, which provides for paving a certain street, is not invalid for omission to prescribe the kind of paving if this is provided for in the second resolution.¹⁷ A general ordinance, passed before the improvement ordinance and then in force, may be resorted

⁹ *Haughawout v. Hubbard*, 131 Cal. 675, 63 Pac. Rep. 1078 [1901]; *Peters v. City of Chicago*, 192 Ill. 437, 61 N. E. 438 [1901]; *Vane v. City of Evanston*, 150 Ill. 616, 37 N. E. 901 [1894]; *City of Chardon v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

¹⁰ *Haughawout v. Hubbard*, 131 Cal. 675, 63 Pac. Rep. 1078 [1901]; *Hynes v. City of Chicago*, 175 Ill. 56, 51 N. E. 705 [1898].

¹¹ *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865].

¹² *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865].

¹³ *Deady v. Townsend*, 57 Cal. 298 [1881]; (where the resolution was "angular corners reconstructed.")

¹⁴ *Schwiesau v. Mahon*, 128 Cal. 114, 60 Pac. 683 [1900].

¹⁵ *Ronan v. People ex rel. Shafter*, 193 Ill. 631, 61 N. E. 1042 [1901]; *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191 [1898]; *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053 [1894]; *Village of Hyde Park v. Borden*, 94 Ill. 26 [1879].

¹⁶ *Edwards House Co. v. City of Jackson*, — Miss. —, 45 So. 14 [1907].

¹⁷ *Edwards House Co. v. City of Jackson*, — Miss. —, 45 So. 14 [1907].

to to aid an indefinite description in an improvement ordinance.¹⁸ Thus, a general ordinance concerning the paving of streets may supplement deficiencies in the improvement ordinance.¹⁹ Where the improvement ordinance bounds the portion of the street to be paved by the street railway right of way, an ordinance requiring railway companies to keep in repair eight feet of the street where a single track is laid and sixteen feet where double track is laid may show what is meant by the term right of way.²⁰ A general ordinance cannot be resorted to unless it is shown that the improvement ordered by the improvement ordinance is one of the class included in the provisions of the general ordinance.²¹ An ordinance which is invalid as being indefinite cannot be ratified by a subsequent ordinance passed after the contract is let.²² An ordinance may specifically refer to plans and specifications already in existence and make them a part thereof by incorporation. In such case the plans and specifications may be resorted to to aid an indefinite or defective description in the ordinance.²³ In some states this is provided for by specific statute.²⁴ If the statute authorizes a reference to plans and specifications in the office of the proper clerk, a reference in an ordinance to plans and specifications on file in the office of the city engineer is not sufficient.²⁵ If in an ordinance not describing an improvement with sufficient certainty, reference is made to specifications in another ordinance and such specifications describe several different types of the same improvement to be constructed out of different materials, such reference is insufficient.²⁶ A description

¹⁸ *Rawson v. City of Chicago*, 185 Ill. 87, 57 N. E. 35 [1900]; *Haegele v. Mallinckrodt*, 3 Mo. App. 329 [1877].

¹⁹ *Haegele v. Mallinckrodt*, 3 Mo. App. 329 [1877].

²⁰ *Rawson v. City of Chicago*, 185 Ill. 87, 57 N. E. 35 [1900].

²¹ *Gage v. City of Chicago*, 143 Ill. 157, 32 N. E. 264 [1893].

²² *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982 [1904].

²³ *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *Chicago and Northwestern Pacific Railroad Company v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898]; *Callon v. City of Jacksonville*, 147 Ill. 113, 35 N. E.

223 [1894]; *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034 [1893]; *Louisville and Nashville Railroad Company v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962 [1891]; *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407 [1894].

²⁴ *Callon v. City of Jacksonville*, 147 Ill. 113, 35 N. E. 223 [1894]; *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034 [1893].

²⁵ *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 920 [1895].

²⁶ *Piedmont Paving Company v. Allman*, 136 Cal. 88, 68 Pac. 493 [1902].

in specifications not referred to in the resolution cannot be considered a part thereof and cannot aid deficiencies.²⁷ In order to be incorporated in an ordinance by reference therein, the plans and specifications referred to must be in existence at the time of the passage of such ordinance.²⁸ If constructed subsequently to the passage of the ordinance, they cannot be resorted to to aid the description given therein.²⁹ If, however, the description of the improvement in the ordinance is itself complete, the fact that reference is made therein to plans which have not yet been prepared does not invalidate the ordinance.³⁰ A recorded plat showing the width of a street may dispense with the necessity of stating such width in the improvement ordinance, where the ordinance shows that the entire width of the street is to be paved.³¹ This is especially true if a reference is made in an ordinance to the plat of the improvement on which the terminus of the improvement is shown where such terminus is inaccurately described in the ordinance.³² The report of commissioners appointed to estimate the cost of an improvement cannot be resorted to to aid the defective description of such improvement.³³ This is especially true if the report does not supply such deficiency.³⁴ If, however, the existing street is so constructed that a reference thereto is ambiguous, an ordinance describing an improvement by such reference is void for uncertainty.³⁵ Thus, if a pavement is to terminate at the north curb line of an intersecting street and such named intersecting street contains a jog of one hundred and sixty feet at the point of intersection, such description is uncertain.³⁶ The courts appear to be unwilling to overthrow ordinances on the ground of uncertainty, if by a fair application of the principles of construction the meaning of the council

²⁷ Bay Rock Company v. Bell, 133 Cal. 150, 65 Pac. 299 [1901].

²⁸ Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683 [1900].

²⁹ Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683 [1900].

³⁰ White v. City of Alton, 149 Ill. 626, 37 N. E. 96 [1894]; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901].

³¹ Givins v. City of Chicago, 188 Ill. 348, 58 N. E. 912 [1900]; People ex rel. Kochersperger v. Markley, 166 Ill. 48, 46 N. E. 742 [1897];

Harrison Bros. v. City of Chicago, 163 Ill. 129, 44 N. E. 395 [1896].

³² Nicholes v. People ex rel. Kochersperger, 171 Ill. 376, 49 N. E. 574 [1898].

³³ McChesney v. City of Chicago, 171 Ill. 253, 49 N. E. 548 [1898].

³⁴ Gage v. City of Chicago, 143 Ill. 157, 32 N. E. 264 [1893].

³⁵ Sanger v. City of Chicago, 169 Ill. 286, 48 N. E. 309 [1897].

³⁶ Sanger v. City of Chicago, 169 Ill. 286, 48 N. E. 309 [1897].

can be made certain.³⁷ Hence, where an ordinance is not clearly drawn, but a careful reading of the ordinance together with a study of the map will make such ordinance intelligible, such ordinance will be upheld.³⁸ Parts of an improvement which are fairly to be regarded as incidental to the main elements of an improvement need not be given in detail in the ordinance.³⁹ Details which are fairly implied by the general terms used and which are necessarily included within such terms are to be regarded as a part of the improvement described by such general terms.⁴⁰ Parts of an improvement which are to be used in connection with those enumerated, but which cannot be regarded as incidental to or implied from those enumerated, are not included therein.⁴¹ Thus, an ordinance for the construction of a "connected system of water works with the necessary reservoirs, fire hydrants and water mains," has been held not to include the construction of a stand pipe, engine house and the like, and hence not to be void on the theory that it was uncertain whether such latter improvements were included or not.⁴² By statute it may be provided that the mayor is to specify in his order the kind of improvement to be constructed. Under such statutes it is not necessary that the council should fix the dimensions or materials for the improvement, since by statute that is the duty of the mayor.⁴³

§ 858. Description in resolution.

A resolution declaring the intention of the public corporation to construct a given improvement is often merely preliminary to the proceedings by which such improvement is planned and executed. Accordingly, the description of the improvement in such resolution may be general in terms.¹ In some states it is not neces-

³⁷ State, Boice, Pros. v. Inhabitants of the City of Plainfield, 38 N. J. L. (9 Vr.) 95 [1875].

³⁸ State, Boice, Pros. v. Inhabitants of the City of Plainfield, 38 N. J. L. (9 Vr.) 95 [1875].

³⁹ People ex rel. McCornack v. McWethy, 177 Ill. 334, 52 N. E. 479 [1898]; Delamater v. City of Chicago, 158 Ill. 575, 42 N. E. 444 [1895]; City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713 [1892].

⁴⁰ People ex rel. McCornack v. McWethy, 177 Ill. 334, 52 N. E. 479 [1898]; Davies v. City of Saginaw, 87 Mich. 439, 49 N. W. 667 [1891];

City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713 [1892].

⁴¹ O'Neil v. People ex rel. Kochersperger, 166 Ill. 561, 46 N. E. 1096 [1897].

⁴² O'Neil v. People ex rel. Kochersperger, 166 Ill. 561, 46 N. E. 1096 [1897].

⁴³ Main v. Fort Smith, 49 Ark. 480, 5 S. W. 801 [1887].

¹ Harney v. Heller, 47 Cal. 15 [1873]; Gage v. City of Chicago, 207 Ill. 56, 69 N. E. 588 [1904]; Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723 [1886]; Nixon v. City of Burlington, — Ia. —, 115 N. W. 239 [1908].

sary that the preliminary resolution should give a description in as great detail as would be necessary in an ordinance.² It is not necessary that the resolution should be as minute and accurate as would be necessary in plans and specifications.³ Thus, a description of a street paving improvement as forty-eight feet wide, consisting of brick, is sufficient, although the foundation and substructure are not mentioned.⁴ The resolution must, however, describe the work to be done in each of its essential parts in an intelligent manner.⁵

§ 859. Location of improvement.

The location of the proposed improvement must be stated so definitely that it is possible from the description given in the ordinance to locate the improvement.¹ The proposed improvement may be described with reference to a pre-existing improvement already located by the city.² Thus, in a proceeding to widen the street it has been held sufficient to describe the land to be taken as "a strip of ground thirty-one feet in width the entire length off the southwest side of lot number one in Allen's Addition to said city so as to make the said street fifty feet in width."³ So a description of a proposed sewer as follows: "the sewer on Bates street be continued to Walnut street" is sufficient.⁴ An ordinance which provides that the roadway of a street to be paved extends a certain number of feet from each side of the center line to the street named is sufficiently definite.⁵ It has been held that in the resolution declaring the necessity of an improvement, the width of the roadway to be improved need not be given.⁶ An ordinance which provides for paving "the public square" has been held void for uncertainty, as not indicating

² McLennan v. City of Chicago, 218 Ill. 62, 75 N. E. 762 [1905]; Gage v. City of Chicago, 207 Ill. 56, 69 N. E. 588 [1904].

³ Fay v. Reed, 128 Cal. 357, 60 Pac. 927 [1900]; Nixon v. City of Burlington, — Ia. —, 115 N. W. 239 [1908].

⁴ Nixon v. City of Burlington, — Ia. —, 115 N. W. 239 [1908].

⁵ Bay Rock Company v. Bell, 133 Cal. 150, 65 Pac. 299 [1901].

⁶ County of DeWitt v. City of Clinton, 194 Ill. 521, 62 N. E. 780 [1902]; McChesney v. City of Chi-

cago, 171 Ill. 253, 49 N. E. 548 [1898]; Copcutt v. City of Yonkers, 83 Hun (N. Y.) 173, 31 N. Y. S. 659 [1894].

² Hays v. City of Vincennes, 82 Ind. 178 [1882].

³ Hays v. City of Vincennes, 82 Ind. 178 [1882].

⁴ Googin v. City of Lewiston, — Me. —, 68 Atl. 694 [1907].

⁵ McChesney v. City of Chicago, 201 Ill. 344, 66 N. E. 217 [1903].

⁶ Fuller v. City of Grand Rapids, 105 Mich. 529, 63 N. W. 530 [1895].

whether the streets surrounding the square or the ground included in the center is to be paved.⁷ If two different plans for laying out a street have been filed, a resolution directing the opening of the street, without specifying which plan is to be followed, is void for uncertainty.⁸ Where only a part of a street is to be paved, the ordinance must show what part is to be so improved. Thus, an ordinance for paving a street between two specified cross streets has been held to be defective where the contract as let was for paving such part of the street, exclusive of sidewalks and of a strip in the center, which the street railroad company was bound to pave.⁹ A provision for locating a road on the route of an existing road or "as near thereto as is most practicable," is too indefinite, especially if the assessment district is to extend a mile and a half on either side of the road as laid out.¹⁰ An ordinance which provides for the construction of a sidewalk is void for uncertainty, if it does not show whether the sidewalk is to be next to the curb line or next to the lot line, and the sidewalk is not wide enough to cover the entire space between the two lines.¹¹ An ordinance which provides for setting curb "on either side" of a given street is not void for uncertainty, since this means on both sides.¹² A resolution which directs the construction of a sidewalk "upon the northeast side" of a given street, between two other designated streets, is sufficiently definite.¹³ An ordinance which requires a curb and gutter, but does not state the height thereof or where the curb is to be placed, is void for uncertainty.¹⁴ An ordinance which provides for the construction of sewers must locate them so that it is possible, from the ordinance, to determine where they are to be constructed,¹⁵ and in the absence of such certainty of location the ordinance is void.¹⁶ An ordinance which requires the construction of house drains, but

⁷ *County of DeWitt v. City of Clinton*, 194 Ill. 521, 62 N. E. 780 [1902].

⁸ *Copeutt v. City of Yonkers*, 83 Hun (N. Y.) 178, 31 N. Y. S. 659 [1894].

⁹ *City of Trenton ex rel. Gardner v. Collier*, 68 Mo. App. 483 [1896].

¹⁰ *Turner v. Thorntown and Mechanicsburg Gravel Road Co.*, 33 Ind. 317 [1870].

¹¹ *McChesney v. City of Chicago*, 171 Ill. 253, 49 N. E. 548 [1898].

¹² *Chicago and Northern Pacific Railroad Company v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898].

¹³ *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624 [1906].

¹⁴ *Fehringer v. City of Chicago*, 187 Ill. 416, 58 N. E. 303 [1900].

¹⁵ *Wetmore v. City of Chicago*, 206 Ill. 367, 69 N. E. 234 [1903]; *Gage v. City of Chicago*, 191 Ill. 210, 60 N. E. 896 [1901].

¹⁶ *Wetmore v. City of Chicago*, 206 Ill. 367, 69 N. E. 234 [1903].

does not show whether such drains are to terminate at the lot lines or four feet inside of the curb line, is void for uncertainty.¹⁷ So an ordinance for a sewer, which fixes the starting point thereof at the connection with another sewer in a cross street named, but shows that the sewer on such cross street stops a block away from the point of beginning thus ordered, is invalid.¹⁸ A provision requiring tile pipe slants at the intersections of certain streets is not void for uncertainty, because it does not show whether the slants are to be placed in the center or at the sides of such street. In the absence of an apparent intention to the contrary, the pipes must be placed in the center.¹⁹ A provision requiring a house slant six inches in diameter opposite each lot of land, shows the number required with sufficient certainty, although it does not describe or enumerate such lots.²⁰ An ordinance which specifies the number of catch basins to be constructed, and provides that they shall be located in the curb lines of the streets at such points as the engineer directs, is not void for uncertainty.²¹ The course of a sewer may be indicated by a line on the map, which is made a part of the order directing the construction of such sewer.²² An ordinance which provides for constructing a suitable building on a suitable lot for a pumping station, is void for uncertainty, as not showing the character or location of the building contemplated.²³ In some states the council may establish sewer districts by ordinance and leave to the engineer the location of the sewers within such district.²⁴ An ordinance which provides that a sewer shall be constructed to a given point and "thence curve until it intersects" another point named, has been held to be sufficiently definite, where the curves are for very short distances and the sewer can be properly located in only one way.²⁵ A petition to lay out a drain must, in some states, show the location, direction and distance thereof.²⁶ In other states it seems to be sufficient, if the land to be drained is described in general terms and the drain

¹⁷ *Wetmore v. City of Chicago*, 206 Ill. 367, 69 N. E. 234 [1903].

¹⁸ *Gage v. City of Chicago*, 191 Ill. 210, 60 N. E. 896 [1901].

¹⁹ *Duane v. City of Chicago*, 198 Ill. 471, 64 N. E. 1033 [1902].

²⁰ *Smythe v. City of Chicago*, 197 Ill. 311, 64 N. E. 361 [1902].

²¹ *Village of Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327 [1899].

²² *Smith v. Abington Savings Bank*, 171 Mass. 178, 50 N. E. 545 [1898].

²³ *Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846 [1888].

²⁴ *State of Missouri ex rel. Caven-der v. City of St. Louis*, 56 Mo. 277 [1874].

²⁵ *Village of Hyde Park v. Borden*, 94 Ill. 26 [1879].

²⁶ *Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705 [1884].

itself is to be located subsequently.²⁷ The chief requirement of the petition for a drainage district, under such statutes, is that it must show the purpose of the improvement so distinctly that all whose lands are liable to be affected thereby may know the facts and have an opportunity to become members of the association.²⁸ An ordinance providing for tiling must show where such tiling is to be placed.²⁹ If data are given, which are sufficient to make it possible to determine other facts by mathematical computation, the ordinance is not uncertain for omission to give such other facts.³⁰ Thus, if the curb line and street line of a street are given, a provision that the curb on intersecting streets shall run back to the street line is sufficient, although such distance is not given.³¹ So, if the dimensions of curb stones are given by their length, and the entire distance to be curbed is fixed, such provisions are sufficient, although the number of curb stones is not specified.³² The same principle has been applied where the ordinance specifies the dimensions of the limestone blocks on which the curb stones are to be bedded, but does not give their number, since it must be inferred that such blocks are to be placed close together so as to be continuous, and their number may thus be computed readily.³³

§ 860. Construction of improvement where necessary.

Ordinances are occasionally passed which require certain work to be done, where it may be "necessary" or "advisable," leaving to the inferior public officers the determination of what is necessary or advisable. If, by statute, the city council is required to pass upon such questions, it cannot delegate its authority to other officers and such ordinances are for that reason void.¹ Thus, ordi-

²⁷ *Seyberger v. Calumet Draining Company*, 33 Ind. 330 [1870].

²⁸ *O'Reiley v. Kankakee Co.*, 32 Ind. 169; *West v. Bullskin Prairie Ditching Company*, 32 Ind. 138 [1869].

²⁹ *Illinois Central Railroad Company v. City of Effingham*, 172 Ill. 607, 50 N. E. 103 [1898].

³⁰ *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *People ex rel. Kochersperger v. Markley*, 166 Ill. 48, 46 N. E. 742 [1897]; *Woods v. City of Chicago*, 135 Ill. 582, 26 N. E. 608 [1892]; *County of*

Adams v. City of Quincy, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890].

³¹ *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901].

³² *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901].

³³ *White & Gleason v. City of Chicago*, 188 Ill. 392, 58 N. E. 917 [1900].

¹ *Cross v. Zane*, 47 Cal. 602 [1874]; *People of the City and County of San Francisco v. Clark*, 47 Cal. 456 [1874]; *Randolph v. Gawley*, 47 Cal.

nances which provide that certain work is to be done "where necessary,"² "where required,"³ "where not in good and sound condition,"⁴ where the work has not been done "in a suitable manner,"⁵ or where the work already done is "not in good repair,"⁶ are void for uncertainty, since they cannot be executed unless the inferior officials exercise their discretion in determining what improvement shall be made and what shall not. So an ordinance is invalid which provides for crossings at street intersections "and at such other places as the board may deem necessary."⁷ Under some statutes, however, a different view has been entertained and ordinances which provide for doing specified kinds of work, where necessary,⁸ or which leave to the city engineer to determine what repairs shall be made,⁹ are held to be valid. If the statute specifically authorizes some specified public officer, such as the county surveyor, to determine what repairs are necessary, no objection can, of course, be made to his exercising such authority and determining what repairs are necessary.¹⁰ An ordinance which provides that crossings shall be "laid at all street intersections, and at such other places as the board may deem necessary,"¹¹ or at such other points as the engineer may direct,¹² is invalid. An ordinance which provides that where

458 [1874]; *Bryan v. City of Chicago*, 60 Ill. 507 [1871]; *McDonnell v. City of Chicago*, 60 Ill. 350 [1871]; *Wright v. City of Chicago*, 60 Ill. 312 [1871]; *Andrews v. City of Chicago*, 57 Ill. 239 [1870]; *Jenks v. City of Chicago*, 56 Ill. 397 [1870]; *Foss v. City of Chicago*, 56 Ill. 354 [1870]; *State, Cronin, Pros. v. Mayor and Aldermen of Jersey City*, 38 N. J. L. (9 Vr.) 410 [1876]; *Tappan v. Young*, 9 Daly, 357 [1880]; *Hawthorne v. City of East Portland*, 13 Or. 271, 10 Pac. 342 [1886].

²*Cross v. Zane*, 47 Cal. 602 [1874]; *Randolph v. Gawley*, 47 Cal. 458 [1874]; *People of the City and County of San Francisco v. Clark*, 47 Cal. 456 [1874].

³*State, Cronin, Pros. v. Mayor and Aldermen of Jersey City*, 38 N. J. L. (9 Vr.) 410 [1876]; *Hawthorne v. City of East Portland*, 13 Or. 271, 10 Pac. 342 [1886].

⁴*Bryan v. City of Chicago*, 60 Ill. 507 [1871]; *McDonnell v. City of*

Chicago, 60 Ill. 350 [1871]; *Wright v. City of Chicago*, 60 Ill. 312 [1871]; *Moore v. City of Chicago*, 60 Ill. 243 [1871].

⁵*Andrews v. City of Chicago*, 57 Ill. 239 [1870]; *Jenks v. City of Chicago*, 56 Ill. 397 [1870]; *Foss v. Chicago*, 56 Ill. 354 [1870].

⁶*Tappan v. Young*, 9 Daly (N. Y.) 357 [1880].

⁷*County of DeWitt v. City of Clinton*, 194 Ill. 521, 62 N. E. 780 [1902].

⁸*Kimble v. City of Peoria*, 140 Ill. 157, 29 N. E. 723 [1893].

⁹*City of Covington v. Boyle*, 6 Bush. (69 Ky.) 204 [1869].

¹⁰*Taylor v. Crawford*, 72 O. S. 560, 69 L. R. A. 805, 74 N. E. 1065 [1905]; (reversing, *Crawford v. Taylor*, 27 Ohio C. C. 245 [1905]).

¹¹*County of DeWitt v. City of Clinton*, 194 Ill. 521, 62 N. E. 780 [1902].

¹²*Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897].

areas or vaults have not been roofed over, such arching as should be found necessary should be built by the contractor according to plans and specifications to be furnished by the engineer, is invalid, since it confers upon the engineer power to determine what improvements shall be made.¹³

§ 861. Construction of improvement where not in existence.

Under some ordinances it is provided that certain specified improvements shall be constructed where they are not already in existence, not already built, and the like. Such ordinances leave no discretion to the subordinate public officials, and are regarded as sufficiently certain and as valid.¹ An ordinance which provides for paving a specified street, "except that portion required by law to be kept in order by the railroad company having its tracks thereon," is sufficiently certain;² as is an ordinance for improving a street, excepting those parts which the abutting owners elected to do themselves.³ If the ordinance combines both expressions and provides for constructing an improvement "where not already built and in good condition," it leaves the determination of the improvement to subordinate officials and is invalid.⁴

§ 862. Necessity of fixing grade.

An improvement, such as a sidewalk or street, which must be constructed to some grade, cannot be ordered unless the grade at which such work is to be done is fixed.¹ This is especially true where a street is to be opened through a pond, and the ordinance does not show at what grade it is to cross the river, and whether

¹³ *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391 [1904].

¹ *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262 [1901]; *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899]; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897]; *Diggins v. Brown*, 76 Cal. 318, 18 Pac. 373 [1888]; *Howe v. City of Chicago*, 224 Ill. 95, 79 N. E. 421 [1906]; *Page v. City of Chicago*, 60 Ill. 441 [1871]; In the Matter of the Petition of *Burmeister*, 12 Hun (N. Y.) 478 [1878].

² *Whiting v. Townsend*, 57 Cal. 515 [1881].

³ *City of Chicago v. Sherwood*, 104 Ill. 549 [1882].

⁴ *Bryan v. City of Chicago*, 60 Ill. 507 [1871]; *Wright v. City of Chicago*, 60 Ill. 312 [1871].

¹ *County of DeWitt v. City of Clinton*, 194 Ill. 521, 62 N. E. 780 [1902]; *Brewster v. City of Peru*, 180 Ill. 124, 54 N. E. 233 [1899]; *McChesney v. City of Chicago*, 171 Ill. 253, 49 N. E. 548 [1898]; *Washington Ice Company v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378 [1894]; *Smith v. Duncan*, 77 Ind. 92 [1881]; *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891]; *Joyes v. Shadburn*, 11 Ky. L. Rep. 892, 13 S. W. 361 [1890].

by an embankment or on a trestle.² Such grade may be fixed in the ordinance which requires the improvement.³ If the grade has been fixed for a pre-existing improvement, and a reconstruction of such improvement is ordered without any reference to the grade, such ordinance is valid, as the grade is to be regarded as unchanged.⁴ An ordinance for a sewer which fixes the outlet and then provides that from that point the sewer should "fall" uniformly two-tenths of a foot from one hundred feet throughout its length, was held not to be void for uncertainty, although the literal compliance with such ordinance would render the sewer useless unless the water in it would run up hill. The entire ordinance showed that the word "rise," instead of "fall," was intended, and this was confirmed by the maps and profiles.⁵ If an ordinance provides for grading a street, it need not further provide for cutting down elevations and filling in depressions, since this is implied in the term "grading."⁶ It has been said that if the grade is not fixed properly, the natural surface will be taken as the true grade.⁷ In some states the council may order an improvement and leave it to some public officer to fix the grade.⁸ If the grade for the city has already been established, it is sufficient if an improvement is ordered to be made in accordance with such established grade;⁹ and if the ordinance shows to what height above or below such grade parts of the improvement are to be made.¹⁰ Thus, an ordinance which provides for ex-

² *Washington Ice Company v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378 [1894].

³ *City of Chicago v. Hulbert*, 234 Ill. 321, 84 N. E. 922 [1908]; *Deer v. Sheraden Borough*, — Pa. St. —, 69 Atl. 814 [1908].

⁴ *Gaertner v. Louisville Artificial Stone Co.*, 114 Ky. 160, 70 S. W. 293 [1902]; *City of Augusta v. McKibben*, — Ky. —, 60 S. W. 291, 22 Ky. Law Rep. 1224.

⁵ *Steele v. Village of River Forest*, 141 Ill. 302, 30 N. E. 1034 [1893].

⁶ *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903].

⁷ *Clapton v. Taylor*, 49 Mo. App. 117 [1892].

⁸ *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896]; *Lake v. City of Decatur*, 91 Ill. 596 [1879]; *State, Parker, Pros. v. May-*

or, etc., of the City of New Brunswick, 30 N. J. L. (1 Vr.) 395 [1863].

⁹ *Chicago Consolidated Traction Company v. Village of Oak Park*, 225 Ill. 9, 80 N. E. 42 [1907]; *Guyer v. City of Rock Island*, 215 Ill. 144, 74 N. E. 105 [1905]; *Shepard v. People ex rel. Raymond*, 200 Ill. 508, 65 N. E. 1068 [1903]; *Clafin v. City of Chicago*, 178 Ill. 549, 53 N. E. 339 [1899]; *Lehmrs v. City of Chicago*, 178 Ill. 530, 53 N. E. 394 [1899]; *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191 [1898]; *State, Mann, Pros. v. Mayor and Common Council of Jersey City*, 24 N. J. L. (4 Zabriskie) 662 [1855].

¹⁰ *Lehmrs v. City of Chicago*, 178 Ill. 530, 53 N. E. 394 [1899]; *Clafin v. City of Chicago*, 178 Ill. 549, 53 N. E. 339 [1899].

cavating a street at the center to a certain depth below the established grade, and for excavating the side lines at a greater depth, is sufficient.¹¹ Such an ordinance is, however, invalid, if it is shown that no grade has, in fact, been established, since the reference to a non-existing grade leaves the improvement without any grade fixed by ordinance.¹² Such defect cannot be cured by the passage of a subsequent ordinance fixing the grade.¹³ An ordinance which provides for the construction of a sewer must fix the grade and depth thereof.¹⁴ Accordingly, an ordinance which provides that a given sewer shall be deepened to as great a depth as its connection with another sewer will admit, and that the grade of the bottom will be as subsequently established by the city surveyor, is invalid.¹⁵ If the statute does not make the assessment depend upon the establishment of the grade, an irregularity in fixing the grade will not invalidate the assessment.¹⁶ In the absence of statute it is not necessary that an official and permanent grade should be established before a public improvement is constructed and an assessment levied therefor.¹⁷ In order to prevent the property owner being assessed for different improvements made at various grades under different theories of the city or the city engineer as to the proper grade of that section of the city, it is provided in some jurisdictions, by statute, that an assessment cannot be levied for a public improvement, such as a street, unless a permanent grade has been established and the street has been graded to such grade.¹⁸ Under such statutes, an improvement before such grade is fixed cannot be paid

¹¹ *Clafin v. City of Chicago*, 178 Ill. 549, 53 N. E. 339 [1890]; *Lehmers v. City of Chicago*, 178 Ill. 530, 53 N. E. 394 [1899]; *Cramer v. City of Charleston*, 176 Ill. 507, 52 N. E. 73 [1898].

¹² *Craig v. People ex rel. Gannaway*, 193 Ill. 199, 61 N. E. 1072 [1901]; *Chicago and Northern Pacific Railroad Company v. City of Chicago*, 174 Ill. 439, 51 N. E. 596 [1898].

¹³ *Chicago and Northern Pacific Railroad Company v. City of Chicago*, 174 Ill. 439, 51 N. E. 596 [1898].

¹⁴ *City of Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212 [1888]; *Wells v. Burnham*, 20 Wis. 119 [1865].

¹⁵ *City of Kankakee v. Potter*, 119 Ill. 324, 10 N. E. 212 [1888].

¹⁶ *Barnes v. City of Parsons*, — Kan. —, 94 Pac. 151 [1908].

¹⁷ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

¹⁸ *City of Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253 [1888]; *City of Napa v. Easterby*, 61 Cal. 509 [1882]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *McManus v. Hornaday*, 99 Ia. 507, 68 N. W. 812 [1896]; *State of Minnesota v. Judges of District Court of Eleventh Judicial District, 51 Minn.* 539, 53 N. W. 800, 55 N. W. 122 [1892].

for by assessments.¹⁹ Accordingly, the fact that a street has not been graded according to the grade established by ordinance, but according to one established by the engineer, without authority, is a valid defense.²⁰ This rule has been extended so far that, where it was provided that the city was not to pay for the cost of street improvements, but that such improvements were to be paid by the owners to be assessed, and that improvements should be made and grades established only on petition, it was held that the adoption for the entire city, of a grade fixed by the engineer, who was to be paid out of the city treasury, was not a valid establishing of an official grade, and that no assessment could be levied for an improvement constructed on the basis of such grade.²¹ After such defective attempt to establish a grade, a new grade may be established.²² This may be done by a general ordinance.²³ The grade may be fixed by reference to another grade already established.²⁴ After the grade has been fixed a contract may be made for improving such street without waiting until the grading has actually been done.²⁵ So, in one resolution a declaration of intention to grade and macadamize a given street may be made.²⁶ When the grade and width of the street have been officially established, the street may be ordered planked without waiting until it is actually graded.²⁷ If the city has so recognized an existing grade as an established grade, that it would be estopped as against a given property owner from denying that such grade had been established legally, it has been held that by virtue of such estoppel, it is not necessary that the city should formally establish a grade before improving such street.²⁸ Upon this question there is much dispute, the better reasoning seeming to be that estoppel is a personal privilege of which the party in whose favor

¹⁹ *City of Napa v. Easterby*, 61 Cal. 509 [1882]; *State ex rel. Boycott v. Mayor*, 107 Wis. 654, 84 N. W. 242 [1900].

²⁰ *Seranton City v. Bush*, 160 Pa. St. 499, 28 Atl. 926 [1894].

²¹ *City of Napa v. Easterby*, 61 Cal. 509 [1882].

²² *City of Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253 [1888].

²³ *City of Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253 [1888].

²⁴ *Chicago Consolidated Traction Company v. Village of Oak Park*, 255 Ill. 9, 80 N. E. 42 [1907].

²⁵ *Dyer v. Hudson*, 65 Cal. 374, 4 Pac. 231 [1884]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

²⁶ *Emery v. San Francisco Gas Co.*, 28 Cal. 346 [1865].

²⁷ *Knowles v. Seale*, 64 Cal. 377, 1 Pac. 159 [1883].

²⁸ *Gibson v. Zimmerman*, 27 Mo. App. 90 [1887]. [This decision can be justified only if a person is bound to take advantage of an estoppel in his own favor.]

it operates may take advantage or not, as he pleases. A statute which fixes the grades of certain streets at their points of intersection with other streets has been held in effect to fix the grades at all intermediate points, such grade to be ascertained by connecting such points with a straight line.²⁹ In the absence of a specific statute forbidding it, the city may adopt and ratify a grade established by the city engineer different from that previously established by the city.³⁰ In case of a subsequent change of grade from that officially established, the damages caused by such change must be considered in levying the assessment for benefits caused by such regrading.³¹ If a contract is let for a grading to the official grade, and subsequently such grade is modified by statute and no new contract is let therefor but the old contract is performed by grading to the grade last established, an assessment therefor is invalid.³² The official grade may be fixed by the persons authorized by statute to fix it.³³ The concurrence of other officers, such as a board of engineers, is not necessary unless specified by statute.³⁴

§ 863. Ordinance fixing grade of street.

As has already been said,¹ it is provided in many statutes that the permanent grade of a street must be established before the street can be permanently graded at the expense of the property owner.² The grade may be fixed by fixing the grade at intersecting streets, such points to be connected by straight lines.³ So, if the grade is established for a part of the street in such a way that it can be computed for the rest thereof, this is sufficient, though the rest of the grade is not established.⁴ The grade may be fixed by reference to some natural object. Thus, a description

²⁹ *Gafney v. City and County of San Francisco*, 72 Cal. 146, 13 Pac. 467 [1887].

³⁰ *McKnight v. City of Pittsburg*, 91 Pa. St. (10 Norris) 273 [1879].

³¹ *Saunderson v. Herman*, 95 Wis. 48, 69 N. W. 977 [1897]; (followed in, *Liebermann v. City of Milwaukee*, 89 Wis. 336, 61 N. W. 1112 [1895]).

³² *Steffins v. Stewart*, 53 Kans. 92, 36 Pac. 55 [1894].

³³ In the Matter of the Proceedings to Change the Grade of Beale School in the City and County of San Francisco, 39 Cal. 495 [1870].

³⁴ *Chambers v. Satterlee*, 40 Cal. 497 [1871].

¹ See § 862.

² *State of Minnesota ex rel. Shannon v. Judges of District Court of Eleventh Judicial District*, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122 [1892].

³ *Connecticut Mutual Life Insurance Company v. City of Chicago*, 217 Ill. 352, 75 N. E. 365 [1905]. See § 862, note 29.

⁴ *Guyer v. City of Rock Island*, 215 Ill. 144, 74 N. E. 105 [1905].

of the grade as being a certain height, measured from the low water mark of Lake Michigan in a certain year, is sufficient.⁵ A general ordinance which fixes the height of curbing stones does not establish the grade of a sidewalk.⁶ Without some further provision fixing the grade of such sidewalk, an ordinance ordering its construction is invalid.⁷ An ordinance which provides that the center of a street should be brought to a uniform grade, according to stakes to be set by the Engineer, excavated and covered with a specified material to a specified depth so as to make the curb lines correspond to the central lines of the street, is sufficiently definite.⁸ If a grade has been established by unauthorized officials of a corporation, the council may ratify such act,⁹ as by appointing viewers to assess benefits for such work, confirming their report and authorizing the collection of assessments.¹⁰

§ 864. Description of material.

The council may fix the material to be used in a public improvement,¹ even if it designates a material which is patented,² or in which one dealer has a monopoly.³ Under most statutes, the council must fix the material which is to be used.⁴ Under some statutes, however, a street committee may be empowered to fix the material.⁵ Similar discretion may, under some statutes, be conferred upon the board of public works,⁶ at least if no objection

⁵ *Hardin v. City of Chicago*, 186 Ill. 424, 57 N. E. 1048 [1900]; *Givins v. City of Chicago*, 186 Ill. 399, 57 N. E. 1045 [1900]; *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824 [1900]; *Chicago, Terminal Transfer Railroad Company v. City of Chicago*, 184 Ill. 154, 56 N. E. 410 [1900].

⁶ *Biggins' Estate v. People ex rel. Tetherington*, 193 Ill. 601, 61 N. E. 1124 [1901].

⁷ *Biggins' Estate v. People ex rel. Tetherington*, 193 Ill. 601, 61 N. E. 1124 [1901].

⁸ *Gross v. People ex rel. Kochersperger*, 172 Ill. 571, 50 N. E. 334 [1898]. For the construction of an ordinance fixing the grade see *Clapton v. Taylor*, 49 Mo. App. 117 [1892].

⁹ *Shiloh Street, Appeal of McCormick*, 165 Pa. St. 386, 44 Am. St. Rep. 671, 30 Atl. 986 [1895].

¹⁰ *Shiloh Street, Appeal of McCormick*, 165 Pa. St. 386, 44 Am. St. Rep. 671, 30 Atl. 986 [1895].

¹ *Schoenberg v. Field*, 95 Mo. App. 241 [1902].

² See § 515.

³ *Schoenberg v. Field*, 95 Mo. App. 241 [1902].

⁴ *Schwiesau v. Mahon*, 128 Cal. 114, 60 Pac. 683 [1900]; *Kiley v. Cranor*, 51 Mo. 541 [1873]; *Sheehan v. Gleason*, 46 Mo. 100 [1870]; *Thompson v. Schermerhorn*, 9 Barb. (N. Y.) 152 [1850].

⁵ *Harton v. Town of Avondale*, 147 Ala. 458, 41 So. 934 [1906].

⁶ *Emmert v. Elyria*, 27 Ohio C. C. 353 [1905].

thereto is made until after the contract has been performed.⁷ In some jurisdictions it has been held that the officials authorized to select materials may select material in the alternative and decide finally upon the material to be used after competitive bids have been received.⁸ In other jurisdictions, it has been held that materials cannot be so selected in the alternative, but that before bids are invited, some one material must be selected, so that the bids may be compared solely on the basis of price and responsibility of the bidders.⁹ An ordinance which requires the foundation and pavement to be made of "cinders, sand, gravel or other materials equally suitable," has been held to be sufficient, where the estimate of the cost approved by the council showed that cinders were to be used.¹⁰ In an ordinance for paving a given street the materials to be used must be designated with sufficient accuracy by the terms of the ordinance.¹¹ An order for paving with wooden blocks, which does not specify of what wood the blocks are to be made or how they are to be laid, is invalid.¹² The character of the brick to be used in paving must be indicated in the improvement ordinance with sufficient certainty.¹³ A provision that stone to be used must be broken so as to pass through rings of a certain diameter is sufficient.¹⁴ A description of the material to be used, as brick to be made "of pure shale of equal quality to that found" in certain designated places,¹⁵ or "asphaltum obtained from Pitch Lake in the Island of Trinidad, or asphaltum which shall be equal in quality for paving purposes to that

⁷ *Emmert v. Elyria*, 27 Ohio C. C. R. 353 [1905].

⁸ *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. Rep. 1112 [1895]; *City of Paducah*, *Petition ex parte*, 28 Ky. Law Rep. 412, 89 S. W. 302 [1905]; *Attorney General on the Relation of Cook v. City of Detroit*, 26 Mich. 263 [1872]; *In the Matter of the Petition of Ford to Vacate an Assessment*, 6 Lansing (N. Y.) 92 [1872]; *Emmert v. City of Elyria*, 74 O. S. 185, 78 N. E. 269 [1906].

⁹ *Piedmont Paving Company v. Allman*, 136 Cal. 88, 68 Pac. 493 [1902]; *Coggeshall v. City of Des Moines*, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889]. See § 495.

¹⁰ *The Jacksonville Railway Com-*

pany v. City of Jacksonville, 114 Ill. 562, 2 N. E. 478 [1886].

¹¹ *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896]; *Washington Ice Company v. City of Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222, 35 N. E. 378 [1894]; *Smith v. Duncan*, 77 Ind. 92 [1881]; *City of Trenton ex rel. Gardner v. Collier*, 68 Mo. App. 483 [1896].

¹² *Smith v. Duncan*, 77 Ind. 92 [1881].

¹³ *City of Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874 [1903].

¹⁴ *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903].

¹⁵ *Hintze v. City of Elgin*, 186 Ill. 251, 57 N. E. 856 [1900].

obtained from Pitch Lake,"¹⁶ or "Trinidad sheet asphaltum according to specifications in the office of the city engineer,"¹⁷ have been held in each case to be sufficiently definite. A description of an improvement as "an elevated roadway thirty-six feet wide, an elevated sidewalk twelve feet wide," is insufficient as not showing the character of the work or the materials to be used.¹⁸ An ordinance which provides that property owners shall cause the street in front of their lot to be "pitched, leveled and flagged" is void for uncertainty, as it does not prescribe the manner in which this shall be done.¹⁹ An ordinance which provides for macadamizing a street between two given points without further directions as to the manner of doing the work, is invalid.²⁰ An ordinance which provides for paving a street with Nicholson pavement,²¹ or with Nicholson pavement or with other wooden pavement,²² has been held not to be void for uncertainty. An ordinance which provides that stone to be used for a sidewalk shall be not less than four and one-half feet wide and ten inches thick is valid.²³ An ordinance which provides that a sidewalk shall be laid to the grade of the street which has already been established, that the foundation of the walk shall be the surface of ground excavated or filled to within eight and one-half inches of the grade; that a layer of cinders shall be placed thereon four inches deep; and then a layer of cement and crushed stone four inches deep; and then a coat of cement one-half inch in thickness shall be laid thereon, is sufficiently definite.²⁴ An ordinance providing that a sidewalk of a certain width should be built of granitoid has been held to be sufficiently definite.²⁵ A provision that a sidewalk shall be constructed with brick or paving tile,²⁶ or that it shall be constructed of wood, stone or brick,²⁷ has, in

¹⁶ *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588 [1904].

¹⁷ *Barber Asphalt Paving Company v. Ullman*, 137 Mo. 543, 38 S. W. 458 [1897].

¹⁸ *Ladd v. Spencer*, 23 Ore. 123, 31 Pac. Rep. 474.

¹⁹ *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385 [1851]; *Thompson v. Schermerhorn*, 9 Barb. (N. Y.) 152 [1850].

²⁰ *Haegele v. Mallinckrodt*, 46 Mo. 577 [1870].

²¹ *Steckert v. City of East Saginaw*, 22 Mich. 104 [1870].

²² *Rogers v. City of St. Paul*, 22 Minn. 494 [1876].

²³ *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900].

²⁴ *Gage v. City of Chicago*, 196 Ill. 512, 63 N. E. 1031 [1902].

²⁵ *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234, 50 S. W. 33 [1899].

²⁶ *Mansfield v. People ex rel. Wells*, 164 Ill. 611, 45 N. E. 976 [1897].

²⁷ *City of Rich Hill v. Donnan*, 82 Mo. App. 386 [1900].

each case, been held to be too indefinite to be enforced. Where an ordinance provides that a sidewalk shall be constructed of pine plank, and in another part provides that it shall be constructed of stone, such ordinance is too indefinite to be enforced.²⁸ If, however, the ordinance describes the material in two ways, differing only in that one of them goes into more detail than the other, such ordinance is valid.²⁹ Thus, an ordinance which described a sidewalk in one place as a "cement sidewalk," and in another place as "cement-concrete-sand-and-gravel-sidewalk," is not indefinite, since the second description merely states the ingredients of the cement sidewalk.³⁰ A provision in an ordinance requiring the construction of curbing without showing either materials or dimensions, has been held to be insufficient.³¹ An ordinance providing for "granite or artificial stone curbing," is void for uncertainty.³² An ordinance which describes curb stones to be used as four feet long, three feet deep and five inches in thickness is sufficiently definite, though the number thereof to be used is not given.³³ So it is sufficient to describe the curbing as made of "stone in pieces not less than" certain specified dimensions.³⁴ A provision that curbing must be securely nailed to stakes of a designated material, each stake to be "three feet long, or longer, if required, and not over four feet long," was held to be sufficiently definite.³⁵ A provision for "five-inch stone curbing in pieces not less than two feet long and two feet wide," was held to be sufficiently definite.³⁶ An ordinance which provides for a granite concrete combined curb and gutter, which is to be laid in alternate blocks six feet in length and six inches in thickness, is invalid, as it does not show the width of the blocks or the

²⁸ *Hull v. City of Chicago*, 156 Ill. 381, 40 N. E. 937 [1895].

²⁹ *Gage v. City of Chicago*, 196 Ill. 512, 63 N. E. 1031 [1902].

³⁰ *Gage v. City of Chicago*, 196 Ill. 512, 63 N. E. 1031 [1902].

³¹ *Schwiesau v. Mahon*, 128 Cal. 114, 60 Pac. 683 [1900]; *San Jose Improvement Company v. Auzeais*, 106 Cal. 498, 39 Pac. 859 [1895].

³² *San Jose Improvement Company v. Auzeais*, 106 Cal. 498, 39 Pac. 859 [1895].

³³ *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *Mark-*

ley v. City of Chicago, 190 Ill. 276, 60 N. E. 512 [1901].

³⁴ *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234, 50 S. W. 33 [1899].

³⁵ *King v. Lamb*, 117 Cal. 401, 49 Pac. 561 [1897].

³⁶ *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234, 50 S. W. 33 [1899]. For similar cases see *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512 [1901]; *White and Gleason v. City of Chicago*, 188 Ill. 392, 58 N. E. 917 [1900].

height of the curb.³⁷ The fact that such term had a known meaning among contractors and conveyed to them a correct idea as to the size and cost does not render such ordinance valid, since it does not show that such terms had a definite and well settled meaning.³⁸ An ordinance which provides for a curb that contains nothing from which the height of the curb can be ascertained, is void for uncertainty.³⁹ Thus, a provision that the curb shall be "six inches in width throughout, and the gutter flag shall be eighteen inches in width," and that the top of the curb shall be "at the established grade of the street" is not sufficiently definite, since it does not show how deep the curb is.⁴⁰ An ordinance which fixes the height of the curb at the back of the gutter and from the inside of the gutter at certain points, and provides for a uniform slope between the points, is sufficiently certain.⁴¹ So a provision that the curb and gutter shall be six inches in thickness throughout, the gutter planks eighteen inches wide and laid to a pitch corresponding to the angle toward the crown of the street, and that the top of the curb shall be at the established grade of the street to be improved, shows the height of the curb with sufficient certainty.⁴² An ordinance which provides exactly how curbs shall be constructed and provides that corner curbs shall be cut from stone blocks six inches in thickness, and that the radius of the corner curbs shall be six feet, or as the engineer should direct, was held not to be too indefinite.⁴³ A provision in an ordinance for curbing which provides that the curbs shall be bedded on "flat stones," without specifying their character or dimensions, is insufficient in the absence of anything to show that the term "flat stones" has a definite technical meaning.⁴⁴ If, how-

³⁷ *Jacobs v. City of Chicago*, 178 Ill. 560, 53 N. E. 363 [1899]; *City of Chicago v. Sherman*, 192 Ill. 576, 61 N. E. 850 [1901].

³⁸ *City of Chicago v. Sherman*, 192 Ill. 576, 61 N. E. 850 [1901].

³⁹ *Willis v. City of Chicago*, 189 Ill. 103, 59 N. E. 543 [1901]; *Willis v. City of Chicago*, 189 Ill. 103, 59 N. E. 543 [1901]; *Fehringer v. City of Chicago*, 187 Ill. 416, 58 N. E. 303 [1900]; *Essroger v. City of Chicago*, 185 Ill. 420, 56 N. E. 1086 [1900]; *Lundberg v. City of Chicago*, 183 Ill. 572, 56 N. E. 415 [1900]; *Jarrett v. City of Chicago*, 181 Ill. 242, 54 N.

E. 946 [1899]; *Holden v. City of Chicago*, 172 Ill. 263, 50 N. E. 181 [1898].

⁴⁰ *Willis v. City of Chicago*, 189 Ill. 103, 59 N. E. 543 [1901].

⁴¹ *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824 [1900].

⁴² *Fay v. City of Chicago*, 194 Ill. 136, 62 N. E. 530 [1902]. See to the same effect *Clafin v. City of Chicago*, 178 Ill. 549, 53 N. E. 339 [1899].

⁴³ *Guyer v. City of Rock Island*, 215 Ill. 144, 74 N. E. 105 [1905].

⁴⁴ *Moll v. City of Chicago*, 194 Ill. 28, 61 N. E. 1012 [1901]; *Beach v.*

ever, the improvement has been constructed and accepted so that it is possible to tell what is meant by the term, the assessment has been upheld.⁴⁵ Failure to describe such stones, other than as "flat stones," does not render such ordinance entirely void; and a judgment of confirmation rendered thereon is not subject to collateral attack on application for a judgment of sale.⁴⁶ If it is shown that the term "flat stones" has a definite technical meaning in street paving and means limestone blocks about six inches thick and twelve to sixteen inches square, the ordinance is not indefinite.⁴⁷ If, however, there is no bill of exceptions, it will not be presumed that the trial court at confirmation heard evidence explaining the term "flat stones."⁴⁸ A provision requiring the construction of gutters "four feet wide," without further description, is insufficient.⁴⁹ A provision that the superintendent of streets may use either a class A or class B rock in certain gutters has been held to be valid, if the two kinds of rock are of the same material, differing only in density, and the cost of the two is substantially the same.⁵⁰ A provision that "culverts be constructed" in a given street,⁵¹ or that the contractor "shall put such culverts as the street superintendent shall direct" without specifying the materials of which the culverts are to be constructed, or the place where they are to be located,⁵² have each been held to be insufficient. A provision that "thirty-two lamp post connections be and are hereby ordered erected" on a designated avenue, is insufficient, where the ordinance does not state the material of

City of Chicago, 193 Ill. 369, 61 N. E. 1015 [1901]; Kelly v. City of Chicago, 193 Ill. 324, 61 N. E. 1009 [1901]; Nichols v. City of Chicago, 192 Ill. 290, 61 N. E. 435 [1901]; Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306 [1900]; Kuester v. City of Chicago, 187 Ill. 21, 58 N. E. 307 [1900]; Gage v. City of Chicago, 179 Ill. 392, 53 N. E. 742 [1899]; Davidson v. City of Chicago, 178 Ill. 582, 53 N. E. 367 [1899]; Lusk v. City of Chicago, 176 Ill. 207, 52 N. E. 54 [1898].

⁴⁵ Markley v. City of Chicago, 190 Ill. 276, 60 N. E. 512 [1901].

⁴⁶ Johnson v. People ex rel. Raymond, 189 Ill. 83, 59 N. E. 515 [1901]; Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306 [1900].

⁴⁷ Beckett v. City of Chicago, 218 Ill. 97, 75 N. E. 747 [1905]; Holden v. City of Chicago, 212 Ill. 289, 72 N. E. 435 [1904]; City of Chicago v. Holden, 194 Ill. 213, 62 N. E. 550 [1902].

⁴⁸ Kelly v. City of Chicago, 193 Ill. 324, 61 N. E. 1009 [1901]; Kuester v. City of Chicago, 187 Ill. 21, 58 N. E. 307 [1900].

⁴⁹ Piedmont Paving Company v. Allman, 136 Cal. 88, 68 Pac. 493 [1902].

⁵⁰ Lambert v. Marcuse, 137 Cal. 44, 69 Pac. 620 [1902].

⁵¹ Schwiesau v. Mahon, 128 Cal. 114, 60 Pac. 683 [1900].

⁵² Grant v. Barber, 135 Cal. 188, 67 Pac. 127 [1901].

which the lamp posts are to be constructed nor the nature of the illumination for which they are used, and where the plan to which reference is made merely shows the location of the posts by marks thereon.⁵³ An ordinance for levying an assessment for a "connected system of water-works, with the necessary reservoirs, fire hydrants and water mains," implies that the stand pipe and engine house are not included therein, and hence is not invalid for uncertainty as to whether they are included or not.⁵⁴ An ordinance which provides for laying water service pipe and does not specify their dimensions or the material of which they are to be made, is too indefinite to be enforced.⁵⁵ A description of pipes as "City of Chicago standard" is insufficient, where there is nothing to show that such standard was definitely recognized and understood.⁵⁶ If the evidence shows that the term "water pipes of the City of Chicago standard" has a well known meaning among persons engaged in constructing water supply pipe and among contractors and people engaged in the business of laying them generally, such description is sufficient.⁵⁷ The term "concrete," when used in connection with street improvements, has a well defined meaning of which the courts will take judicial notice.⁵⁸ A provision for making concrete which requires the use of "seven parts best quality of broken limestone or other stone which shall be equal in quality for concrete purposes," is sufficiently certain.⁵⁹ A provision that a certain part of a street shall be "filled" to a certain grade, has been held valid where it is shown that the term "filling" means in the business of constructing streets to raise the surface of a street by using clay, earth, sand or other material free from animal or vegetable substance.⁶⁰ If the ordinance does not specify the kind of material to be used in filling, and no reference in the ordinance is made to filling, such ordinance will not be *prima facie* invalid, but it will be presumed that no filling is necessary.⁶¹ An ordinance for the construction of a sewer must

⁵³ *Otis v. City of Chicago*, 161 Ill. 199, 43 N. E. 715 [1896].

⁵⁴ *O'Neil v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897].

⁵⁵ *Cass v. People ex rel. Kochersperger*, 166 Ill. 126, 46 N. E. 729 [1897].

⁵⁶ *McChesney v. City of Chicago*, 213 Ill. 592, 73 N. E. 368 [1905].

⁵⁷ *McChesney v. City of Chicago*, 226 Ill. 238, 80 N. E. 770 [1907].

⁵⁸ *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903].

⁵⁹ *Jones v. City of Chicago*, 213 Ill. 92, 72 N. E. 798 [1904].

⁶⁰ *Levy v. City of Chicago*, 113 Ill. 650 [1886].

⁶¹ *Givins v. City of Chicago*, 186 Ill. 399, 57 N. E. 1045 [1900].

specify the materials of which the sewer is to be constructed.⁶² Thus, an ordinance which provides for "suitable drains" is too indefinite.⁶³ An ordinance which provides that in reconstructing a sewer the materials in the old sewer shall be used in the new as far as possible, is invalid.⁶⁴ An ordinance for the construction of a sewer, which provides that for rock excavation, in addition to the price otherwise stipulated, the contractor should receive a compensation of — dollars per cubic yard, is invalid, since the price to be paid for such work is not indicated.⁶⁵ A provision that it shall be constructed of "the best bricks and cement,"⁶⁶ or that it shall be constructed of "a single ring of sewer brick" laid edgewise,⁶⁷ is sufficient. A provision that the walls of catch basins shall be eight inches thick, resting on a solid bottom of two inch oak plank, strongly spiked to cross planks firmly embedded, is sufficiently definite, although it does not state the dimensions of the cross planks, or the kind of wood of which they are to be constructed, or the material in which they are to be imbedded, or the depth to which they are to be imbedded.⁶⁸ However, an estimate which provides for sewer pipe connections is sufficient, although it does not provide for Y junctions, since any one familiar with such work would know that the connections included Y junctions.⁶⁹ An ordinance which provides for the construction of lateral sewers must show the number and general character of such laterals.⁷⁰ An ordinance for the construction of a sewer which provides for placing it at such a depth that in order to be used it must be covered to a depth of several feet, but makes no provision for the work, furnishes no data for the

⁶² *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290 [1903]; *Williamson v. Joyce*, 137 Cal. 107, 69 Pac. 854 [1902]; *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927 [1900]; *Cochran v. Village of Park Ridge*, 138 Ill. 295, 27 N. E. 939 [1893]; *Ogden v. Town of Lake View*, 121 Ill. 422, 13 N. E. 159 [1887]; *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982 [1904]; *City of St. Joseph ex rel. Danaher v. Wilshire*, 47 Mo. App. 125 [1891].

⁶³ *Fay v. Reed*, 128 Cal. 357, 60 Pac. 927 [1900].

⁶⁴ *Lake Shore and Michigan Southern Railway Company v. City of Chi-*

cago, 144 Ill. 391, 33 N. E. 602 [1893].

⁶⁵ *Lake Shore and Michigan Southern Railway Company v. City of Chicago*, 144 Ill. 391, 33 N. E. 602 [1893].

⁶⁶ *Cochran v. Village of Park Ridge*, 138 Ill. 295, 27 N. E. 939 [1893].

⁶⁷ *Peters v. City of Chicago*, 192 Ill. 437, 61 N. E. 438 [1901].

⁶⁸ *Smythe v. City of Chicago*, 197 Ill. 311, 64 N. E. 361 [1902].

⁶⁹ *Village of Oak Park v. Galt*, 231 Ill. 482, 83 N. E. 212 [1907].

⁷⁰ *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290 [1903].

estimate of the cost of covering it, and does not provide for an assessment of such cost, is invalid.⁷¹ An ordinance which provides that a sewer shall be constructed of vitrified tile pipe of a certain internal diameter is valid, although the thickness of the pipe is not specified, if there is a standard thickness for tile pipe of different diameters.⁷² Hence, an ordinance which provides that a sewer shall be constructed of five hundred seventy feet of eight inch vitrified clay pipe, forty-eight Y junctions, laid twenty-five feet apart, and one manhole, is sufficient.⁷³ An ordinance which provides for tiling but does not specify the nature of the tiles, give a description of them, or provide where they are to be placed, is invalid.⁷⁴ If an ordinance provides for constructing basins, the material of which such basins are to be constructed must be specified.⁷⁵ If an ordinance for the construction of a sewer provides for the construction of manholes, and does not specify their number or location, such ordinance is invalid.⁷⁶ An ordinance which provides for the construction of a pumping engine, boiler and foundation therefor for a sewer system, without giving any specifications from which their cost can be ascertained, is invalid.⁷⁷ A provision for the construction of a manhole without further description thereof has been held to be valid.⁷⁸ Such an ordinance has been held to be valid, where the evidence showed that "a manhole is a well understood thing usually constructed in a round form, though sometimes in a square, but that there was no material difference in the expense; and that any person at all familiar with such work could estimate their cost with reason-

⁷¹ Title Guarantee and Trust Co. v. City of Chicago, 162 Ill. 505, 44 N. E. 832 [1896].

⁷² Hynes v. City of Chicago, 175 Ill. 56, 51 N. E. 705 [1898]; Dickey v. Porter, 203 Mo. 1, 101 S. W. 586 [1907].

⁷³ City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506 [1907].

⁷⁴ Illinois Central Railroad Co. v. City of Effingham, 172 Ill. 607, 50 N. E. 103 [1898].

⁷⁵ City of St. Joseph ex rel. Danaher v. Wilshire, 47 Mo. App. 125 [1891].

⁷⁶ Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290 [1903]; McDonnell v. Gillon, 134 Cal. 329, 66 Pac. 314 [1901]; Ogden v. Town of Lake View, 121 Ill. 422, 13 N. E. 159 [1889]; Village of Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846 [1888].

⁷⁷ Village of Hyde Park v. Spencer, 118 Ill. 446, 8 N. E. 846 [1888].

⁷⁸ This result has been reached under a statute which requires the size of sewers to be specified by ordinance but does not make a similar provision for man-holes. City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713 [1892].

able certainty."⁷⁹ An ordinance which provides for the construction of a certain number of manholes and catch basins and gives their dimensions, manner of construction and material out of which they are to be constructed, is sufficiently definite, although the points at which they are to be placed is not specified,⁸⁰ or they are to be placed at such points as the engineer should direct.⁸¹ An ordinance providing for the construction of the "necessary manholes and inlets for surface drainage" has been held to be valid.⁸² A provision describing covers for catch basins as of the same size and pattern as those used in that street during a given year,⁸³ or describing the iron covers to be used on manholes as of the size and weight now used on manholes in a specified boulevard in the village,⁸⁴ is in each case sufficient. An ordinance which provides that iron covers on catch basins shall be of the same kind and pattern as those used in new work in such city in a designated year is sufficiently definite.⁸⁵ A provision requiring the construction of a flushing tank,⁸⁶ or an automatic flushing apparatus,⁸⁷ without any further description, is not sufficiently definite. Where a paving ordinance provides for "back filling," a combined curb and gutter, and gives the grade of the street, the height of the curb and provides that the filling shall be of earth four feet wide at the top of the curb and even therewith, and shall slope down at a specified rate, such ordinance is sufficiently definite.⁸⁸ Since the amount of filling can be ascertained by mathematical computation, it need not be given in cubic yards.⁸⁹ An ordinance which provides that light shall be kept burning at railroad crossings during the night, except when the moon is sufficiently bright, has been held to be sufficient.⁹⁰

⁷⁹ *Houghton v. Burnham*, 22 Wis. 289 [1867].

⁸⁰ *Walker v. People ex rel. Kochersperger*, 166 Ill. 96, 46 N. E. 761 [1897]; *Barber v. City of Chicago*, 152 Ill. 37, 38 N. E. 253 [1894]; *Rieh v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894].

⁸¹ *Village of Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327 [1899].

⁸² *City of Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92 [1888].

⁸³ *Connecticut Mut. Life Insurance Company v. City of Chicago*, 217 Ill. 352, 75 N. E. 365 [1905].

⁸⁴ *Pearce v. Village of Hyde Park*, 126 Ill. 287, 18 N. E. 824 [1890].

⁸⁵ *Lanphere v. City of Chicago*, 212 Ill. 440, 72 N. E. 426 [1904]; *Connecticut Mutual Life Insurance Company v. City of Chicago*, 217 Ill. 352, 75 N. E. 365 [1905]; *Pearce v. Village of Hyde Park*, 126 Ill. 287, 18 N. E. 824 [1890].

⁸⁶ *McDonnell v. Gillon*, 134 Cal. 329, 66 Pac. 314 [1901].

⁸⁷ *Williamson v. Joyce*, 137 Cal. 107, 69 Pac. 854 [1902].

⁸⁸ *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588 [1904].

⁸⁹ *McChesney v. City of Chicago*, 205 Ill. 611, 69 N. E. 82 [1903].

⁹⁰ *Chicago, Indianapolis & Louisville Railway Company v. City of*

§ 865. Dimensions of improvement.

It is necessary in an ordinance ordering an improvement that the size and dimensions thereof be given with such degree of certainty that the improvement can be constructed in accordance with such description.¹ It is ordinarily necessary that the length of the portion of the street which is to be paved should be given, although this may be done by describing the portion to be paved as that portion between designated intersecting streets,² unless by reason of a jog at such intersection, such description is ambiguous.³ The width of the portion of a street to be paved must be determined in the ordinance or order for such improvement.⁴ The width may be fixed by describing the road as a certain number of feet on each side of the center line of the street.⁵ If the entire width of the street is to be paved, and the width of the street is fixed by a map or plat or by an ordinance, it is not necessary in the improvement ordinance to show anything more than the entire width of the street to be paved.⁶ An ordinance requiring the construction of a sidewalk must fix the width thereof.⁷ The city council, if authorized by statute, must prescribe the width of the sidewalk to be constructed, and cannot delegate such power to the city engineer.⁸ If the space left for the sidewalk is thir-

Crawfordsville, 164 Ind. 70, 72 N. E. 1025 [1904]; (modifying *City of Shelbyville v. Cleveland*, Chicago & St. Louis Railway Company, 146 Ind. 66, 44 N. E. 929 [1896]).

¹ *Haag v. Ward*, 186 Mo. 325, 85 S. W. 311 [1904].

² *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *Brevoort v. City of Detroit*, 24 Mich. 322 [1872].

³ *Sanger v. City of Chicago*, 169 Ill. 286, 48 N. E. 309 [1897].

⁴ *Fuller v. City of Grand Rapids*, 105 Mich. 529, 63 N. W. 530 [1895]; *City of Trenton ex rel. Gardner v. Collier*, 68 Mo. App. 493 [1896]; *State, Boice, Pros. v. Inhabitants of City of Plainfield*, 38 N. J. L. (9 Vr.) 95 [1875].

⁵ *McChesney v. City of Chicago*, 201 Ill. 344, 66 N. E. 217 [1903].

⁶ *Gafney v. City and County of San Francisco*, 72 Cal. 146, 13 Pac. 467 [1887]; *Lehmers v. City of Chicago*,

178 Ill. 530, 53 N. E. 394 [1899]; *People ex rel. Kochersperger v. Markley*, 166 Ill. 48, 46 N. E. 742 [1897]; *Harrison Bros. v. City of Chicago*, 163 Ill. 129, 44 N. E. 395 [1896]; *Fuller v. City of Grand Rapids*, 105 Mich. 529, 63 N. W. 530 [1895]; *State, Boice, Pros. v. Inhabitants of the City of Plainfield*, 38 N. J. L. (9 Vr.) 95 [1875].

⁷ *Heman Construction Co. v. Loevy*, 64 Mo. App. 430 [1896].

⁸ *Heman Construction Co. v. Loevy*, 64 Mo. App. 430 [1896]; *McCrowell v. City of Bristol*, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1893]. For a case involving the construction of a statute changing the previous requirement as to the width of a sidewalk and its effect upon a prior contract, see *In the Matter of the Petition of The Mutual Life Insurance Company of New York to Vacate an Assessment*, 89 N. Y. 530 [1882].

teen feet, a provision for a five foot walk is too indefinite.⁹ A provision in an ordinance that crosswalks be built in such form as directed by the city engineer at street intersections and other points is indefinite.¹⁰ A provision that a sidewalk shall be "not less than" a certain width is too indefinite.¹¹ It is not necessary to allege that the width of a sidewalk has been established by the proper officials before the proceedings for instituting the work have begun.¹² A general ordinance fixing the width of sidewalks in streets of specified widths may be resorted to in order to show the width of the portion of the street which is to be paved.¹³ If the ordinance provides generally for paving a street, it will be presumed that the entire width of the street is to be paved,¹⁴ extending up to and not including the sidewalks.¹⁵ If the street as laid out is sixty-six feet in width and the sidewalks are each fifteen feet in width, an ordinance for paving thirty-six feet of the width of the street is not void for uncertainty, as it requires all of the street between the sidewalks to be paved.¹⁶ An ordinance which requires the grading and paving of a street, "excepting a space sixteen feet in width in the middle of the street," is sufficiently definite, since the width to be paved is the entire width of the street less the width of the sidewalks on each side and the width of the sixteen foot strip in the middle.¹⁷ An ordinance which provides for building cross walks of stone of "not less than" certain specified dimensions, is sufficiently definite.¹⁸ By statute it may be provided that the width of a street must be designated and fixed officially.¹⁹ It has been held that such designation may be sufficiently made by printing the width of the street across the

⁹ *Municipal Securities Corporation v. Gates*, — Mo. App. —, 109 S. W. 85 [1908].

¹⁰ *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897].

¹¹ *Mansfield v. People ex rel. Wells*, 164 Ill. 611, 45 N. E. 976 [1897].

¹² *Doane v. Houghton*, 75 Cal. 360, 17 Pac. 426 [1888].

¹³ *Topliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692 [1902].

¹⁴ *Topliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692 [1902]; *Dickey v. City of Chicago*, 164 Ill. 37, 45 N. E. 537 [1896]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890].

¹⁵ *Dickey v. City of Chicago*, 164 Ill. 37, 45 N. E. 537 [1896]; *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890].

¹⁶ *Chicago, Burlington & Quincy Railroad Company v. City of Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334, 27 N. E. 192 [1892].

¹⁷ *Woods v. City of Chicago*, 135 Ill. 582, 26 N. E. 608 [1891].

¹⁸ *Shannon v. Village of Hinsdale*, 180 Ill. 202, 34 N. E. 181 [1899].

¹⁹ *Gafney v. City and County of San Francisco*, 72 Cal. 146, 13 Pac. 467 [1887].

space on the official map which denotes such street, even if there is nothing to show whether such number represents miles, feet or inches, if the scale of the map shows that the number must be intended to represent feet.²⁹ If the city has by ordinance fixed the width of the street, the commissioners, to assess benefits and damages, cannot alter such width, even if erroneous.²¹

§ 866. Waiver of objections. *

Where, by statute, a provision is made for confirming assessments by proceedings in court, in which the property owners have full opportunity to be heard, a judgment of confirmation bars the objection that the ordinance is indefinite and delegates authority,¹ at least if the ordinance is not so absolutely lacking in specifications as to the nature, character, locality and description of the improvement as to be absolutely void.² Thus, confirmation cures the objection that the width of the street is not given³ or that the grade is not fixed,⁴ or that certain stones are described only as "flat stones."⁵ An objection not presented to the trial court is regarded as being waived.⁶ Unless, however, a bill of exception shows that specific objections, which might have been made under

²⁰ *Gafney v. City and County of San Francisco*, 72 Cal. 146, 13 Pac. 467 [1887].

²¹ *County of Jefferson v. City of Mt. Vernon*, 145 Ill. 80, 33 N. E. 1091 [1893].

¹ *People ex rel. Price v. Wiemers*, 225 Ill. 17, 80 N. E. 45 [1907]; *People ex rel. Russell v. Colegrove*, 218 Ill. 545, 75 N. E. 991 [1905]; *People ex rel. Russel v. Brown*, 218 Ill. 375, 75 N. E. 989 [1905]; *Perry v. People ex rel. Hanberg*, 206 Ill. 334, 69 N. E. 63 [1903]; *Johnson v. People ex rel. Raymond*, 189 Ill. 83, 59 N. E. 515 [1901]; *Blount v. People ex rel. Raymond*, 188 Ill. 538, 59 N. E. 241 [1901]; *Gross v. People ex rel. Kochersperger*, 172 Ill. 571, 50 N. E. 334 [1898]; *Walker v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694 [1897]; *People ex rel. Kochersperger v. Lingle*, 165 Ill. 65, 46 N. E. 10 [1897].

² *People ex rel. Price v. Wiemers*, 225 Ill. 17, 80 N. E. 45 [1907];

Johnson v. People ex rel. Raymond, 189 Ill. 83, 59 N. E. 515 [1901]; *Blount v. People ex rel. Raymond*, 188 Ill. 538, 59 N. E. 241 [1901]; *Gross v. People ex rel. Kochersperger*, 172 Ill. 571, 50 N. E. 334 [1898]; *Walker v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694 [1897].

³ *Perry v. People ex rel. Hanberg*, 206 Ill. 334, 69 N. E. 63 [1903].

⁴ *Shepard v. People ex rel. Raymond*, 200 Ill. 508, 65 N. E. 1068 [1903].

⁵ *Johnson v. People ex rel. Raymond*, 189 Ill. 83, 59 N. E. 515 [1901]; *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306 [1900]; *People ex rel. Kochersperger v. Warneke*, 173 Ill. 40, 50 N. E. 221 [1898]; *City of Alton v. Middleton's Heirs*, 158 Ill. 442, 41 N. E. 926 [1895].

⁶ *Close v. City of Chicago*, 217 Ill. 216, 75 N. E. 479 [1905]; *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903].

the general objection filed, are not presented to the trial court, it will be presumed that every objection which might have been offered under such general objection was offered.⁷ Performance which defines the improvement for which the assessment is to be levied cures some of these objections,⁸ such as failure to define the meaning of "flat stones,"⁹ or a delegation of power to an inferior board to choose between different kinds of material.¹⁰ The objection that the ordinance is not sufficiently definite can be raised only by a party in some way affected thereby.¹¹ Accordingly, if the description of a part of the improvement contemplated is indefinite, but no assessment is levied therefor, a property owner who is assessed for that part of the improvement which is definitely described, cannot object on the ground of the indefiniteness of such description.¹²

§ 867. Delegation of authority to inferior agent.

If the legislature has, by statute, conferred certain power, such as the power to determine the nature and character of a proposed public improvement, upon a designated set of officials, such officials cannot, in the absence of a statutory provision expressly authorizing them so to do, delegate the exercise of such discretionary power to another official or set of officials.¹ Thus, if, by statute, power is given to a certain public body, such as the city council, to determine the nature and character of proposed improvements, such official or body cannot delegate to a subordinate

⁷ *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903].

⁸ *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512 [1901]; *Emmert v. Elyria*, 27 Ohio C. C. R. 353 [1905].

⁹ *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512 [1901].

¹⁰ *Emmert v. Elyria*, 27 Ohio C. C. R. 353 [1905].

¹¹ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901].

¹² *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901].

¹ *Chase v. Scheerer*, 136 Cal. 248, 68 Pac. 768 [1902]; *Grant v. Barber*, 135 Cal. 188, 67 Pac. 127 [1901]; *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *Smith v. Duncan*, 77 Ind. 92 [1881]; *Zable v.*

Louisville Baptist Orphans' Home, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891]; *Moale v. Mayor, etc., of Baltimore*, 61 Md. 224 [1883]; *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391 [1904]; *Heman Construction Co. v. Loevy*, 64 Mo. App. 430 [1895]; *Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705 [1884]; *City of St. Joseph ex rel. Danaher v. Wilshire*, 47 Mo. App. 125 [1891]; *Thompson v. Schemerhorn*, 6 N. Y. 92, 55 Am. Dec. 385 [1851]; *McCrowell v. City of Bristol*, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1892]; *Lisbon Avenue Land Co. v. Town of Lake*, — Wis. —, 113 N. W. 1099 [1907]; *Wells v. Burnham*, 20 Wis. 112 [1865].

officer the power to determine such questions.² Thus, the officers authorized to determine the nature and character of a public improvement and to levy assessments therefor cannot delegate to a subordinate officer, not expressly authorized by statute, the right to determine what material shall be used in the public improvement,³ or what the general character of such improvement shall be,⁴ or how much work shall be done thereon,⁵ or the grade of a street,⁶ or the width of the sidewalk,⁷ or the direction and distance of a drain,⁸ or the grade of the street.⁹ Thus, if the council

² Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768 [1902]; Grant v. Barber, 135 Cal. 188, 67 Pac. 127 [1901]; Chase v. City Treasurer of Los Angeles, 122 Cal. 540, 55 Pac. 414 [1898]; Stansbury v. White, 121 Cal. 433, 53 Pac. 940 [1898]; N. P. Perine Contracting & Paving Company v. Pasadena, 116 Cal. 6, 47 Pac. 777 [1897]; People ex rel. Talbot Paving Company v. City of Pontiac, 185 Ill. 437, 56 N. E. 114 [1900]; People ex rel. Kochersperger v. Warneke, 173 Ill. 40, 50 N. E. 221 [1898]; Bradford v. City of Pontiac, 165 Ill. 612, 46 N. E. 794 [1897]; Smith v. Duncan, 77 Ind. 92 [1881]; Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891]; Murray v. Tucker, 73 Ky. (10 Bush.) 241 [1874]; Hydes & Goose v. Joyce, 67 Ky. (4 Bush.) 464, 96 Am. Dec. 311 [1868]; Haag v. Ward, 186 Mo. 325, 85 S. W. 391 [1904]; Heman Construction Company v. Loevy, 64 Mo. App. 430 [1895]; City of St. Joseph ex rel. Danaher v. Wilshire, 47 Mo. App. 125 [1891]; Thompson v. Schemerhorn, 6 N. Y. 92, 55 Am. Dec. 385 [1851]; Phelps v. Mayor, Aldermen and Commonalty of the City of New York, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408 [1888]; Bennison v. City of Galveston, 18 Tex. Civ. App. 20, 44 S. W. 613 [1898]; McCrowell v. City of Bristol, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1892].

³ Stansbury v. White, 121 Cal. 433, 53 Pac. 940 [1898]; N. P. Perine Contracting and Paving Company v.

City of Pasadena, 116 Cal. 6, 47 Pac. 777 [1897]; King Hill Brick Co. v. Hamilton, 51 Mo. App. 120 [1892].

⁴ People ex rel. Talbot Paving Co. v. City of Pontiac, 185 Ill. 437, 56 N. E. 114 [1900]; Heman Construction Company v. Loevy, 64 Mo. App. 430 [1896].

⁵ Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768 [1902]; Grant v. Barber, 135 Cal. 188, 67 Pac. 127 [1901]; Stansbury v. White, 121 Cal. 433, 53 Pac. 940 [1898]; Cross v. Zane, 47 Cal. 602 [1874]; Randolph v. Gawley, 47 Cal. 458 [1874]; People of the City and County of San Francisco v. Clark, 47 Cal. 456 [1874]; Bradford v. City of Pontiac, 165 Ill. 612, 46 N. E. 794 [1897]; Jenks v. City of Chicago, 56 Ill. 397 [1870]; Haag v. Ward, 186 Mo. 325, 85 S. W. 391 [1904]; Thompson v. Schemerhorn, 6 N. Y. 92, 35 Am. Dec. 385 [1851].

⁶ County of De Witt v. City of Clinton, 194 Ill. 521, 62 N. E. 780 [1902]; *contra*, State, Parker, Pros. v. Mayor, etc., of the City of New Brunswick, 30 N. J. L. (1 Vr.) 395 [1863].

⁷ Heman Construction Company v. Loevy, 64 Mo. App. 430 [1896]; McCrowell v. City of Bristol, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1892].

⁸ Frost v. Leatherman, 55 Mich. 33, 20 N. W. 705 [1884].

⁹ Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891]; *contra*, Lake v. City of Decatur, 91 Ill. 596 [1879].

has power to require property owners to construct sidewalks in front of their lots, it cannot delegate such power to a committee.¹⁰ If, however, the action of a committee¹¹ or other subordinate public official to whom power has been delegated by the council,¹² is subsequently ratified by the council, such ratification is ordinarily regarded as making the entire transaction the act of the council, and hence a substantial compliance with the statute. If power is delegated to the superintendent of streets to determine the amount of certain materials to be used, so that bidders cannot determine in advance the cost of the work, such provision renders the contract and the assessment based thereon invalid.¹³ Neither can such officials delegate to a subordinate public officer the power to determine whether to let the contract on competitive bidding or not,¹⁴ nor can it delegate authority to advertise for bids, except in specific cases under the authority of statute.¹⁵ The body which is empowered to levy the assessment cannot delegate to a subordinate officer the power to make such levy.¹⁶ Thus, if a council has power to levy an assessment by ordinance it can not by resolution delegate the power to the clerk to make such assessment.¹⁷ However, the fact that a subordinate computes the amount of a tax bill, which is signed by the officer who is authorized by statute, does not amount to a delegation of power.¹⁸ An improvement ordinance which provides that it shall not take effect until certain cases growing out of similar improvements have been dismissed, does not amount to a delegation of power to the courts to determine the character of the improvement.¹⁹ Since

¹⁰ *Whyte v. Mayor and Aldermen of Nashville*, 2 Swan. (32 Tenn.) 364 [1852].

¹¹ *Main v. Fort Smith*, 49 Ark. 480. 5 S. W. 801 [1887].

¹² *Bassett v. City of New Haven*, 76 Conn. 70, 55 Atl. 579 [1903].

¹³ *California Improvement Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802 [1898].

¹⁴ *Phelps v. Mayor, Aldermen and Commonalty of the City of New York*, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408 [1889]; *In the Matter of Petition of Emigrant Industrial Savings Bank*, 75 N. Y. 388 [1878]; *In the Matter of the Petition of the Trustees of the Presbytery of New*

York, 57 Howard (N. Y.) 500 [1879]; *In the Matter of the Petition of the Trustees of the Presbytery of New York*, 9 Daly (N. Y.) 116 [1879].

¹⁵ *Meuser v. Risdon*, 36 Cal. 239 [1868].

¹⁶ *City of Sedalia to use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 89 S. W. 386 [1905].

¹⁷ *City of Nevada to use of Gilfillan v. Eddy*, 123 Mo. 546, 27 S. W. 471 [1894].

¹⁸ *Heman Construction Company v. Loevy*, 179 Mo. 455, 78 S. W. 613 [1904].

¹⁹ *Mayor and City Council of Baltimore v. Clunet*, 23 Md. 449 [1865].

the legislature might have authorized the council or other board of public officers to delegate their power to specify subordinate officers,²⁰ the legislature may prescribe the effect of such unauthorized delegation of power.²¹ Thus, under a statute providing that no error in the proceedings of a city council shall exempt the property owner from paying the assessment after the work has been done in accordance with the contract, a property owner can not defend against an assessment on the grounds that the council has delegated to a committee or to a subordinate officer matters it should have determined itself.²² It is proper, however, especially under specific statutory authority, to allow the engineer or superintendent of improvements or other corresponding officer to determine whether the materials used in the work are, in fact, such as have been ordered and contracted for.²³ It is proper to allow such officer to determine when the work shall be begun and performed.²⁴ Where, however, time is of the essence of the contract, it has been said that the engineer cannot be given authority to extend the time of performance.²⁵ A provision giving him such power, however, does not destroy the right to an extension which might exist otherwise,²⁶ as by the act of the city in constructing a culvert across the street to be improved.²⁷ Even if time is material, it has been held proper to authorize the engineer to determine when the work should be done.²⁸ A subordinate officer can not be authorized to determine where the work is to be done, since this involves the exercise of discretion as to the nature and character of the work.²⁹ Thus, the proper board cannot decide that work is to be done upon the street somewhere between two designated points and then leave it to the superintendent of streets to

²⁰ See § 273 *et seq.*

²¹ *Noland v. Mildenger*, — Ky. 97 S. W. 24 [1906].

²² *Noland v. Mildenger*, — Ky. 97 S. W. 24 [1906].

²³ *Taylor v. Palmer*, 31 Cal. 240 [1866]; *The Jacksonville Railway Company v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886]; *Gilsonite Construction Co. v. Arkansas McAlester Coal Co.*, 205 Mo. 49, 103 S. W. 93 [1907]; *In the Matter of the Fifth Avenue Sewer in the City of Pittsburgh*, 4 Brewster (Pa.) 364 [1870].

²⁴ *McChesney v. City of Chicago*, 152 Ill. 543, 38 N. E. 767 [1894].

²⁵ *Childers v. Holmes*, 95 Mo. App. 154, 68 S. W. 1046 [1902]; *McQuiddy v. Brannock*, 70 Mo. App. 535 [1897].

²⁶ *Sparks v. Villa Rosa Land Co.*, 99 Mo. App. 489, 74 S. W. 120 [1903].

²⁷ *Sparks v. Villa Rosa Land Co.*, 99 Mo. App. 489, 74 S. W. 120 [1903].

²⁸ *Strassheim v. Jerman*, 56 Mo. 104 [1874].

²⁹ *Richardson v. Hydenfeldt*, 46 Cal. 68 [1873].

determine where such work is to be done.³⁰ If, by statute, the council is to pass upon the nature and character of the improvement and the board of public works is to attend to the construction thereof, an ordinance which attempts to leave to such board a discretion in determining the nature and character of the particular improvement is invalid.³¹ It may be provided by statute that the council may delegate to some subordinate officer, power to determine certain questions under general rules laid down by the council.³² If, however, the statute provides that "the city council may by ordinance prescribe general rules" of this sort, such statute is permissible merely and council may, if it sees fit, make specific provision in the case of each separate improvement.³³ The fact that power which may be conferred upon a given officer is exercised by a substitute acting as such officer who is a *de facto* officer at least, does not invalidate the assessment.³⁴ Minor details may be left to a subordinate officer,³⁵ such as determining the radius of the curve of curb stones at street corners,³⁶ or the location of manholes and catch basins,³⁷ or, in some states, what repairs are necessary.³⁸ Under many statutes, a wider range of discretion in delegating power is permitted than has been indicated by the foregoing authorities.³⁹ An ordinance which defines the width of a street and leaves it to the engineer to locate it within the limits of the street as laid out has been upheld.⁴⁰ Under such grant of power, the engineer may locate the paved way upon one side of the center of the street as laid out.⁴¹ A provision that the

³⁰ Richardson v. Heydenfeldt, 46 Cal. 68 [1873].

³¹ People ex rel. Kochersperger v. Hurford, 167 Ill. 226, 47 N. E. 368 [1897]; Cass v. People ex rel. Kochersperger, 166 Ill. 126, 46 N. E. 729 [1897]; Walker v. City of Chicago, 62 Ill. 286 [1871]; Workman v. City of Chicago, 61 Ill. 463 [1871].

³² Santa Cruz Rock Pavement Co. v. Heaton, 105 Cal. 162, 38 Pac. 693 [1894].

³³ Santa Cruz Rock Pavement Co. v. Heaton, 105 Cal. 162, 38 Pac. 693 [1894].

³⁴ Akers v. Kolkmeier & Company, 97 Mo. App. 520, 71 S. W. 536 [1903].

³⁵ Whitworth v. Webb City, 204 Mo. 579, 103 S. W. 86 [1907]; Swift v.

City of St. Louis, 180 Mo. 80, 79 S. W. 172 [1904].

³⁶ Guyer v. City of Rock Island, 215 Ill. 144, 74 N. E. 105 [1905].

³⁷ Barber v. City of Chicago, 152 Ill. 37, 38 N. E. 253 [1894]; Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894]; City of Springfield v. Mathus, 124 Ill. 88, 16 N. E. 92.

³⁸ Covington v. Boyle, 6 Bush. (69 Ky.) 204 [1869].

³⁹ State of Missouri ex rel. Caven-der v. City of St. Louis, 56 Mo. 277 [1874].

⁴⁰ Nevin v. Roach, etc. (Watson, etc. v. Nevin), 86 Ky. 492, 5 S. W. 546 [1887].

⁴¹ Nevin v. Roach, 86 Ky. 492, 5 S. W. 546 [1887].

contractor shall do extra work as the street commissioner should direct, at a price to be fixed by such commissioner, does not invalidate the ordinance.⁴² An ordinance authorizing the street commissioner to have a specified street "graded, paved and curbed" between two specified points has been held valid, though it does not specify the method of constructing such improvement.⁴³ Thus, a subordinate officer may fix the grade of the street.⁴⁴ Under many statutes, council may provide for doing a maximum amount of work and leave it to some subordinate officer, such as a city engineer, street superintendent or special board, to determine how much of the work as ordered should, in fact, be done.⁴⁵ Where it is practically impossible to determine in advance the amount of certain kinds of work which must be done, it has been held proper to leave some designated officer, such as the city engineer, power to determine how much work shall be done.⁴⁶ Thus, where the amount of wood sheeting to be used in a sewer cannot be determined in advance, a provision that the engineer should direct how much should be left in the improvement when it was filled in, and that one dollar per lineal foot should be paid therefor, did not invalidate the assessment.⁴⁷ Under a statute providing that public improvements of certain kinds "must, in all cases, be done under the directorship and to the satisfaction of the superintendent of streets," it has been held proper to provide, with reference to an excavation for a sewer, that, "when the ground does not afford a sufficiently solid foundation the contractor shall excavate the trench to such increased depth as the street superintendent may decide to be necessary, and shall then bring it up to the required level and form, with such material and in such manner as the street superintendent may direct."⁴⁸ Under some statutes power to levy an assessment may be conferred upon some subordinate officer, such as the engineer.⁴⁹ This has

⁴² *Allen v. Rogers*, 20 Mo. App. 290 [1886].

⁴³ *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883].

⁴⁴ *State, Parker, Pros. v. Mayor, etc., of the City of New Brunswick*, 30 N. J. L. (1 Vr.) 395 [1863].

⁴⁵ *Oakland Paving Co. v. Rier*, 52 Cal. 270 [1877]; *In the Matter of the Petition of Eager*, 46 N. Y. 100 [1871]; *Matter of Eager*, 12 Abb. Pr. 151 [1871].

⁴⁶ *Haughawout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078 [1901]; *City of Cincinnati v. Anchor White Lead Co.*, 44 O. S. 243, 7 N. E. 11.

⁴⁷ *City of Cincinnati v. Anchor White Lead Co.*, 44 O. S. 243, 7 N. E. 11.

⁴⁸ *Haughawout v. Hubbard*, 131 Cal. 675, 63 Pac. 1078 [1901].

⁴⁹ *Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971 [1900]; *Keese v. City of Denver*, 10 Colo. 112, 15 Pac. 825 [1887].

been held to be true, especially where, under the statute and ordinance, the assessment was to be made by an arbitrary mathematical calculation, and no discretion was to be exercised in making the same.⁵⁰ If, by statute, a given officer is authorized to make an assessment, it is not necessary that the council should attempt by ordinance to make such assessment or to confer power upon such officer.⁵¹ An ordinance authorizing the contractor to collect the assessments out of which he is to be paid, has been held to be valid.⁵² It is not a delegation of municipal power within the meaning of the constitutional provision forbidding such delegation.⁵³

§ 868. Ratification of act of inferior agent.

The officer or body of officers who might, in the first instance, have performed a given act with reference to a public improvement, may ordinarily adopt the acts of subordinate officers to whom power has been delegated improperly, and, by such adoption and ratification, make them their own.¹ Thus, a re-assessment is valid, though the material to be used was not determined in advance.² A provision of an ordinance requiring an officer to be appointed to superintend the paving provided for by the ordinance, is one which may be waived by the city.³ Omission to appoint such officer is therefore no defense to the assessment.⁴

§ 869. Construction as to description of improvement.

What is comprehended by the general terms of description used in ordinances and resolutions, depends upon the intention of the city council as deduced from the language employed. An order to improve a street does not include work to be done upon a side-

⁵⁰ *City of Harrisburg v. Shepler*, 190 Pa. St. 374, 42 Atl. 893 [1899].

⁵¹ *Schenley v. Commonwealth for the use of the City of Allegheny*, 36 Pa. St. (12 Casey) 29 [1859].

⁵² *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309 [1901].

⁵³ *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309 [1901].

¹ *Main v. Fort Smith*, 49 Ark. 480, 5 S. W. 801 [1887]; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886]; *Sears v. Board of Aldermen*

of Boston, 173 Mass. 71, 43 L. R. A. 834, 53 N. E. 138; *Naegly v. City of Saginaw*, 101 Mich. 532, 60 N. W. 46 [1894]; *Davies v. City of Saginaw*, 87 Mich. 439, 49 N. W. 367 [1891]; *Whitworth v. Webb City*, 204 Mo. 579, 103 S. W. 86 [1907].

² *Tuttle v. Polk*, 84 Ia. 12, 50 N. W. 38 [1891].

³ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853].

⁴ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853].

walk.¹ Macadamizing a street has been said not to include curbing.² An order for paving a street has, on the other hand, been said to include curbing and guttering necessarily.³ An ordinance for grading a street has been held to authorize an improvement which consists of grading, grubbing, guttering and curbing.⁴

§ 870. Combination of improvements in ordinance.

In the absence of a statute specifically forbidding it, an ordinance may provide for the construction of several improvements.¹ The improvements may be so related as to be a part of a general scheme of improvement.² The different improvements may, on the other hand, be distinct and separate improvements, such as separate streets.³

§ 871. Necessity of fixing time of performance by ordinance.

Where the time of performance of a public contract is regarded as of the essence of the contract, an ordinance is not invalid because it does not fix the time of performance, unless the statute specifically requires the time of performance to be fixed.¹ A reasonable time of performance will be implied in such cases. If the statute requires the time of performance to be fixed, it is sufficient if the time of commencing and performing the contract are fixed, as each within a certain number of days from the time of making the contract.² If time is of the essence of the contract, the time as fixed is mandatory, and if the contract is not performed within such time, an assessment therefor will be invalid.³

§ 872. Determination of necessity and benefits by ordinance.

The public corporation by which the improvement is to be constructed, is often empowered to determine the question of the

¹ *Dyer v. Chase*, 52 Cal. 440 [1877]; *Himmelman v. Satterlee*, 50 Cal. 68 [1875].

² *Beaudry v. Valdez*, 32 Cal. 269 [1867].

³ *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

⁴ *City of Spokane v. Brown*, 8 Wash. 317, 36 Pac. 26 [1894].

¹ *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Lynch v. City of Kansas City*, 44 Kan. 452, 24 Pac. 973 [1890].

² *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Lyne v. City of Kansas City*, 44 Kan. 452, 24 Pac. 973 [1890].

³ *Wilbur v. City of Springfield*, 123 Ill. 395, 14 N. E. 871 [1889].

⁴ *Carlin v. Cavender*, 56 Mo. 286 [1874]; *Strassheim v. Jerman*, 56 Mo. 104 [1874]; *Ayers v. Schmohl*, 86 Mo. App. 349 [1900].

¹ *Williams v. Bergen*, 127 Cal. 576, 60 Pac. 164 [1900]; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920 [1899].

² *Rose v. Trestrail*, 62 Mo. App. 352 [1895].

necessity of the improvement for which the assessment is to be levied. A passage of an ordinance providing for an improvement is ordinarily equivalent in legal effect to a determination that such an improvement is necessary, as it cannot be presumed that the public corporation would order the improvement unless it found that it was necessary.¹ If, however, two or more methods of procedure are permissible, one of which is to be resorted to only upon a finding of the necessity of the improvement, an express finding of necessity is necessary. Under a statute, however, which authorizes a city council to provide for opening streets whenever in its opinion the public good might require it, without a petition of the property owners, and without the right of the property owners to interfere with such improvement by remonstrance, it has been held to be necessary that the council make an express finding that the public good requires such improvement.² In the absence of a statute expressly providing therefor, it is not necessary that the ordinance set forth an express finding by the council that the contemplated improvement will be beneficial to the property upon which the assessment is to be levied, since the very fact of levying an assessment shows that council looks upon such property as benefited.³ Under a statute, however, which provides for apportioning an assessment according to benefits, an apportionment according to frontage without any finding as to the expense or apportionment of benefits has been held to be invalid.⁴ Under a statute which provides that an improvement is not to be made unless the benefits therefrom equal or exceed the cost thereof, the act of the council in ordering an improvement of this class has been held to be equivalent to a finding that the cost would not exceed the benefits.⁵ Under such a statute, how-

¹ Williams v. Mayor of Detroit, 2 Mich. 560 [1853]; Kiley v. Forsee, 57 Mo. 390 [1874]; Young v. City of St. Louis, 47 Mo. 492 [1871]; Eyermann v. Blakesley, 9 Mo. App. 231 [1880]; Strowbridge v. City of Portland, 8 Or. 67 [1879]. See § 832.

² State, Northern Railroad Co. of New Jersey, Pros. v. Englewood, 62 N. J. L. (33 Vr.) 188, 40 Atl. Rep. 653 [1898].

³ Dann v. Woodruff, 51 Conn. 203 [1883]; Graham v. City of Chicago, 187 Ill. 411, 58 N. E. 393 [1900];

Middaugh v. City of Chicago, 187 Ill. 230, 58 N. E. 459 [1900]; Culver v. City of Chicago, 171 Ill. 399, 49 N. E. 573 [1898]; Lightner v. City of Peoria, 150 Ill. 80, 37 N. E. 69 [1894]; Crawford v. The People ex rel. Rumsey, 83 Ill. 557 [1876]; Miller v. Anheuser, 2 Mo. App. 168 [1876]; Connor v. City of Paris, 87 Tex. 32, 27 S. W. 88 [1894].

⁴ State ex rel. Moore v. Mayor and Common Council of Ashland, 88 Wis. 599, 60 N. W. 1001 [1894].

⁵ Cook v. Slocum, 27 Minn. 509, 8 N. W. 755 [1881].

ever, a modification in the nature of the improvement made after the resolution for the improvement was adopted, without any new finding, as to the relation between the benefits and the cost of the improvement, was held to make the assessment invalid.⁶

§ 873. Determination to proceed on assessment plan.

If the city or other public corporation has a choice of methods of paying for the cost of the contemplated improvement, one of which is by local assessment, it must show affirmatively its intention to construct such improvement by local assessment.¹ In the absence of such affirmative showing, it will be presumed that the improvement is to be constructed by general taxation. If the public corporation constructing the improvement has the right to pay for the same by general taxation or by local assessment, as it may think best, and the work is constructed under circumstances which do not show affirmatively an intention to pay therefor by local assessment, the public corporation cannot subsequently levy an assessment for the cost of such improvement.² Where a local assessment can be levied only if the council finds that, in its opinion, the condition of the public treasury is such that the cost of the improvement need not be paid out of the general funds, an improvement constructed without such finding cannot be paid for by local assessment.³ If the city has no choice in its method

⁶ *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907].

¹ *Dolese v. McDougall*, 78 Ill. App. 629 [1897]; *Brown v. Mayor and Aldermen of Fitchburg*, 128 Mass. 282 [1880]; *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088 [1898]; *City of Sedalia to the use of Taylor v. Abell*, 103 Mo. App. 431, 76 S. W. 497 [1903]; *City of Carthage ex rel. Carthage National Bank v. Badgley*, 73 Mo. App. 123 [1897]; *City of Poplar Bluff to use of Wheeler v. Hoag*, 62 Mo. App. 672 [1895]; *Hunter v. Freeman*, 51 O. S. 574 [1894]; *Hunter v. Earl*, 51 O. S. 573 [1894].

² *Connecticut Mutual Life Insurance Company v. City of Chicago*, 185 Ill. 148, 56 N. E. 1071 [1900]; *Pells v. City of Paxton*, 176 Ill. 318, 52 N. E. 64 [1898]; *The City of East St. Louis v. Albrecht*, 150 Ill. 506, 37 N.

E. 534 [1894]; *Weld v. The People ex rel. Kern*, 149 Ill. 257, 36 N. E. 1006 [1894]; *The City of Carlyle v. County of Clinton*, 140 Ill. 512, 30 N. E. 782 [1893]; *City of Alton v. Foster*, 74 Ill. App. 511 [1897]; *Independent School District of Burlington v. City of Burlington*, 60 Ia. 500, 15 N. W. Rep. 295 [1883]; *Second Municipality of New Orleans v. Botts*, 8 Robinson (La.) 198 [1844]; *City of Greenville v. Harvie*, 79 Miss. 754, 31 So. 425 [1901].

³ *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088 [1898]; *City of Sedalia to the use of Taylor v. Abell*, 103 Mo. App. 431, 76 S. W. 497 [1903]; *City of Carthage ex rel. Carthage National Bank v. Badgley*, 73 Mo. App. 123 [1897]; *City of Poplar Bluff to use of Wheeler v. Hoag*, 62 Mo. App. 672 [1895]. That such statute is constitutional see

of paying for such improvement, but is restricted to local assessment only, the ordinance need not show affirmatively the intention of the city to levy a local assessment therefor, since no other method of paying the cost of the improvement can be presumed.⁴ If, by statute, an assessment is a personal liability of the land owner, no steps are necessary to impose such liability further than those necessary to a valid assessment.⁵ The fact that the city has paid for an improvement in advance or has provided a means for making such payment, does not show that the city does not intend to levy a local assessment therefor.⁶ Such a method of securing payment is compatible with the subsequent levy of an assessment to reimburse the city for the amount thus expended.

§ 874. Determination of assessment district.

The power of fixing an assessment district is frequently conferred by statute upon the council of the public corporation, by which the improvement is to be constructed, or some body corresponding thereto.¹ Under such statutes the assessment district must be fixed by ordinance.² The act of the city council in submitting to the electors of the city a proposition to issue bonds for the expense of paying a certain part of a given street by a resolution in which it is stated that the owners of property abutting on such portion of the street are to pay a specified part of the cost of the improvement, does not render the assessment invalid, since the assessment district is not defined by the electors of the city,

City of Sedalia *ex rel.* Taylor v. Smith, 206 Mo. 346, 104 S. W. 15 [1907].

⁴City of Joplin *ex rel.* Carthage Dimension & Flag Stone Co. v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506 [1907].

⁵Bennison v. City of Galveston, 18 Tex. Civ. App. 20, 44 S. W. 613 [1898].

⁶Sweet v. West Chicago Park Commissioners, 177 Ill. 492, 53 N. E. 74 [1899]; Tucker v. Sellers, 130 Ind. 514, 30 N. E. 531 [1891]; Burns v. City of Duluth, 96 Minn. 104, 104 N. W. 714 [1905]; State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark, 48 N. J. L. (19 Vr.) 101, 2 Atl. 627 [1886];

In the Matter of Roberts, 81 N. Y. 62 [1880]; Wetmore v. Campbell, 4 N. Y. Sup. Ct. 341 [1849]; *In re* Beechwood Avenue, Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899].

¹O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020 [1904]. See § 555.

²State *ex rel.* Keith v. Common Council of Michigan City, 138 Ind. 455, 37 N. E. 1041 [1894]; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204 [1895]; Whitney v. Common Council of Village of Hudson, 69 Mich. 189, 37 N. W. 184 [1888]; In the Matter of Ford, 6 Lansing, 92 [1871]; Savage v. City of Buffalo, 59 Hun. 606, 14 N. Y. Supp. 101 [1891].

but by the subsequent action of the council.³ A general description of the property embraced in an assessment district is sufficient.⁴ It has been said that any description which would be sufficiently certain in a conveyance is sufficiently certain as a description of an assessment district.⁵ An assessment district may be described as consisting of the lots or tracts of land fronting upon the improvement.⁶ If the depth to which property may be assessed is fixed by statute, it is not necessary that the council should fix such depth by ordinance.⁷ In the absence of some statutory provision requiring it, it is not necessary that the improvement district should be described by exterior boundaries.⁸

§ 875. Other matters as to which ordinance is necessary.

If the method of apportionment of an assessment is not fixed by statute, but is to be determined by council, such method of apportionment should be made by the ordinance.¹ If provision for apportionment is made by general ordinance, it is not necessary that such provision as to apportionment should be repeated in a subsequent resolution for the construction of an improvement.² If, by statute, it is made necessary to advertise for bids, it is not necessary that the improvement ordinance should contain a provision requiring advertisement for bids.³ In the absence of such provision in the improvement ordinance, advertisement in compliance with the statute is sufficient.⁴ An assessment cannot be enforced unless it is levied by ordinance.⁵ An ordinance providing that property owners may obtain an order for the improvement of streets, to be paid for by special tax bills, does not operate

³ *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895].

⁴ *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902].

⁵ *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902].

⁶ *City of Kalamazoo v. Francoise*, 115 Mich. 554, 73 N. W. 801 [1898]; *Bell v. City of Yonkers*, 78 Hun, 196, 28 N. Y. S. 947 [1894].

⁷ *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

⁸ *Field v. City of Chicago*, 198 Ill.

224, 64 N. E. 840 [1902]; (distinguishing *Yaggy v. City of Chicago*, 194 Ill. 88, 62 N. E. 316 [1901]).

¹ *Birket v. City of Peoria*, 185 Ill. 369, 57 N. E. 30 [1900]; *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889].

² *City of Charton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

³ *Bambrick v. Campbell*, 37 Mo. App. 460 [1889].

⁴ *Bambrick v. Campbell*, 37 Mo. App. 460 [1889].

⁵ *The Town of Trenton v. Coyle*, 107 Mo. 193, 17 S. W. 643 [1891]; *Hall v. Moore*, 3 Neb. Unoff. 574, 92 N. W. 294 [1902].

as the levy of an assessment.⁶ If no levy has, in fact, been made, certifying the expense of the improvement and extending it as a tax upon certain land does not render the assessment valid.⁷

§ 876. Other questions which may be determined by ordinance.

The council may fix the rule of apportionment according to which the assessment is to be levied, without making a specific finding as to the exact amount for which each tract is to be assessed.¹ The council must fix the amount to be raised by assessment or fix the data by means of which the amount to be raised can readily be computed.² If the duties of the commissioners or assessors are fixed by statute, the ordinance need not prescribe their duties, since, in such cases, an ordinance would be a repetition of the statute.³

§ 877. Assessment ordinance.

Under many systems of procedure, in levying a local assessment, an assessment ordinance whereby the assessment is levied is provided for in addition to the improvement ordinance whereby the improvement is provided for. To levy a local assessment or a special tax is to charge upon the person or the property upon which such tax may be imposed the sum of money ascertained as the proportion of the entire assessment which should be charged upon such person or property.¹ An ordinance which merely provides that a street improvement is to be paid for by special tax bills is, therefore, not a levy.² Under statutes which provide for an assessment ordinance, it is necessary that an ordinance should

⁶The Town of Trenton v. Coyle, 107 Mo. 193, 17 S. W. 643 [1891].

⁷Hall v. Moore, 3 Neb. Unoff. 574, 92 N. W. 294 [1902].

¹Dittoe v. City of Davenport, 74 Ia. 66, 36 N. W. 895 [1887].

²Spalding v. City and County of Denver, 33 Colo. 172, 80 Pac. 126 [1905]; Ronan v. People ex rel. Shafter, 193 Ill. 361, 61 N. E. 1042 [1901]. Kuehner v. The City of Freeport, 143 Ill. 92, 17 L. R. A. 774, 32 N. E. 372 [1893]; Kimble v. City of Peoria, 140 Ill. 157, 29 N. E. 723 [1893]; City of Sterling v. Galt, 117 Ill. 11, 7 N. E. 471 [1887]. "Where the cost of a local improvement is

to be raised, in whole or in part, by special taxation, the ordinance itself must either state the sum or give the data by which the commissioners can fix the amount to be raised, and when so fixed or raised in conformity with the ordinance, it is conclusive on the property owners." City of Sterling v. Galt, 117 Ill. 11, 7 N. E. 471 [1887].

³In the Matter of Beekman, 31 Howard, 16 [1865].

¹City of Westport v. Whiting, 62 Mo. App. 647 [1895].

²City of Westport v. Whiting, 62 Mo. App. 647 [1895].

be passed which levies the assessment or the special tax in question.³ In the absence of such an assessment ordinance no assessment exists, even though the work has been ordered and the improvement has been constructed and accepted. If the council has power to levy an assessment by ordinance, it cannot do so by resolution.⁴ An ordinance which provides that a certain proportion of the cost of the improvement should be paid by the city, and that "the remainder of the costs of said improvements shall be paid for by special taxation and for that purpose a special tax . . . is hereby ordered to be levied, assessed and collected" upon certain designated real estate, has been held to be in legal effect a levy of the tax, especially if followed by provisions for the usual steps for imposing such tax.⁵ An ordinance which provides for the doing of work to be paid for by special assessment or special taxation, is said to ordain such tax in legal effect.⁶ In this case, however, the determination of the amount of the tax was to be made by a board of assessors, and a board of revision and the report made by them was to be confirmed. The theory that the ordering of the improvement in effect ordained the tax was resorted to, to show that the tax was really imposed by the corporate authorities, and not by the board of assessors. Under some statutes, a levy is made by having an estimate of the amount due to the contractor made by some public official, such as the city engineer, and having the payment of such estimate ordered by the council.⁷ The fact that the council has refused to order an estimate to be paid does not prevent the council from subsequently ordering such estimate to be paid.⁸ The act of a county board in fixing the amount of assessments to be paid for the construction of a ditch is said to be a judicial act.⁹ This view of the law was

³ *Laakman v. Pritchard*, 160 Ind. 24, 66 N. E. 153 [1902]; *City of Sedalia to use of Sedalia National Bank v. Donohue*, 190 Mo. 407, 89 S. W. 386 [1905]; *City of Nevada to use of Gilfillan v. Eddy*, 123 Mo. 546, 27 S. W. 471 [1894]; *Hall v. Moore*, 3 Neb. Unofficial, 574, 92 N. W. 294 [1902]; *Brewer v. Incorporated Village of Bowling Green, Ohio*, 7 Ohio C. C. 489 [1893].

⁴ *City of Nevada to use of Gilfillan v. Eddy*, 123 Mo. 546, 27 S. W. 471 [1894].

⁵ *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. 692 [1890].

⁶ *In the Matter of Roberts*, 81 N. Y. 62 [1880].

⁷ *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861].

⁸ *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886].

⁹ *Dodge County v. Acom*, 72 Neb. 71, 100 N. W. 136 [1904]; (affirming on rehearing 61 Neb. 376, 85 N. W. 292 [1901]).

stated as the theory on which the court proceeded in holding that error should be prosecuted from the judgment and order of the county board to the district court.

§ 878. Time within which assessment may be levied.

In the absence of some specific statutory provision, a delay in levying the assessment after the improvement is made, does not invalidate the assessment.¹ A lapse of more than a year between the time that an ordinance is introduced into the council on the recommendation of the board of local improvements and the time that it is passed does not invalidate the ordinance in the absence of a statute requiring the council to act within a certain time.² A lapse of eighteen months,³ or of three years,⁴ does not invalidate the assessment in the absence of special statute. Thus, where a sewer was completed in 1874, and an assessment was made in 1878, such assessment was quashed in 1880 and a second assessment made in 1880, it was held that the right to make such assessment was not barred by lapse of time.⁵ If there is a special statutory provision limiting the time within which an assessment must be made, the effect of levying an assessment after the time thus fixed, depends upon the provisions of such statute so limiting the time.⁶ Under a statute which provides that a tax bill for a public improvement shall be issued within twenty days from the completion and acceptance of the work, and that a failure to issue a tax bill within such time shall not affect the validity thereof, a tax bill may be issued after the expiration of twenty days from the completion of the work.⁷ Where delay was due to a protracted litigation which resulted in a decision that the original tax bill was invalid, a tax bill issued five years after the completion and acceptance of the

¹ *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897]; *McLaughlin v. City of Chicago*, 198 Ill. 518, 64 N. E. 1036 [1902]; *Geiger v. Bradley*, 117 Ind. 120, 19 N. E. 760 [1888]. If the engineer is required to report the cost per front foot, this report may be approved within a reasonable time after the improvement is completed. *Flewelling v. Proetzel*, 80 Tex. 191, 15 S. W. 1043 [1891].

² *McLaughlin v. City of Chicago*, 198 Ill. 518, 64 N. E. 1036 [1902].

³ *Geiger v. Bradley*, 117 Ind. 120, 19 N. E. 760 [1888].

⁴ *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897].

⁵ *Fairbanks v. Mayor and Aldermen of Fitchburg*, 132 Mass. 42 [1882].

⁶ *Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56 [1904].

⁷ *Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56 [1904]; *Dollar Savings Bank v. Ridge*, 79 Mo. App. 26 [1898].

work was held to be valid.⁸ If the statute provides that the assessment is to be made within a certain time without further provision as to the effect of making an assessment after such time, an assessment is not valid unless made within the time so fixed by statute.⁹ Thus, under a statute providing that an assessment must be made within two years from the passage of the original order for the improvement, an assessment made after the expiration of such period of two years is invalid.¹⁰ Where the original order is subject to the veto of the mayor, the two year period begins to run according to the disposition of the ordinance; that is, if the mayor approves the ordinance, the time runs from the date of his approval; if he vetoes it and it is passed over his veto, the period runs from the date of such passage; and if he allows the ordinance to take effect by permitting ten days to elapse without any action on his part, the two year period runs from the expiration of such ten days.¹¹ However, delay in levying an assessment, caused by injunction proceedings which were brought to restrain such levy, does not prevent the public corporation from levying an assessment as soon as the injunction is dissolved, even if the time fixed by statute has expired.¹² Under a statute providing that an assessment shall not be vacated by reason of the omission of any officer to perform any duty imposed upon him, except in cases of fraud and of repavement, an assessment could not be vacated because confirmed thirteen years after the improvement was completed, though the assessment was to be confirmed in six months.¹³

§ 879. Levy of assessment as dependent upon construction of improvement.

Whether an assessment may be made before or after the construction of the improvement for which the assessment is levied, is a question which is entirely within the discretion of the legislature, and which, therefore, depends upon the provisions of the statute. It may be provided that an assessment may be made be-

⁸ *Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56 [1904].

⁹ *State ex rel. Ackerman, Pros. v. Town of Bergen*, 33 N. J. L. (4 Vr.) 39 [1868]. Such a statute does not limit the time for which the assessment is to operate as a lien. *The People ex rel. McCrea v. Atchison*, 95 Ill. 452 [1880].

¹⁰ *Hitchcock v. Board of Aldermen of Springfield*, 121 Mass. 382 [1876].

¹¹ *Quinn v. City of Cambridge*, 187 Mass. 507, 73 N. E. 661 [1905].

¹² *State v. District Court of Blue Earth County*, 102 Minn. 482, 113 N. W. 697 [1907].

¹³ *In the Matter of Deering*, 14 Daly (N. Y.) 89 [1886].

fore the improvement is constructed.¹ The public corporation may have the power to assess either before or after the improvement is constructed.² It may be provided that an assessment can not be made until after the report and the list of property and owners to be affected by the levy of such tax have been accepted and approved by the city council. An assessment made without complying with such provisions is invalid.³ An assessment may be made under statutory provisions after the improvement is constructed.⁴ If the actual cost of the work, as distinguished from estimates or benefits, is to be the basis of the assessment, the assessment cannot be levied till the work is done and the cost ascertained.⁵

§ 880. Assessment to be in writing.

The report of the assessing body is ordinarily required by statute to be in writing, or is so referred to by statute as to show that it is to be in writing to be preserved as a permanent record of the proceedings of the assessing body. Under such statutes it is essential that the assessment should be in writing.¹ Accordingly, if the record of proceedings which is made in writing shows a failure to comply with the statutory requirements, it cannot be shown by extrinsic evidence that the statutory requirements have been in fact complied with.²

¹ *The Freeport Street Railway Co. v. City of Freeport*, 151 Ill. 451, 38 N. E. 137 [1894].

² *In the Matter of Beekman*, 31 Howard, 16 [1865].

³ *City of Corsicana v. Kerr*, 89 Tex. 461, 35 S. W. 794 [1896].

⁴ *Pennsylvania Co. v. Cole*, 132 Fed. 668 [1904]; *Prince v. City of Boston*, 111 Mass. 226 [1872]; *Flew-ellin v. Proetzel*, 80 Tex. 191, 15 S. W. 1043 [1891]; *Adams v. Fisher*, 63 Tex. 651 [1885].

⁵ "An assessment of this kind is necessarily subsequent to the widening. From the nature of the case it cannot be made until the completion of the work. One element in the apportionment, 'the net expense of grading the whole widened street' cannot be sooner ascertained." *Whiting v.*

Mayor and Aldermen of the City of Boston, 106 Mass. 89, 95 [1870]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Prince v. City of Boston*, 111 Mass. 226 [1872].

¹ *Lyon v. Alley*, 130 U. S. 177, 32 L. 899, 9 S. 480 [1889]; (affirming *Alley v. Lyon*, 14 D. C. (Mackey) 457 [1885]); *People ex rel. Jeffries v. Record*, 212 Ill. 62, 72 N. E. 7 [1904]; *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893]; *State of Minnesota ex rel. Lewis, v. District Court of Ramsey County*, 33 Minn. 164, 22 N. W. 295 [1885]; *State, McCarty, Pros. v. Mayor, etc., of Jersey City*, 44 N. J. L. (15 Vroom) 136 [1882].

² *Saunderson v. Herman*, 95 Wis. 48, 69 N. W. 977 [1897]. See § 884.

§ 881. Caption of assessment.

The caption of the assessment may serve to show the location of the property assessed.¹ Thus, where the venue is inserted in the caption of a street assessment by the use of the words "State of California, City and County of San Francisco, ss." this is sufficient to show that the property to be assessed is within such city and county.² A mistake in the caption of a special assessment, whereby it is designated "assessment of a special tax," is regarded as a clerical error, which may be amended.³

§ 882. Date of assessment.

The date of an assessment may, by statute, be made essential.¹ To give the year without the month or day is insufficient.² The date of an assessment is said to be the date at which the commissioners certify thereto and not the date at which the assessment is confirmed,³ though if the assessment is modified or altered in any way, it may be described properly as of the year in which it was modified.⁴

§ 883. Statement in assessment of amount assessed.

The assessment roll must show the amount of the assessment with such certainty that the amount can readily be determined therefrom.¹ If it shows an assessment against the same tract of land in two different sums, it is insufficient.² In some cases it has been held that the omission of the dollar sign from the statement of the amount of the assessment invalidates the assessment, since it cannot be determined from examination of the assessment what the amount thereof is.³ It has been said that parol evidence is inad-

¹ *Whiting v. Quackenbush*, 54 Cal. 306 [1880].

² *Whiting v. Quackenbush*, 54 Cal. 306 [1880].

³ *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86 [1890].

¹ *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. Rep. 599 [1893].

² *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. Rep. 599 [1893].

³ *Brophy v. Harding*, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253 [1892].

⁴ *Brophy v. Harding*, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253 [1892].

¹ *Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285 [1888]; *People v. Glenn*, 207 Ill. 50, 69 N.

E. 568 [1903]; *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *City of Chicago v. Walker*, 24 Ill. 494 [1860]; *Dean v. Mayor and Aldermen of the City of Paterson*, 67 N. J. L. (38 Vr.) 199, 50 Atl. 620 [1901]; *State ex rel. Agens, Pros. v. Mayor and Common Council of the City of Newark*, 35 N. J. L. (6 Vr.) 168 [1871].

² *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872].

³ *People of the State of California v. Hastings*, 34 Cal. 571 [1868]; *Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285 [1888]; *City of Chicago v. Walker*, 24 Ill. 494

missible to supply the deficiency.⁴ A judgment of sale is insufficient where it refers to an attached schedule for the amount of the judgment, and the schedule does not show what denomination of money the figures are intended to represent.⁵ If, however, the context of the assessment shows what denomination of money the figures are intended to represent, the omission of the dollar sign does not invalidate the assessment.⁶ The omission of a dollar sign has been held not to invalidate an assessment where the connection makes the intention so clear that "no one can fail to understand it."⁷ If the report shows a certain amount, it must appear with sufficient certainty to what this amount was intended to apply.⁸ If a column of figures is headed "valuation" this is not sufficient and parol evidence is not admissible to supply the deficiency.⁹ If the assessors are to report benefits or injuries their report must show which is intended.¹⁰ An assessment beginning "A schedule of lands and assessments of benefits to same" sufficiently shows that the assessment is of benefits.¹¹

§ 884. Report must show compliance with statute and ordinance.

The report must show on its face a substantial compliance with the terms of the statute under which the public corporation derives its authority to levy the assessment.¹ Thus, if the charter

[1860]; *Gibson v. City of Chicago*, 22 Ill. 567 [1859]; *Brown v. City of Joliet*, 22 Ill. 123 [1859]; In the Matter of the Church of the Holy Sepulchre, 61 Howard, 315 [1880].

⁴ *People of the State of California v. Hastings*, 34 Cal. 571 [1868].

⁵ *Gage v. People ex rel. Hanburg*, 219 Ill. 20, 76 N. E. 56 [1905].

⁶ *Walker v. District of Columbia*, 6 Mackey (D. C.) 352 [1888]; *Linck v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893]; *City of Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077 [1891].

⁷ *Walker v. District of Columbia*, 6 Mackey (D. C.) 352 [1888].

⁸ *City of Chicago v. Walker*, 24 Ill. 494 [1860]; *Etchison Ditching Association v. Jarrell*, 33 Ind. 141 [1870].

⁹ *Chicago v. Walker*, 24 Ill. 494 [1860].

¹⁰ *Etchison Ditching Association v. Jarrell*, 33 Ind. 131 [1870].

¹¹ *Jordan Ditching and Draining Association v. Wagoner*, 33 Ind. 50 [1870].

¹ *Hundley & Rees v. Commissioners, etc., of Lincoln Park*, 67 Ill. 559 [1873]; *Wright v. City of Chicago*, 48 Ill. 285 [1868]; *City of Chicago v. Walker*, 24 Ill. 494 [1860]; *Beek v. Tolen*, 62 Ind. 469 [1878]; *Hardwick v. Danville & North Salem Gravel Road Company*, 33 Ind. 321 [1870]; *Thompson v. Honey Creek Draining Company*, 33 Ind. 268 [1870]; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866 [1900]; *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524 [1898]; *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897]; *Smith v. City of Omaha*, 49 Neb. 883, 69 N. W. 402 [1896]; *State, Lemon, Pros. v. Inhabitants of the*

provides that the council shall designate a time and place for the meeting of the board of assessors, their report must show what notice was given and what method of publication was adopted.² If the ordinance under which the assessment is levied has prescribed the method of levying it, and such ordinance is enacted under proper statutory authority, the assessment must be levied in accordance with the terms of such ordinance.³ The report must, accordingly, show upon its face a substantial compliance with the terms of the ordinance enacted by the public corporation as the basis of the assessment which it is sought to levy.⁴ Thus, if the commissioners are appointed to assess the cost of improving a given street, they have no authority to assess the cost of improving a different street.⁵ If, by distinct ordinances, provision is made for constructing distinct streets, parts of which do not form a continuous line of improvement, an assessment for benefits and damages for the two streets, treated as one entire improvement, is invalid.⁶ If the council in the exercise of its authority has, by ordinance, fixed the assessment district and has thus determined that the property within such district is benefited,

City of Trenton, 47 N. J. L. (18 Vroom) 489, 4 Atl. Rep. 312 [1886]; State, Spear, Pros. v. City of Perth Amboy, 38 N. J. L. (9 Vr.) 425 [1876]; State, Gleason, Pros. v. Town of Bergen, 33 N. J. L. (4 Vr.) 72 [1868]; State, Water Commissioners of Jersey City, Pros. v. Mayor and Common Council of City of Hudson, 27 N. J. L. (3 Dutcher) 214 [1858]; State, Townsend, Pros. v. Mayor and Common Council of Jersey City, 26 N. J. L. (2 Dutcher) 444 [1857]; McCarty v. Brick, 11 N. J. L. (6 Hals.) 27 [1829]; Sutphin v. Inhabitants of the City of Trenton, 31 N. J. Eq. (4 Stewart) 468 [1879].

²State, Lemon, Pros. v. Inhabitants of the City of Trenton, 47 N. J. L. (18 Vroom) 489, 4 Atl. Rep. 312 [1886].

³Ferris v. City of Chicago, 162 Ill. 111, 44 N. E. 436 [1896]; Barber v. City of Chicago, 152 Ill. 37, 38 N. E. Rep. 253 [1894]; State, Kerrigan, Pros. v. Township of West Hoboken, 37 N. J. L. (8 Vroom) 77

[1874]; Ellwood v. City of Rochester, 122 N. Y. 229, 25 N. E. 238 [1890]; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777 [1885]; Webber v. Common Council of the City of Lockport, 43 Howard, 368 [1872].

⁴Ferris v. City of Chicago, 162 Ill. 111, 44 N. E. 436 [1896]; Barber v. City of Chicago, 152 Ill. 37, 38 N. E. Rep. 253 [1894]; County of Jefferson v. City of Mt. Vernon, 145 Ill. 80, 33 N. E. 1091 [1893]; State, Kerrigan, Pros. v. Township of West Hoboken, 37 N. J. L. (8 Vroom) 77 [1874]; Ellwood v. City of Rochester, 122 N. Y. 229, 25 N. E. 238 [1890]; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777 [1885]; Hassan v. City of Rochester, 67 N. Y. 528 [1876]; In the Matter of Turfler, 44 Barb. 46 [1865]; Turfler's Case, 19 Abb. Prac. 140 [1865].

⁵Ferris v. City of Chicago, 162 Ill. 111, 44 N. E. 436 [1896].

⁶State, Kerrigan, Pros. v. Township of West Hoboken, 37 N. J. L. (8 Vroom) 77 [1874].

the commissioners have no authority to decide that a part of such district is not benefited by such improvement, and to omit such part, levying the entire assessment upon the rest of such district.⁷ If, however, the report of the commissioners shows that the work was to be done "conformably to the drawings of such ordinance attached," it will not be assumed that the commissioners disregarded the ordinance enacted and followed the drawings in the absence of evidence that such drawings existed.⁸

§ 885. Contents of report as to benefits and land benefited.

Whether land included by the public corporation in the assessment district can be omitted from the report on the theory that such land is not benefited, depends upon the nature of the power conferred by the statute upon the public corporation, and upon the commissioners or other persons by whom such assessment is to be made. If the determination of the public corporation is to be final and conclusive as to the land benefited, the commissioners or other persons making the report have no power to omit land which has been included by the public corporation in the assessment district.¹ If, on the other hand, the commissioners or other persons making the assessment are empowered to determine what land is benefited, and the action of the public corporation is merely preliminary, the commissioners may omit as not benefited, land which is included in the assessment district.² The persons making the assessment may be required by statute to include in their report a finding of the fact of benefits to the land affected by the assessment proceedings.³ In levying an assessment of benefits, it has been said not to be necessary that the report should show affirmatively that the commissioners took into consideration each particular fact which was necessary to enable them to come to a proper determination as to the amount and existence of benefits.⁴ It is held in some jurisdictions to be necessary that the report

⁷ *Ellwood v. City of Rochester*, 122 N. Y. 229, 25 N. E. 238 [1890].

⁸ *Barber v. City of Chicago*, 152 Ill. 37, 38 N. E. Rep. 255 [1894].

¹ *State ex rel. Stotts v. Wall*, 153 Mo. 216, 54 S. W. 465 [1899]; *Ellwood v. City of Rochester*, 122 N. Y. 229, 25 N. E. 238 [1890]; *Webber v. Common Council of the City Lockport*, 43 Howard, 368 [1872].

² *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898].

³ *Guckien v. Rothrock*, 137 Ind. 353, 37 N. E. 17 [1893].

⁴ *Cook v. Slocum*, 27 Minn. 509, 8 N. W. 755 [1881]; *State, Ackerson, Pros. v. Inhabitants of North Bergen*, in the County of Hudson, 39 N. J. L. (10 Vr.) 694 [1877].

should show that all the land within the limits of the corporation making the assessment, was considered by the commissioners in determining what land was, in fact, benefited.⁵ Under other statutes, it has been held that the assessment need not show that all the land named was taken into consideration, since it is to be assumed as a fair inference that the council, or commissioners, or other body making the assessment, levied the assessment upon all the land which was benefited, and would have assessed other land if they had determined that it was in fact benefited.⁶ If an apportionment is to be made showing the amount which the property owners are to bear, an express finding that certain owners receive no benefits sufficiently shows such fact.⁷ A report which apportions to a town "the sum of \$...." and apportions the entire expense upon the property, shows sufficiently that the commissioners found that the public would receive no benefit from the improvement.⁸ Under some statutes, it is provided that if the preliminary estimate of benefits shows that the property assessed will not be benefited to the extent of the assessment necessary for such improvement, the improvement must be abandoned.⁹ Under a statute which requires the board of public works to certify to an assessment roll that each parcel of land which is assessed "is benefited specially by such improvement to the amount of the assessment thereon," a certificate which shows the entire amount assessed, the amount assessed upon each lot, the fact that the lots set forth on the assessment roll are all that are benefited, and that the assessment is made in proportion to the benefits received, is sufficient.¹⁰

⁵ *State, Van Houten, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 412 [1875]; *State, Kilburn, Pros. v. Essex Public Road Board*, 37 N. J. L. (8 Vr.) 273 [1874]; *State, Van Horne, Pros. v. Town of Bergen*, 30 N. J. L. (1 Vr.) 307 [1863]; *State, Culver, Pros. v. Town of Bergen*, 29 N. J. L. (5 Dutch.) 266 [1861]. So of all the lands within the district as laid out. *Hardwick v. Danville & North Salem Gravel Road Company*, 33 Ind. 321 [1870].

⁶ *Jones v. Board of Aldermen of*

City of Boston, 104 Mass. 461 [1870]; *State, Wilkinson, Pros. v. City of Trenton*, 35 N. J. L. (6 Vr.) 485 [1872]; (treating as obiter the remark in *State, Abrey, Pros. v. Cannon*, 33 N. J. L. (4 Vr.) 218 [1868]).

⁷ *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898].

⁸ *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890].

⁹ *In the Matter of Albany Street*, 11 Wend. 149, 25 Am. Dec. 618 [1834].

¹⁰ *Nelson v. City of Saginaw*, 106 Mich. 659, 64 N. W. 499.

§ 886. Description of land.

The statute may provide that a list of lands to be affected by the contemplated improvement, or within a certain distance thereof, shall be made. An assessment levied without a compliance that such statutory requirement is invalid,¹ whether no list at all is made,² or whether a list is made from which some of the land is omitted.³ It is frequently provided by statute that the assessment roll must describe the property which is to be assessed. Under such statutes a description of the property is necessary, and in the absence of a sufficient description, the assessment is invalid.⁴ Oral evidence is inadmissible to describe the land which it is sought to assess or to supply defects in the description.⁵ Under a statute requiring a description of the property, the assessment is invalid, if the description is entirely wanting.⁶ If a description of a property is attempted, but such description is so vague or inaccurate as to be unintelligible, the assessment is void.⁷ Upon the other hand, if the description is sufficient to identify property upon which the assessment is to be levied, the assessment is not invalid, even though the description is not made with the utmost technical accuracy.⁸ It has been said that

¹ Redfork Levee District v. St. Louis Railway Co., 80 Ark. 98, 96 S. W. 117 [1906]; New Haven & Ft. Wayne Turnpike Company v. Bird, 33 Ind. 325 [1870].

² Redfork Levee District v. St. Louis Railway Co., 80 Ark. 98, 96 S. W. 117 [1906].

³ New Haven & Ft. Wayne Turnpike Co. v. Bird, 33 Ind. 325 [1870].

⁴ Pennsylvania Co. v. Cole, 132 Fed. 668 [1904]; Himmelmann v. Gahn, 49 Cal. 285 [1874]; Hoover v. People ex rel. Peabody, 171 Ill. 182, 49 N. E. 367 [1898]; People ex rel. Kochersperger v. Hurford, 167 Ill. 226, 47 N. E. 368 [1897]; McChesney v. The People ex rel. Kern, 145 Ill. 614, 34 N. E. 431 [1893]; Smith v. Duck Pond Ditching Association, 54 Ind. 235 [1876]; Higman v. City of Sioux City, 129 Ia. 291, 105 N. W. 524 [1906]; People ex rel. Kilmer v. McDonald, 69 N. Y. 362 [1877]; Webber v. Common Council of the City of Lockport, 43 Howard, 368 [1872]. See also Pennock v. Hoover, 5 Rawle (Pa.) 291 [1835].

⁵ Pennsylvania Co. v. Cole, 132 Fed. 668 [1904]; Higman v. City of Sioux City, 129 Ia. 291, 105 N. W. 524 [1906].

⁶ People ex rel. Kilmer v. McDonald, 69 N. Y. 362 [1877]; City of Allentown v. Hower, 93 Pa. St. (12 Norris) 332 [1880].

⁷ People of the City and County of San Francisco v. Quackenbush, 53 Cal. 52 [1878]; Himmelmann v. Bateman, 50 Cal. 11 [1875]; McClellan v. District of Columbia, 7 Mackey (D. C.) 94 [1889].

⁸ Labs v. Cooper, 107 Cal. 656, 40 Pac. Rep. 1042 [1895]; Luzadder v. State for Use of Rhine, 131 Ind. 598 31 N. E. Rep. 453 [1891]; Peru and Indianapolis Railroad Company v. Hanna, 68 Ind. 562 [1879]; Glass v. Silbert, 58 Pa. St. (8 P. F. Smith) 266 [1868]; Schenley v. Commonwealth for Use of the City of Allegheny, 36 Pa. St. (12 Casey) 64 [1859]; Jenkintown Borough v. Firmstone, 2 Penn. Dist. Rep. 124 [1892].

if the description is such as would enable a person somewhat acquainted with surveying to identify the land by means of such description,⁹ or would enable a surveyor to locate the land,¹⁰ it is sufficient. A description which would be sufficient in a mortgage or a mechanic's lien is said to be sufficient in an assessment.¹¹ A description of a tract as "tract of land, north side, between Front street and O. & M. R. R.," is invalid for uncertainty.¹² Land may be described by means of a diagram, if this identifies it with sufficient certainty.¹³ The description need not set forth the city, county or state in which the land is situated, as it will be presumed to be within the public corporation by which such assessment is levied.¹⁴ Land is sometimes described by reference to its lot number upon the plat of such land. If the lot number is given and the plat upon which such lot is numbered is referred to in a proper way, the description is sufficient.¹⁵ A description of a lot by its number is insufficient, if there is no reference to the map on which such numbers are shown and the lots are platted.¹⁶ Reference to a lot by number in a designated subdivision is insufficient where there is no lot of such number in such subdivision.¹⁷ On the same principle, a description of a lot by giving its number and referring to the section and township, in which it is situated, where there are several lots of that same number in such section and township, is insufficient.¹⁸ If the lot number is given, and a reference is made to the diagram for further description, and the description as given in the assessment and diagram when taken together, identify the property, such method of describing the property is said to be sufficient.¹⁹ A description of land as "lot number 3, Smith and Van Allen's addition to the City of Grand Rapids, except the railway lands and the lands owned by

⁹ *Peru and Indianapolis Railroad Company v. Hanna*, 68 Ind. 652 [1879].

¹⁰ *Lower Kings River Reclamation District No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887 [1899].

¹¹ *Eel River Draining Association v. Topp*, 16 Ind. 242 [1861].

¹² *Becker v. Baltimore & Ohio South-Western Railway Company*, 17 Ind. App. 324, 46 N. E. Rep. 685 [1897].

¹³ *Whiting v. Quackenbush*, 54 Cal. 306 [1880].

¹⁴ *Kansas City v. Napiecek*, — Kan. —, 92 Pac. 827 [1907].

¹⁵ *Vennum v. People ex rel. Galloway*, 188 Ill. 158, 58 N. E. 979 [1900].

¹⁶ *Labs v. Cooper*, 107 Cal. 656, 40 Pac. Rep. 1042 [1895].

¹⁷ *Vennum v. People ex rel. Galloway*, 188 Ill. 158, 58 N. E. 979 [1900].

¹⁸ *Sleight v. Roe*, 125 Mich. 585, 85 N. W. Rep. 10 [1901].

¹⁹ *Ede v. Knight*, 93 Cal. 159, 28 Pac. Rep. 860 [1892].

Wolverton and Blair," is sufficient, if such railway land and land owned by Wolverton and Blair is itself described on the assessment roll with sufficient accuracy.²¹ An error in a section number may be corrected by the rest of the description.²¹ If the property is described in the assessment roll by the same description as that whereby the owner acquired title, such description is good as against the owner.²² He cannot at one and the same time claim the ownership of the property under such description, and yet claim that the description is insufficient. Under some statutes, property may be described for local assessment in the same way in which it is described upon the tax duplicate for general taxation, and such description will be *prima facie* valid.²³ In the absence of a statute specifically authorizing it, however, reference to the description of the property as it appears in an assessors' plat, which was made under a statute authorizing the same to be made for assessing taxes, but which was not made by the county surveyor as the statute controlling such plat required, has been held to be insufficient.²⁴ Reference to a map or diagram which does not show the direction of the points of a compass, is held to be an insufficient description of property to be assessed.²⁵ Under a statute which requires a diagram on which each lot or portion of the lot to be assessed is numbered and the frontage shown, an assessment is sufficient which gives the lot numbers as shown on the diagram and the frontage of each lot, and refers to the diagram for further description.²⁶ If, however, neither the description nor the diagram shows the portions of the lots which are assessed for work done on street crossings, and does not show the frontage of the portions so assessed, the description is insufficient.²⁷ If the land to be assessed is described by means of abbreviations and such abbreviations are well understood,²⁸ or are uniformly used in the same manner throughout the assessment, and

²⁰ Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564, 52 N. W. 1028 [1892].

²¹ Lower Kings River Reclamation District No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887 [1899].

²² Wiemers v. People ex rel. Price, 225 Ill. 82, 80 N. E. 68 [1907]; People v. Wiemers ex rel. Price, 225 Ill. 17, 80 N. E. 45 [1907].

²³ Sample v. Carroll, 132 Ind. 496, 92 N. E. 220 [1892].

²⁴ Upton v. People ex rel. Murrie, 176 Ill. 632, 52 N. E. 358 [1898].

²⁵ Labs v. Cooper, 107 Cal. 656, 40 Pac. Rep. 1042 [1895].

²⁶ Hewes v. Reis, 40 Cal. 255 [1870].

²⁷ Dyer v. Harrison, 63 Cal. 447 [1883].

²⁸ Brosemer v. Kelsey, 106 Ind. 504, 7 N. E. 569 [1886].

are of such a nature that they must have been understood by all who examined the assessment,²⁹ the use of such abbreviations does not invalidate the assessment.³⁰ Thus, a description of land as "S. $\frac{1}{2}$ S. E. Sec. 27, T. 21, R. 6 E., 20 acres,"³¹ or as "S. E. $\frac{1}{4}$ of N. W. $\frac{1}{2}$ Sec. 18, T. 21, N. R. 7 E., 40 acres,"³² have each been held to be sufficiently definite. However, a description which contains abbreviations rendering it unintelligible, generally is insufficient. Thus, a description of a point as "Pt. S. E. $\frac{1}{4}$ of N. E. qr. frac. sec. 7, T. 6 S. R. 5 E." and "Pt. S. W. $\frac{1}{4}$ of N. E. qr. frac. sec. 7, T. 6 S. R. 5 E." has been held to be invalid, partly because of the use of abbreviations, but also because if the description were written out in full it would be uncertain, as it did not appear what part of a specified quarter was assessed.³³ If property is described by reference to a plat which has never been properly recorded, such description is invalid in the absence of circumstances estopping the land owner from taking advantage of such defect.³⁴ The fact that a land owner has acknowledged a plat, caused it to be properly certified and has submitted it to the council for approval, which approval has been granted, does not estop him from denying the validity of such plat where it has not been recorded, as long as no lots have been sold with reference thereto, and the public has not accepted the streets and alleys shown in such plat.³⁵ If, on the other hand, the land owner has sold lands with reference to such plat and has paid taxes upon his land described with reference to such plat, he is estopped from denying its validity for the purpose of local assessment.³⁶ A tract of land to be assessed is sometimes described as a part of a larger tract. Such description, in the absence of anything further to indicate what part of the larger tract is intended, is uncertain and

²⁹ *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. Rep. 630, 41 Pac. 335 [1895].

³⁰ *Brosemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569 [1886]; *Lake Erie & Western Railway Company v. Bowker*, 9 Ind. App. 428, 36 N. E. Rep. 864 [1893].

³¹ *Etchison Ditching Association v. Jarrell*, 33 Ind. 131 [1870].

³² *Jordan Ditching and Draining Association v. Wagoner*, 33 Ind. 50 [1870].

³³ *Ross v. State for the Use of Zenor*, 119 Ind. 90, 21 N. E. Rep. 345 [1888].

³⁴ *People ex rel. Kochersperger v. Clifford*, 166 Ill. 165, 46 N. E. 770 [1897]. See also *People v. Owens*, 231 Ill. 311, 83 N. E. 198 [1907].

³⁵ *People ex rel. Kochersperger v. Clifford*, 166 Ill. 165, 46 N. E. 770 [1897].

³⁶ *Harts v. People ex rel. Kochersperger*, 171 Ill. 373, 49 N. E. 539 [1898].

insufficient.³⁷ The rest of the description may, however, show what part of the larger tract is meant.³⁸ A description of the larger tract by giving its frontage,³⁹ or its area,⁴⁰ does not indicate what part of the larger tract is intended, and is insufficient. A description of a part of a tract as a certain number feet off of a specified end of such larger tract is sufficient if the larger tract is properly described. A description of a tract as being the "southerly one hundred and forty-six feet," of certain subdivisions of government sections, "except Prior Avenue," is sufficiently definite, and clearly shows that the avenue named, is excluded from the tract described.⁴¹ The description of property as "the north ten feet" of a certain lot, "in accordance with the plan hereto annexed," has been held to be sufficient, although the north line of such lot was not a straight line but formed an obtuse angle at the center; where the plan showed that the tract described was made by running a line parallel with the north side of the lot and at a distance of ten feet therefrom.⁴² A description of a tract of property as "the south sixty feet of the north one hundred twenty-one and three-fourths feet," has been held to be *prima facie* sufficient.⁴³ An error in describing certain lots does not affect the assessment against other lots,⁴⁴ even if the error consisted in copying the description of another lot, which was itself correctly described and thus appeared twice.⁴⁵ Under a statute providing for a description of the property assessed, it has been held that the property of a street railway company, including its right of way, may be assessed, although it cannot be described with the accuracy with which land belonging to a natural person can be described.⁴⁶ Where an assessment is levied against the township on account of benefits to a

³⁷ Bostman v. Macy, 82 Ind. 490 [1882].

³⁸ Richcreek v. Moorman, 14 Ind. App. 370, 42 N. E. Rep. 943 [1895].

³⁹ Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. O'Brien, 24 Ind. App. 547, 57 N. E. Rep. 47 [1899].

⁴⁰ Zigler v. Menges, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. Rep. 782 [1889].

⁴¹ State of Minnesota ex rel. Minnesota Transfer Railway Company v. District Court of Ramsey County, 68 Minn. 242, 71 N. W. 27 [1896].

⁴² City of Chicago v. Habar, 62 Ill. 283 [1871].

⁴³ Adkins v. Quest, 79 Mo. App. 36 [1898].

⁴⁴ Gurnee v. City of Chicago, 40 Ill. 165 [1866].

⁴⁵ Gregory v. City of Ann Arbor, 127 Mich. 454, 86 N. W. 1013 [1901]. [The owner of the tract erroneously described having paid his assessment voluntarily, the owner of the other tract could not complain.]

⁴⁶ Storrie v. Houston City Street Ry. Company, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898].

highway, a description of such highway as a "highway in Civil Township of Pleasant Porter County," was held to be sufficient; the assessment not being a lien upon the highway but merely a debt of the township.⁴⁷ A description of land by its popular name by which it is generally known, or which is associated with the land by some claim of title or possession, has been held to be sufficient.⁴⁸ However, an assessment upon property described as "St. Peter's and St. Paul's Cathedral" was held to be insufficient where the property was not further described nor was the name of the owner given.⁴⁹ If the essential facts which affect the amount of the assessment, are given correctly, together with a description which will identify the property assessed, error in other matters of description is regarded as immaterial. Thus, where an assessment is to be made by frontage and the frontage of the lot is correctly given, an incorrect representation of the interior lines of the lot does not invalidate the assessment if the lot is described with sufficient definiteness to enable the purchaser at a judicial sale to obtain possession thereof.⁵⁰ If a tract of land is otherwise correctly described, an error in the area is immaterial, if the assessment is not levied according to area.⁵¹ If land is otherwise correctly described, but its depth is described as less than it really is, the lien of the assessment and the conveyance thereof under a sale for such assessment operate only upon that part of such lot as is in fact described.⁵² An error in giving the frontage of an irregularly shaped lot, the description being otherwise correct, does not invalidate the assessment if it does not increase the amount assessed against such lot.⁵³ A description of land by its popular name and general location has been held to be sufficient.⁵⁴ Thus, the description of a tract as "Cummings' estate, land on the east side of Pleasant Street," has been held to be sufficient.⁵⁵ The description of a tract of land as "Plot J." has been held

⁴⁷ Pleasant Township v. Cook, 160 Ind. 533, 67 N. E. 262 [1902].

⁴⁸ Glass v. Gilbert, 58 Pa. St. (8 P. F. Smith) 266 [1868].

⁴⁹ Lefevre v. Mayor, etc., of Detroit, 2 Mich. 586 [1853].

⁵⁰ Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. Rep. 283 [1895].

⁵¹ Swamp Land District No. 307 v. Glide, 112 Cal. 85, 44 Pac. 451 [1896].

⁵² Jackson v. Healy, 20 Johns. (N. Y.) 495 [1823].

⁵³ Morse v. City of Buffalo, 35 Hun, 613 [1885].

⁵⁴ Masonic Building Association v. Brownell, 164 Mass. 306, 41 N. E. 306 [1895].

⁵⁵ Masonic Building Association v. Brownell, 164 Mass. 306, 41 N. E. 306 [1895].

insufficient where it is shown by extrinsic evidence that Plot J. includes other lands in addition to those of the person who is designated in the assessment roll as the owner of such plot.⁵⁶ A description of land as "Samuel Barber, h., sixty feet, Linden Street," has been held to be insufficient.⁵⁷ A description of a tract of land after giving the name of the owner, as "2d. bet. Pa. Ave. and B. N. W. Square 744. Lots: of 2. Front feet: West 428. Square feet: 51.440. Fronting on: N., South," was held to be insufficient.⁵⁸ Under some statutes errors in description may be corrected after the assessment report has been filed and recorded.⁵⁹ If no objection is interposed, such correction may be made at confirmation.⁶⁰ Correction by one of the parties without the action of the court or without leave thereof, by erasing a lot number and substituting a different number has been held to invalidate the assessment.⁶¹ If the statute provides the method of attacking the report of the commissioners, the objection that the property is not described sufficiently must be made in the manner indicated by statute.⁶² Failure to make such objection in the mannner indicated by statute operates as a waiver thereof. Thus, failure to interpose such objection at an application for confirmation waives such objection;⁶³ and it cannot be made the ground of a collateral attack upon the judgment of confirmation on application for the sale of the property assessed.⁶⁴ Errors in the description of land which it is sought to appropriate for proceedings in eminent domain are concluded

⁵⁶ *State, Ackerson, Pros. v. Inhabitants of North Bergen in County of Hudson*, 39 N. J. L. (10 Vroom) 694 [1877].

⁵⁷ *State, Parker, Pros. v. City of Elizabeth*, 39 N. J. L. (10 Vroom) 689 [1877].

⁵⁸ *Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285 [1888].

⁵⁹ *Connecticut Mutual Life Insurance Company v. City of Chicago*, 217 Ill. 352, 75 N. E. 365 [1905]; *Ager v. State ex rel. Heaston*, 162 Ind. 538 70 N. E. 808 [1903]; *Luzadder v. State for Use of Rhine*, 131 Ind. 598, 31 N. E. Rep. 453 [1891]; *State ex rel. Ely v. Smith*, 124 Ind. 302, 24 N. E. Rep. 331 [1890].

⁶⁰ *Connecticut Mutual Life Insur-*

ance Co. v. City of Chicago, 217 Ill. 352, 75 N. E. 365 [1905].

⁶¹ *Gage v. City of Chicago*, 216 Ill. 107, 74 N. E. 726 [1905].

⁶² *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. Rep. 1074 [1897]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. Rep. 163 [1895]; *Earhart v. Farmer's Creamery*, 148 Ind. 79, 47 N. E. 226 [1897]; *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886]; *Dunkirk Land Co. v. Zehner*, 35 Ind. App. 694, 74 N. E. 1099 [1905].

⁶³ *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. Rep. 163 [1895].

⁶⁴ *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. Rep. 1074 [1897].

by the judgment in eminent domain, if they do not amount to such a total want of description of the property appropriated as to deprive the court of jurisdiction to appropriate the same. Such objections, therefore, cannot ordinarily be made in a proceeding to levy local assessments to pay the cost of such appropriation of land.⁶⁵ If the description of land is claimed to be erroneous because street numbers were not given, this objection must be interposed at the trial or it will be waived.⁶⁶

§ 887. Necessity of stating name of owner.

If the statute requires the name of the owner to be stated in the assessment proceedings, failure to state the name of the owner as required by statute invalidates such proceedings.¹ An assessment upon "St. Peter's and St. Paul's Cathedral" not giving the name of the owner of the land has been held to be void.² The statute may require the names of owners and occupants to be given.³ A statement that land is owned by A and occupied by B, C and D is sufficient.⁴ If the occupant is not named, he cannot be assessed.⁵ However, mistakes as to ownership which do not cast upon one owner charges which should have been paid by another and which do not increase the burden of taxation

⁶⁵ *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. Rep. 1053 [1894]; *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034 [1893].

⁶⁶ *Laimbeer v. Mayor, Aldermen and Commonalty of the City of New York*, 6 N. Y. Sup. Ct. Rep. 109 [1850].

¹ *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254 [1898]; *Gwynn v. Dierssen*, 101 Cal. 563, 3 Pac. 103 [1894]; *City of Stockton v. Dunham*, 59 Cal. 608 [1881]; *Bucknall v. Story*, 46 Cal. 599, 13 Am. Rep. 220 [1873]; *Smith v. Cofran*, 34 Cal. 310 [1867]; *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595 [1867]; *Blatner v. Davis*, 32 Cal. 328 [1867]; *Taylor v. Donner*, 31 Cal. 481 [1866]; *Smith v. Davis*, 30 Cal. 537 [1866]; *Conlin v. Seamen*, 22 Cal. 546 [1863]; *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Brose-*

mer v. Kelsey, 106 Ind. 504, 7 N. E. 569 [1886]; *Troyer v. Dyer*, 102 Ind. 396, 1 N. E. 728 [1885]; *Higman v. City of Sioux City*, 129 Ia. 291, 105 N. W. 524 [1906]; *City of Sedalia v. Gallie*, 49 Mo. App. 392 [1892]; *State, Ackerson, Pros. v. Inhabitants of North Bergen in the County of Hudson*, 39 N. J. L. (10 Vroom) 694 [1877]; *Felthousen v. City of Amsterdam*, 69 Hun (N. Y.) 505, 23 N. Y. Sup. 424 [1893]; *Paillet v. Youngs*, 6 N. Y. S. Ct. Rep. 50 [1850]; *Lane v. Morrel*, 3 Edward's Chan. Rep. 185 [1838]; *Hawthorne v. City of Portland*, 13 Ore. 271, 10 Pac. Rep. 342 [1886].

² *Lefevre v. Mayor, etc., of Detroit*, 2 Mich. 586 [1853].

³ *Gilbert v. Havemeyer*, 4 N. Y. Sup. Ct. Rep. 507 [1849].

⁴ *Gilbert v. Havemeyer*, 4 N. Y. Sup. Ct. Rep. 507 [1849].

⁵ *Wetmore v. Campbell*, 4 N. Y. Sup. Ct. Rep. 341 [1849].

upon any owner do not violate the Fourteenth Amendment and do not present a Federal question.⁶ The rule requiring the name of the property owners to be given is a rule of statutory origin entirely; and if the legislature does not require the name of the owner to be given, an assessment levied without giving the name of the owner is valid.⁷ If it is not specifically provided by statute that the name of the owner should be given, an assessment in which the name of the owner is given erroneously is not on that account invalid.⁸ So the fact that property is assessed in the name of a former owner does not invalidate the assessment where the statute does not require the name of the owner to be given.⁹ The fact that a small tract of land has been assessed in the name of a person who is not the owner thereof does not invalidate the entire assessment.¹⁰

§ 888. Who is to be regarded as owner.

It is often said that the question of ownership is not involved in assessment proceedings.¹ Under a statute, however, which requires the name of the owner to be set forth, the question of ownership is often involved, since failure to state the name of the owner may render it invalid; and in determining whether the name of the owner is correctly stated or not, questions of ownership must often be considered.² Complicated questions of title are sometimes considered by the courts in determining whether the name of the owner is correctly stated in the assessment proceedings. Thus, the owner of land devised it to three trustees for the benefit of A. during A.'s life. A. conveyed her

⁶ *Ballard v. Hunter*, 204 U. S. 241, 27 S. 261 [1907]; (affirming *Ballard v. Hunter*, 74 Ark. 174, 85 S. W. 252 [1905]).

⁷ *Bow v. Smith*, 9 Mod. 94, 95; *Masonic Building Assoc. v. Brownell*, 164 Mass. 306, 41 N. E. 306 [1895]; *Smith v. Carney*, 127 Mass. 179 [1879]; *Brewer v. City of Springfield*, 97 Mass. 152 [1867]; *In the Matter of Lower Chatham*, 35 N. J. L. (6 Vr.) 497 [1872].

⁸ *West Chicago St. Ry. Co. v. People ex rel. Kern*, 156 Ill. 18, 40 N. E. Rep. 605 [1895]; *Gas Light & Coke Company v. City of New Albany*, 158 Ind. 268, 63 N. E. 458 [1901]; *Fel-*

ker v. City of New Whatcom, 16 Wash. 178, 47 Pac. 505 [1896]; *Town of Elma v. Carney*, 4 Wash. 418, 30 Pac. 732 [1892]; *Massing v. Ames*, 37 Wis. 645 [1875].

⁹ *Dashiell v. Mayor and City Council of Baltimore, for Use of Hax*, 45 Md. 615 [1876]; *Eyermann v. Scollay*, 16 Mo. App. 498 [1885].

¹⁰ *Hendricks v. Gilchrist*, 76 Ind. 369 [1881].

¹ *Board of Health v. Gloria Dei.*, 23 Pa. St. (11 Harr.) 259 [1854].

² *Taylor v. Conner*, 31 Cal. 481 [1866]; *Board of Health v. Gloria Dei.*, 23 Pa. St. (11 Harr.) 259 [1854].

interest in such property to B. for a valuable consideration, and a lease was given to B. executed by two of the three trustees, it not appearing whether the third trustee was alive at the time or not. Upon these facts it was held that B. was the owner within the meaning of the statute requiring an assessment to be made against the owner.³ Cemetery lots after sale still belong to the cemetery association, though the right to make use of them is in the purchaser.* The name of the owner may be shown by the engineer's plat which has been adopted by the council.⁵ If a change of ownership has occurred, but notice thereof is not given to the assessors, an assessment in the name of the person who was owner when the proceedings were commenced is sufficient.⁶ An assessment levied on the assumption that the persons who owned the property when the proceedings were begun, remain the owners when the assessment is levied, has been held not to be invalid in the absence of a showing that any change of ownership had in fact occurred.⁷ Under some statutes it is proper to give the name of the owner of realty to be assessed, as the same is given upon the tax roll for general taxation.⁸ In the absence of a statute providing for assessing property for local assessment according to the ownership appearing on the tax duplicate, it is held that under a statute requiring the name of the owner to be given, the property must be assessed to the owner, even if the name of such owner is not given upon the tax duplicate.⁹ It has been held proper to assess property for local assessment in the name of the person who appears upon the official records to be the owner thereof.¹⁰ This rule rests on the general principle that persons dealing with realty are permitted to rely upon the title as it appears of record

³ *Remsen v. Wheeler*, 121 N. Y. 685, 24 N. E. 704 [1890].

⁴ *Buffalo City Cemetery v. City of Buffalo*, 46 N. Y. 506 [1871].

⁵ *Edwards & Walsh Construction Co. v. Jasper County*, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

⁶ *Morange v. Mix*, 44 N. Y. 315 [1871].

⁷ *City of Covington v. Drassman*, 6 Bush. (69 Ky.) 210 [1869]; *City of Covington v. Boyle*, 6 Bush. (69 Ky.) 204 [1869].

⁸ *Keiser v. Mills*, 162 Ind. 366, 69 N. E. 142 [1903]; *In the Matter of Munn*, 165 N. Y. 149, 58 N. E. 881 [1900]; (reversing, *In re Munn*, 49 App. Div. 232); *In the Matter of Tappan*, 54 Barb. (N. Y.) 225 [1869].

⁹ *Gage v. Webb*, 141 Ill. 533, 31 N. E. 130 [1893].

¹⁰ *Roberts v. First National Bank of Fargo*, 8 N. D. 504, 79 N. W. 1049 [1899].

and are not bound by unrecorded instruments of which they have no actual notice. While the rule is ordinarily meant to protect *bona fide* purchasers for value, it is extended here to protect city officials in levying local assessments. The assessment roll need not distinguish the resident property owners from the non-resident property owners, in the absence of a statute conferring different rights upon two classes of property owners or providing specifically that the residence of the property owners should be shown.¹¹

§ 889. Assessment to unknown owners.

It is frequently provided that if the name of the owner is not known, the property may be assessed as the property of unknown owners.¹ Under such statutes if there is a reasonable doubt as to ownership in the minds of the officials charged with making the assessment, they may assess the property to unknown owners.² If the name of the owner is known and no rational doubt exists as to the fact of his ownership, an assessment to unknown owners cannot be made.³ If the name of the property owner does not appear in the assessment proceedings, it has been said that there is a presumption that the name of the owner is not known, and could not be ascertained with reasonable diligence.⁴ Under other statutes which require the name of the owner to be given and make no exception in case the name of the owner is not known, it has been held that the name of the owner must be given in all cases; and that if the name of the owner of certain property is not known and cannot be ascertained, such property cannot be assessed.⁵ A claim against the occupant as "owner or reputed owner, or whoever may be owner" has been held to be sufficient.⁶

¹¹ Williams v. Mayor, etc., of Detroit, 2 Mich. 560 [1853].

¹ Englebert v. McElwee, 122 Cal. 284, 54 Pac. 900 [1898]; Himmelmänn v. Hoadley, 44 Cal. 213 [1872]; Hewes v. Reis, 40 Cal. 255 [1870]; Himmelmänn v. Steiner, 38 Cal. 175 [1869]; Mayo v. Ah Lov, 32 Cal. 477, 91 Am. Dec. 595 [1867]; Taylor v. Conner, 31 Cal. 481 [1866]; Smith v. Davis, 30 Cal. 537 [1866]; Hawthorne v. City of East Portland, 13 Or. 271, 10 Pac. Rep. 342 [1886].

² Himmelmänn v. Hoadley, 44 Cal. 213 [1872]; Himmelmänn v. Steiner, 38 Cal. 175 [1869].

³ Smith v. Cofran, 34 Cal. 310 [1867].

⁴ White v. City of Alton, 149 Ill. 626, 37 N. E. 96 [1894].

⁵ In the Matter of Flatbush Avenue in the City of Brooklyn, 1 Barb. 286 [1847].

⁶ Soullier v. Kern, 69 Pa. St. (19 P. F. Smith) 16 [1871].

§ 890. Assessment against deceased owner.

Where the former owner of land is dead, and his interest descends to his heirs, it is frequently sought to assess such land as an entire tract in the name of the former owner, or in the name of his estate. Under statutes requiring the property to be assessed in the name of the owner, an assessment of property in the name of the estate of the deceased owner is invalid.¹ An assessment in the name of the estate of the deceased owner is proper where it is specifically authorized by statute,² or where it is not provided by statute that the name of the owner must be given.³ An assessment of a tract of land as belonging to the heirs of the deceased owner has been held to be valid.⁴ This view has been entertained even where the heirs of such deceased person have conveyed their interests in the greater part of the land, as long as such conveyances are not placed upon record.⁵ Where an assessment may be in the name of the estate of the deceased person a demand for payment required by statute cannot be made upon the executor, since he does not represent the real property.⁶

§ 891. Error in name of owner.

Since the names of the property owners are to be given only if required by statute,¹ the statute may provide that a mistake in the name of a property owner shall not invalidate the assessment. Full effect must be given to such statute.² Under a statute which provides that no error in the proceedings of the general council shall exempt from payment for improvements after the work is done, but that correction shall be made by the court or the council, an error.

¹Smith v. Petree, 79 S. W. 251, 25 Ky. Law Rep. 2014 [1904]; Brown v. Otis, 90 N. Y. S. 250, 98 App. Div. 554 [1904]; Platt v. Stewart, 8 Barb. (N. Y.) 493 [1850]; In the Matter of Flatbush Avenue in City of Brooklyn, 1 Barb. 286 [1847]; Hawthorne v. City of East Portland, 13 Ore. 271, 10 Pac. Rep. 342 [1886].

²Peck v. City of Bridgeport, 75 Conn. 417, 53 Atl. 893 [1903].

³Moale v. Mayor and City Council of Baltimore, 61 Md. 224 [1883].

⁴Masonic Building Association v. Brownell, 164 Mass. 306, 41 N. E.

306 [1895]; Northern Liberties v. Coates Heirs, 15 Pa. St. (3 Harr.) 245 [1850].

⁵Murphey v. Mayor and Council of Wilmington, 5 Del. Ch. 281 [1879].

⁶Barber Asphalt Pav. Co. v. Peck, 186 Mo. 506, 85 S. W. 387 [1905].

¹See § 887.

²Cohen v. City of Alameda, 124 Cal. 504, 57 Pac. 377 [1899]; Chicago, Rock Island & Pacific R. R. Co. v. City of Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; Kendig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882].

in the Christian name of the owner does not invalidate the assessment.³ If the name of the owner of land is misspelled upon the tax roll, but the name as spelled sounds substantially like the true name of the owner, the doctrine of *idem sonans* is applied and the assessment is not thereby rendered invalid.⁴ An abbreviation of the name of the owner which shows with sufficient certainty who is really intended by such abbreviation does not invalidate the assessment. Thus, where property is owned by the "Chicago West Division Railway Company," an assessment in the name of "Chicago W. Div. R. R. Co." or "W. Div. Ry. Co." has been held to be valid. However, an assessment in the name of the "Ft. W. and C. Railway Co." has been held to be insufficient in an assessment against the "Pittsburg, Fort Wayne and Chicago Railway Company."⁷ Under some statutes an error in the name of the property owner may be corrected by the court.⁸ A certificate that proceedings are correct, provided for by statute, does not cover questions of ownership, and is not conclusive as to them.⁹ Under a statute which authorizes the city comptroller and common council to correct mistakes in the description of realty, they cannot strike out the name of one as owner and insert the name of another person without notice to such latter person.¹⁰ If land is leased and the lessee requests that it be assessed in his name, since he has covenanted to pay all assessments, he is estopped to claim the assessment invalid as not mentioning the lessor's interest.¹¹ Assessing the same land twice to different owners is a defect which is not a mere "informality, irregularity or omission" within the meaning of a statute curing minor defects.¹² Under some statutes, failure to object to an error in the name of the property owner at the time provided for by statute operates

³ Langan v. Bitzer, — Ky. —, 82 S. W. 280, 26 Ky. L. Rep 579 [1904].

⁴ City of Detroit v. Macier, 117 Mich. 76, 75 N. W. Rep. 285 [1898].

⁵ West Chicago Street Railway Co. v. People ex rel. Kern, 155 Ill. 299, 40 N. E. Rep. 599 [1895].

⁶ West Chicago Street Railway Company v. People ex rel. Kern, 156 Ill. 18, 40 N. E. 605 [1895].

⁷ Pennsylvania Co. v. Cole, 132 Fed. 668 [1904].

⁸ Brewer, Pros. v. City of Elizabeth, 66 N. J. L. (37 Vr.) 547, 49 Atl. Rep. 480 [1901].

⁹ Marsh v. The City of Brooklyn, 59 N. Y. 280 [1874]; Newell v. Wheeler, 48 N. Y. 486 [1872].

¹⁰ Bennett v. City of Buffalo, 17 N. Y. 383 [1858].

¹¹ Second Universalist Society in Providence v. City of Providence, 6 R. I. 235 [1859].

¹² Etchison Ditching Association v. Hillis, 40 Ind. 408 [1872].

as a waiver of such defect, and it cannot subsequently be used as a ground for resisting the assessment.¹³

§ 892. Necessity of finding as to value of property.

If the assessment is not to be apportioned according to value and the statute does not require the report to show the value of the property, a report is sufficient, although the value is not shown.¹ If, however, the assessment is not to exceed a certain proportion of the value, the report must show either the value of the property,² or else that the assessment does not exceed the proportion of the value fixed by law.³ If, however, the report shows affirmatively that the assessment does not exceed the proportion of the valuation of the property, it is not necessary that the valuation of the different tracts of property assessed should be stated.⁴ If a report leaves it uncertain when the value of the land was fixed as of the date when the title vested or of the date of the report, the objectors should move to send the report back so that it could be amended to show what the fact was.⁵ If the statute requires the value of the property assessed to be entered on the assessment roll, an assessment which omits to state the value of the property thus assessed is invalid.⁶

§ 893. Report must show principle on which assessment is made.

The report of the commissioners must show the principle upon which the assessment is made. An assessment which does not show the principle upon which it is made is invalid.¹ Thus, a report showing that the assessment was made upon the owners of land benefited, but not showing what rule of apportionment was adopted is insufficient.² A recital in the certificate of the assessor

¹³ *McGill v. Bruner*, 65 Ind. 421 [1879]; *Lake Erie & Western Railway Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. Rep. 864 [1893]; *Huston v. Clark*, 112 Ill. 344 [1885].

¹ *Scammon v. City of Chicago*, 42 Ill. 192 [1866].

² *In re Mayor, etc., of City of New York*, 83 App. Div. 513, 82 N. Y. S. 417 [1903].

³ *In re City of New York*, 178 N. Y. 421, 70 N. E. 924 [1904]; (reversing, *In re Opening of Whitlock Ave.*, 85 N. Y. S. 650 [1904]).

⁴ *In re City of New York*, 178 N. Y. 421, 70 N. E. 924 [1904]; (re-

versing, *In re Opening of Whitlock Ave.*, 85 N. Y. 650).

⁵ *In re Avenue D in City of New York*, — N. Y. —, 84 N. E. 936 [1908]; (affirming order in 122 App. Div. 416, 106 N. Y. Supp. 889, though not on the merits).

⁶ *Steckert v. City of East Saginaw*, 22 Mich. 104 [1870].

¹ *State, Kerrigan, Pros. v. Township of West Hoboken*, 37 N. J. L. (8 Vr.) 77 [1874].

² *The State, Tims, Pros. v. Mayor and Common Council of Newark*, 25 N. J. L. (1 Dutcher) 399 [1856].

that he has made the assessment roll "pursuant to the resolution" is insufficient, since such certificate may mean only that he made the assessment in obedience to the resolution and does not necessarily show that he levied the assessment upon the principle laid down by the ordinance.³ If the correct principle is applied, the decision of the commissioners upon the facts is final under some statutes.⁴ In some jurisdictions it is held that the assessment need not show the method of computation, but that if the correct result is reached, such an assessment is valid.⁵

§ 894. Necessity of showing apportionment prescribed by law.

In many jurisdictions the report must show on its face, affirmatively, a compliance with the statutory provisions as to apportionment of the assessment. In some jurisdictions it is necessary that an apportionment should be made according to benefits *eo nomine*. In these jurisdictions an assessment which purports to be on any other basis is held to be invalid necessarily, even if it can be shown that the same result would be reached by an assessment on the basis of benefits.¹ Accordingly, in some jurisdictions the report must show that the assessment was apportioned according to the benefits received by the property assessed, and that the assessment did not exceed the amount of benefits conferred.²

³ Warren v. City of Grand Haven, 30 Mich. 24 [1874].

⁴ Lincoln v. Board of Street Commissioners of City of Boston, 176 Mass. 210, 57 N. E. 356 [1900].

⁵ The City of St. Joseph to Use of Gibson v. Farrel, 106 Mo. 437, 17 S. W. 497 [1891].

¹ See § 692 *et seq.*

² Adams v. Bay City, 78 Mich. 211, 44 N. W. 138 [1889]; Poillon v. Mayor and Council of the Borough of Rutherford, 65 N. J. L. (36 Vr.) 538, 47 Atl. 439 [1900]; Hendrickson v. Borough of Point Pleasant, 65 N. J. L. 535, 47 Atl. 465 [1900]; Buess, Pros. v. Town of West Hoboken, 51 N. J. L. (22 Vr.) 267, 17 Atl. 110 [1889]; State, Ward, Pros. v. Commissioners of Streets and Sewers of New Brunswick, 49 N. J. L. (20 Vr.) 552, 10 Atl. 109 [1887]; State, Souther, Pros. v. Village of South

Orange, 46 N. J. L. (17 Vr.) 317 [1884]; State, Hutton, Pros. v. Inhabitants of the Township of West Orange, 39 N. J. L. (10 Vr.) 453 [1877]; Paret v. City of Bayonne, 39 N. J. L. (10 Vr.) 559 [1877]; State, Speer, Pros. v. City of Passaic, 38 N. J. L. (9 Vr.) 168 [1875]; State, Simmons, Pros. v. City of Passaic, 38 N. J. L. (9 Vr.) 60 [1875]; State, Kingsland, Pros. v. Inhabitants of the Township of Union in the County of Bergen, 37 N. J. L. (8 Vr.) 268 [1874]; Village of Passaic v. State, Delaware, Lackawanna and Western Railroad Company, Pros., 37 N. J. L. (8 Vr.) 538 [1875]; State, Delaware, Lackawanna and Western Railroad Company, Pros. v. Village of Passaic, 37 N. J. L. (8 Vr.) 137 [1874]; State, Van Houten, Pros. v. Mayor, etc., of Paterson, 37 N. J. L. (8 Vr.) 412 [1875]; State, Wilkin-

A report showing that the assessment is apportioned according to frontage without showing that the commissioners found that the benefits were conferred upon the property assessed in proportion to the frontage thereof is insufficient.³ If the commissioners do not certify that the assessment is not in excess of the benefits conferred, the report is insufficient.⁴ This is true, even if the commissioners have followed the language of the statute in certifying that they have assessed the expense of making the improvement fairly and equitably upon the lands on the line of the improvement which in their judgment would be benefited by the improvement.⁵ Such a report is said to be "the statement of a conclusion" of law without the facts necessary to warrant such conclusion.⁶ So a certificate that the commissioners have assessed the cost of an improvement equitably upon property fronting on the street is defective.⁷ The report must show that the commissioners have examined and determined what real estate should be assessed and have ascertained what proportion should be assessed to each owner.⁸ If the report shows that the commissioners have determined that the benefits are apportioned according to frontage and that they have accordingly apportioned the assessment according to frontage such apportionment is valid even in a jurisdiction in which an assessment must be apportioned

son, *Pros. v. Inhabitants of the City of Trenton*, 36 N. J. L. (7 Vr.) 499 [1873]; *State, Abrey, Pros. v. Cannon*, 33 N. J. L. (4 Vr.) 218 [1868]; *State, Gleason, Pros. v. Town of Bergen*, 33 N. J. L. (4 Vr.) 72 [1868]; *State, Malone, Pros. v. Mayor and Common Council, Jersey City*, 28 N. J. L. (4 Dutch.) 500 [1860]; *The State, Tims, Pros. v. Mayor and Common Council of Newark*, 25 N. J. L. (1 Dutcher) 399 [1856]; *Ellwood v. City of Rochester*, 43 Hun, 102 [1887].

³ *City of Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.

⁴ *State, Buess, Pros. v. Town of West Hoboken*, 51 N. J. L. (22 Vr.) 267, 17 Atl. 110 [1889]; *State, Hutton, Pros. v. Inhabitants of the Township of West Orange*, 39 N. J. L. (10 Vr.) 453 [1877]; *State, Kohler, Pros. v. Town of Guttenburg*, 38 N. J. L. (9 Vr.) 419 [1876]; *State,*

Bogart, Pros. v. City of Passaic, 38 N. J. L. (9 Vroom) 57. *Contra, Sutphin v. Inhabitants of the City of Trenton*, 31 N. J. Eq. (4 Stewart) 468 [1879].

⁵ *State, Hutton, Pros. v. Inhabitants of the Township of West Orange*, 39 N. J. L. (10 Vr.) 453 [1877]; *State, Bogart, Pros. v. City of Passaic*, 38 N. J. L. (9 Vroom) 57 [1875].

⁶ *State, Bogart, Pros. v. City of Passaic*, 38 N. J. L. (9 Vroom) 57 [1875].

⁷ *State ex rel. Van Houten v. Mayor, etc., of City of Paterson*, 37 N. J. L. (8 Vr.) 412 [1875].

⁸ *State, Evans, Pros. v. Mayor and Common Council of Jersey City*, 35 N. J. L. (6 Vr.) 381 [1872]; *State, Hoboken Land & Improvement Co., Pros. v. Mayor, etc., of Hoboken*, 36 N. J. L. (7 Vr.) 291 [1873].

according to benefits.⁹ It has been held that if the report does not show that the assessment does not exceed the benefits, but the statute permits an amended return to be made in a certiorari proceeding, and the evidence shows that the assessment does not in fact exceed the benefit, such report will not be set aside.¹⁰ If a report can be amended, the failure to state that the assessment is apportioned according to benefits may be cured by evidence, and by an agreed statement of facts showing that the assessment was apportioned according to benefits.¹¹ If the statute provides that the assessment must be apportioned according to frontage, the report must show such apportionment.¹² However, it has been held in some jurisdictions that if the property is, in fact, assessed in proportion to benefits and not in excess of benefits, no complaint can be made of the method in which the commissioners arrived at their result.¹³ In some jurisdictions, if the council has provided a rule of apportionment such as the front foot rule, it has been held that the record need not show affirmatively that the question of the benefit was considered in levying such assessment, but that such assessment is held to be valid unless it is shown affirmatively that it exceeds the benefits conferred upon the property assessed.¹⁴ If the statute does not require the commissioners to make a finding as to the amount in money due from each property owner, it is sufficient if they find the proportion of the cost to be paid by each.¹⁵

§ 895. Apportionment of assessment among different tracts.

If a large tract of land is used and occupied by the owner thereof as an entire tract, an assessment may be levied thereon as an entirety.¹ This is true even though the tract includes

⁹ State, Johnson, Pros. v. Inhabitants of the City of Trenton, 43 N. J. L. (14 Vr.) 166 [1881]; State, Hunt, Pros. v. Mayor, etc., of Rahway, 39 N. J. L. (10 Vroom) 646 [1877].

¹⁰ State, Van Solinger, Pros. v. Town of Harrison, 39 N. J. L. (10 Vroom) 51 [1876].

¹¹ Chase v. Board of Aldermen of Springfield, 119 Mass. 556 [1876].

¹² Eyerman v. Hardy, 8 Mo. App. 311 [1880].

¹³ *In re* City of Seattle, — Wash. —, 91 Pac. 548 [1907].

¹⁴ Schroder v. Overman, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 153 [1899].

¹⁵ Adams v. Joyner, — N. C. —, 60 S. E. 725 [1908].

¹ Lower Kings River Reclamation District No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887 [1899]; City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605 [1891]; Schroder v. Overman, 61 O. S. 1, 47 L. R. A. 156, 55 N. E. 158 [1899]; (affirming, Schroder v. Overman, 18 Ohio C. C. 385 [1899]). See §§ 630, 631.

several subdivisions of forty acres each.² On the other hand, the public corporation has no power to subdivide an entire tract of land into smaller tracts and to levy the assessment separately upon each of such smaller tracts.³ If the owner has treated a tract of land as divided into city lots and has acquiesced in general taxation thereof upon such theory, the public corporation may treat it as so divided for the purpose of assessment.⁴ If a tract is divided into smaller lots by the owners, but the city plan of the lots does not show subdivision, it has been held proper to treat such real property as one entire tract for the purpose of local assessment.⁵ If, however, dividing a large tract into two or more smaller tracts for the purpose of local assessment does not increase the burden of the assessment, but merely frees the rest of such tract from the lien thereof, the property owner is not injured thereby, and cannot complain.⁶ An ordinance providing for connections for sewer or water at certain intervals has been regarded as, in effect, subdividing larger tracts into smaller tracts, and hence has been held to be invalid.⁷ These cases have been distinguished subsequently where the property was assessed according to its legal description, and house connections were required to be placed at intervals which were held not to be unreasonable.⁸ If land is divided into two or more lots and is so used and occupied, it has been held proper to levy the assessment against each lot separately, even if such lots are owned by the same person.⁹ The public corporation has no power to levy an

² Lower Kings River Reclamation District No. 531 v. McCullah, 124 Cal. 175, 56 Pac. 887 [1899].

³ Langlois v. Cameron, 201 Ill. 301, 66 N. E. 332 [1903]; Scott County v. Hinds, 50 Minn. 204, 52 N. W. 523 [1892]; State, Coward, Pros. v. Mayor, etc., of North Plainfield, 63 N. J. L. 61, 42 Atl. 805 [1899]; State, Muller, Pros. v. Mayor and Common Council of the City of Bayonne, 55 N. J. L. (26 Vr.) 102, 25 Atl. 267 [1892].

⁴ Van Wagoner v. Mayor and Aldermen of City of Paterson, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

⁵ Hutchinson v. Pittsburg, 72 Pa. St. (22 P. F. Smith) 320 [1873]. See to the same effect City of Atchi-

son v. Price, 45 Kan. 296, 25 Pac. 605 [1891].

⁶ Barber v. City of Chicago, 152 Ill. 37, 38 N. E. 253 [1894].

⁷ Bickerdike v. City of Chicago, 185 Ill. 280, 56 N. E. 1096 [1900]; (distinguished in Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902]); People ex rel. Kochersperger v. Cook, 180 Ill. 341, 54 N. E. 173 [1899]; (distinguished in Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902]).

⁸ Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902].

⁹ Hoover v. People ex rel. Peabody, 171 Ill. 182, 49 N. E. 367 [1898];

assessment against two or more distinct lots or tracts of land as an entirety, even though such lots or tracts belong to the same owner. The assessment should be levied against each lot separately.¹⁰ Not only should the assessments be separate, but if a judgment is rendered for the assessment, a separate judgment should be rendered against each separate lot. An entire judgment rendered against all the lots or tracts of land is improper, since it deprives the owner of his right to pay the assessment against one or more of such lots, leaving it to be enforced against the remaining tracts of land.¹¹ Under a statute which provides that an assessment "shall be a tax against such owner or owners and a lien, charge and incumbrance upon the property so owned and held by each," it has been held to be proper to levy an assessment as an entirety upon two or more separate lots belonging to the same owner.¹² If an assessment is levied as an entirety against two or more lots owned by the same person, the remedy in some jurisdictions is to have such assessment apportioned upon each lot, and not to have the entire assessment vacated.¹³ Under some statutes it is said to be permissible¹⁴ and under some even necessary¹⁵ to levy the assessment upon the different lots in gross, instead of apportioning the proper amount to each, if they are owned by

Beltzhoover Borough v. Maple, 130 Pa. St. 335; *sub nomine*, Maple v. Borough of Beltzhoover, 18 Atl. 650 [1889]; Schenley v. Commonwealth for Use of the City of Allegheny, 36 Pa. St. (12 Casey) 29, 78 Am. Dec. 359 [1859]; Nicholson Borough, Main Street, 27 Pa. Super. Ct. 570 [1905].

¹⁰ Schirmer v. Hoyt, 54 Cal. 280 [1880]; Ottis v. Sullivan, 219 Ill. 365, 76 N. E. 487 [1906]; The Louisville and Nashville Railroad Company v. East St. Louis, 134 Ill. 656, 25 N. E. Rep. 962 [1891]; Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Company v. Oglesby, 165 Ind. 542, 76 N. E. 165 [1905]; Martindale v. Palmer, 52 Ind. 411 [1875]; Balfe v. Johnson, 40 Ind. 235 [1872]; Becker v. Baltimore & Ohio Southwestern Railway Company, 17 Ind. App. 324, 46 N. E. Rep. 685 [1897]; Stutsman v. City of Burlington, Iowa, 127 Ia. 563, 103 N. W.

800 [1905]; Gill v. Patton, 118 Iowa, 88, 91 N. W. 904 [1902]; City of St. Louis v. Provenchere, 92 Mo. 66, 4 S. W. 410 [1887]; Kemper v. King, 11 Mo. App. 116 [1881]; Sharp v. Johnson, 4 Hill (N. Y.) 92, 40 Am. Dec. 259 [1843]; Corry v. Foltz, O'Brien & Company, 28 O. S. 320 [1876]; Pennel's Appeal, 2 Pa. St. (2 Barr.) 218 [1845].

¹¹ Brady v. Kelley, 52 Cal. 371 [1877]; Brockschmidt v. Cavender, 3 Mo. App. 563; Kefferstein v. Holliday, 3 Mo. App. 569, 570; Gray v. Bowles, 74 Mo. 419 [1881].

¹² Taylor v. Boyd, 63 Tex. 533 [1885].

¹³ In the Matter of Anderson, 39 Howard, 184 [1870]; In the Matter of Anderson, 60 Barb. 375 [1871].

¹⁴ In the Matter of Anderson, 39 Howard, 184 [1870]; Taylor v. Boyd, 63 Tex. 533 [1885].

¹⁵ Pennock v. Hoover, 5 Rawle (Pa.) 291 [1835].

the same person. If two or more distinct tracts of land are owned each by a different person, the objection to combining the separate tracts in one assessment is still stronger, since by this system of procedure a property owner cannot free his property from the lien of the assessment without paying the assessment upon the property of another owner. An assessment of this sort is therefore invalid.¹⁶ If, however, two or more owners in severalty of different parts of a lot ask that the lot be assessed as a whole, and the assessment is apportioned according to frontage and can accordingly be apportioned readily between the different owners, the combination in one assessment of land thus owned by different owners, does not invalidate the assessment.¹⁷

§ 896. What constitutes entire tract.

In determining whether land is an entire tract or consists of two or more distinct tracts, the condition of the land at the time at which jurisdiction of the public corporation to levy the assessment attaches, is said to control.¹ Under this theory land which was an entire tract when the assessment attached can be assessed as an entire tract even if subsequently, before the assessment is made, it is divided by sales to different parties.² A sale between the impaneling of a jury to assess benefits and damages and its verdict does not necessitate a separate assessment against the different parcels, where the vendee did not intervene in such proceedings.³ In other jurisdictions it is said that where a contract to sell a part of a tract is made before the assessment proceedings of which notice is given to the body levying the assessment after the assessment is made and before confirmation, the part thus sold should be regarded as a tract separate from the rest.⁴ Whether an assessment should be levied against a tract

¹⁶ Romig v. City of Lafayette, 33 Ind. 30 [1870]; Hunt v. State, for Use of Downey, 26 Ind. App. 518, 58 N. E. Rep. 557 [1900]; Duncan v. City of Elizabeth, 25 N. J. Eq. (10 C. E. Green) 430 [1874]; Hamar v. Leihy, 124 Wis. 265, 102 N. W. 568 [1905]; Towne v. Salentine, 92 Wis. 404, 66 N. W. 395 [1896]; Hamilton v. City of Fond du Lac, 25 Wis. 490 [1870]; Jenkins v. Board of Supervisors of Rocke County, 15 Wis. 11 [1862].

¹⁷ McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010 [1894].

¹ Dougherty v. Miller, 36 Cal. 83 [1868]; Wilkinson v. District of Columbia, 22 App. D. C. 289 [1903]. See §§ 630, 631.

² Dougherty v. Miller, 36 Cal. 83 [1868].

³ Wilkinson v. District of Columbia, 22 App. D. C. 289 [1903].

⁴ Brennan v. City of St. Paul, 44 Minn. 464, 47 N. W. 55 [1890].

of land as an entirety or whether it should be levied against the different parts into which said tract has been divided, has been held to be immaterial where the original owner who has conveyed part of such tract remains personally liable for the entire amount of the assessment.⁵ If the recorded plat of the city does not show any subdivision of a tract, and it appears on the records that it all belongs to one person, it may be assessed as an entirety.⁶ If property which is platted as two or more different lots is used and occupied by the owner thereof as an entire tract, it is proper, under most statutes, to regard such property as an entire tract for the purpose of assessment.⁷ Thus, where a woman had a dower estate in a tract of land and owned the fee of another adjoining tract, and occupied both tracts of land together, it was held to be proper to assess both tracts as one parcel.⁸ If property has been subdivided into smaller lots by a lessee without the consent of the lessor, such subdivision is not binding on the city, and the entire tract may therefore be assessed as a whole.⁹ If a street is opened through an entire tract of land, the question whether such street makes the land on each side thereof a separate tract, or whether it is still to be regarded as an entire tract, subject only to the public easement, is a question which is decided differently in different jurisdictions. In some cases it is held that the land on each side of the street is to be regarded as a tract separate from that on the other side,¹⁰ even if the two tracts stand on the duplicate for purposes of general taxation as one tract.¹¹ In other cases it is held that the two tracts are still to be regarded as an entire tract.¹² Where a railroad is located

⁵ *Evans v. Sharp*, 29 Wis. 564 [1872].

⁶ *City of Atchison v. Price*, 45 Kan. 296, 25 Pac. 605 [1891].

⁷ *Chicago Union Traction Company v. City of Chicago*, 207 Ill. 544, 69 N. E. 849 [1904]; *Moore, Executor, v. The People ex rel. Lewis*, 106 Ill. 376 [1883]; *Parsons v. City of Grand Rapids*, 141 Mich. 467, 104 N. W. 730 [1905]; *Wolfert v. City of St. Louis*, 115 Mo. 139, 21 S. W. 912 [1892]; *Hill-O'Meara Construction Co. v. Sessinghaus*, 106 Mo. App. 163, 80 S. W. 747 [1904]; *City of Chester to Use of Ross v. Eyre*, 181 Pa. St. 642, 37 Atl. 837 [1897].

⁸ *Parsons v. City of Grand Rapids*, 141 Mich. 467, 104 N. W. 730 [1905].

⁹ *Barnett v. Board of St. Louis Public Schools*, 60 Mo. App. 539 [1894].

¹⁰ *Spangler v. The City of Cleveland*, 35 O. S. 469 [1880]; *Younglove v. Hackman*, 43 O. S. 69, 1 N. E. 230 [1885]; *In the Matter of Westlake Avenue*, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

¹¹ *Younglove v. Hackman*, 43 O. S. 69, 1 N. E. 230 [1885].

¹² *Watts v. Village of River Forest*, 227 Ill. 31, 81 N. E. 12 [1907]; *DeKoven v. City of Lake View*, 129 Ill. 399, 21 N. E. 813 [1890]; (followed

across a tract of land it has been held proper to assess the two tracts of land thus made as one entire parcel.¹³ Hence, a description of land as the west half of a certain described tract "except streets" is sufficient.¹⁴ Under a statute which so provides, the lot lines may control the use, and property may be subject to assessment according to the platted lines, even though several lots are used as an entire tract.¹⁵ It may be provided by statute that where land is platted after an assessment has been levied, the city engineer shall apportion such assessment among the different lots of such plat affected by the assessment. The court has suggested that the only available rule was to apportion according to area, although the court pointed out that there was no statutory rule as to the method of such apportionment.¹⁶

§ 897. Objection to assessment as entire tract.

If a property owner objects to an assessment against his land because an entire assessment is levied against two or more distinct lots or tracts, he must make such objection before confirmation where formal confirmation is had. A failure to interpose such objection at confirmation operates as a waiver.¹ A judgment enforcing an assessment as an entirety against two or more lots is erroneous, but not void.² Hence while such judgment may be reversed on error, it cannot be attacked collaterally.³

§ 898. Necessity of exercise of judgment by commissioners.

Commissioners appointed to determine the question of benefits must exercise their own judgment in making such determination.¹ It will be presumed, however, in the absence of a showing to the

in *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]).

¹³ *The Chicago, Rock Island and Pacific R. R. Co. v. Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893]; *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892].

¹⁴ *Watts v. Village of River Forest*, 227 Ill. 31, 81 N. E. 12 [1907].

¹⁵ *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904].

¹⁶ *Bloch v. Godfrey*, 26 Ohio C. C. 781 [1904].

¹ *Thomson v. People ex rel. Foote*, 184 Ill. 17, 56 N. E. 383 [1900]; *Turley v. The People ex rel. Mayfield*, 116 Ill. 433, 6 N. E. 52 [1887]; *Martindale v. Palmer*, 52 Ind. 411 [1875]; *Hayden, Pros. v. Ocean City*, 67 N. J. L. (38 Vr.) 155, 50 Atl. 584 [1901].

² *Gray v. Bowles*, 74 Mo. 419 [1881].

³ *Gray v. Bowles*, 74 Mo. 419 [1881].

¹ *Wright v. City of Chicago*, 48 Ill. 285 [1868].

contrary, that the commissioners acted according to their own judgment.² The fact that their report does not make use of the word "investigate" with reference to their inquiry, does not show that they did not investigate the subject.³ The viewers or commissioners cannot base their estimate entirely on the judgment of others.⁴ Thus, viewers appointed to assess damages and benefits cannot base their estimate upon the certificate of the chief of the department of public works as to the contract price of the work to be done.⁵

§ 899. Necessity of actual view of premises.

Under most statutes it is necessary that the commissioners make an actual view of the property upon which they are to levy an assessment.¹ A statute requiring the commissioners to "jointly view and assess upon each and every acre" an assessment, requires joint action in viewing and assessing.² If one of the commissioners is absent when the land is viewed, the assessment is invalid, even if he is well acquainted with the land and assents by letter to the acts of the majority.³ It is not necessary, however, that they go upon each and every acre of land in the district to be assessed, but it is sufficient if they jointly make such examination of the land to be assessed as enables them to form an intelligent judgment as to the benefits which will accrue to each acre.⁴ Under some statutes it has been held not to be necessary for the commissioners to make a personal examination of the property to be assessed.⁵ It has been said that a board of

² Wright v. City of Chicago, 48 Ill. 285 [1868].

³ Wright v. City of Chicago, 48 Ill. 285 [1868].

⁴ Monroe Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893].

⁵ Monroe Avenue, Chamber's Appeal, 159 Pa. St. 20, 28 Atl. 123 [1893].

¹ Swamp Land District No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. Rep. 462 [1886]; Reclamation District No. 3 v. Parvin, 67 Cal. 501, 8 Pac. 43 [1885]; People v. Hagar, 49 Cal. 229 [1874]; Hendricks v. Gilchrist, 76 Ind. 369 [1881]; Beck v. Tolen, 62 Ind. 469 [1878]; Hardwick v. Danville and N. Salem Gravel Road Company, 33 Ind. 321 [1870]; Pittel-

kow v. City of Milwaukee, 94 Wis. 651, 69 N. W. 803 [1897]; Heubner v. City of Milwaukee, 124 Wis. 153, 101 N. W. 930 [1904]. (Application for rehearing denied, 102 N. W. 578 [1905]); Watkins v. City of Milwaukee, 52 Wis. 98, 8 N. W. 823 [1881].

² Reclamation District No. 3 v. Parvin, 67 Cal. 501, 8 Pac. 43 [1885].

³ People v. Coghill, 47 Cal. 361 [1874].

⁴ People of the State of California v. Hagar, 52 Cal. 171 [1877].

⁵ Wright v. City of Chicago, 48 Ill. 285 [1868]; State, Hunt, Pros. v. Mayor and Common Council of City of Rahway, 39 N. J. L. (10 Vr.) 646 [1877].

public works may be presumed to know the location of the property to be assessed, and that acting on such knowledge they may make investigation in their own office if they see fit.⁶ Where commissioners have been appointed to pass upon the question of benefits and damages, it has been said to be within their discretion whether they will make a personal examination or not, and their action cannot be attacked only if it is shown to be erroneous.⁷ It is not necessary that the commissioners survey the land which is assessed.⁸

§ 900. Necessity of joint action of commissioners.

If the statute contemplates joint action on the part of the commissioners by whom the assessment is to be made, such commissioners must act jointly in making such assessment and in reporting the same to the proper body.¹ If three special commissioners are appointed, a report by two of them is invalid where it does not appear that the third person took any part in the proceedings.² If the certificate is signed by only two out of three commissioners and nothing in the certificate appears to show that the third commissioner acted, it will not be presumed, in a direct attack upon the proceedings that he did act.³ If provision is made for a formal confirmation of an assessment, the objection that the commissioners did not act jointly in making the assess-

⁶ *Wright v. City of Chicago*, 48 Ill. 285 [1868].

⁷ *State, Hunt, Pros. v. Mayor and Common Council of City of Rahway*, 39 N. J. L. (10 Vr.) 646 [1877].

⁸ *Zinser v. Board of Supervisors of Buena Vista County*, — Ia. —, 114 N. W. 51 [1907].

¹ *Reclamation District No. 3 v. Parvin*, 67 Cal. 501, 8 Pac. 43 [1885]; *People v. Hagar*, 49 Cal. 229 [1874]; *People v. Coghill*, 47 Cal. 361 [1874]; *Town of Cicero v. Andren*, 224 Ill. 617, 79 N. E. 962 [1907]; *Vennum v. People ex rel. Galloway*, 188 Ill. 158, 58 N. E. 979 [1900]; *Evart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478 [1899].

² *Reclamation District No. 3 v. Parvin*, 67 Cal. 501, 8 Pac. 43 [1885]; *People v. Hagar*, 49 Cal. 229

[1874]; *People v. Coghill*, 47 Cal. 361 [1874]; *Town of Cicero v. Andren*, 224 Ill. 617, 79 N. E. 962 [1907]; *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *Moore v. City of Mattoon*, 163 Ill. 622, 45 N. E. 567 [1896]; *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *Adcock v. City of Chicago*, 160 Ill. 611, 43 N. E. 589 [1896]; *State, Simmons, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 60 [1875]; *People ex rel. President, Managers and Company of the Delaware & Hudson Canal Company v. Parker*, 117 N. Y. 86, 22 N. E. 752 [1889]; *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874].

³ *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898].

ment must ordinarily be interposed before the confirmation; and if such objection is not then made, it is to be regarded as waived, and cannot be interposed subsequently in a collateral attack upon the judgment of confirmation.⁴ It is said, however, that a property owner cannot complain of unauthorized changes in the assessment after it was made and returned by the appraisers, without any meeting of the appraisers for the purpose of making such changes, unless he can show that his assessment has been increased.⁵ If, however, an assessment of benefits is to be made by one of the assessors of the city, the fact that it is made by two of them does not render the assessment invalid.⁶

§ 901. Necessity of unanimous action of commissioners.

Unless the statute contemplates the action and unanimous consent of the commissioners or other persons empowered to make the assessment, the concurrence of a majority is sufficient.¹ Accordingly, the fact that one of the members was absent from the proceedings does not under such statutes invalidate the proceedings,² nor does the fact that he refuses to sign the report³ or that some of the persons chosen to determine the amount of benefits do not concur in the result,⁴ invalidate the assessment. Under some statutes it has been held that it is not necessary that the commissioners act jointly in viewing the land to be assessed.⁵ Where less than all may act, failure to give notice to one of the commissioners so as to enable him to take part in the proceedings, invalidates the assessment.⁶ If, however, all are notified and have an opportunity of taking part in the proceedings, failure on the part of one to take part in the proceedings does not invalidate the assessment.⁷

⁴ *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *People ex rel. Kochersperger v. Markley*, 166 Ill. 48, 46 N. E. 742 [1897].

⁵ *Bannister v. Grassy Fork Ditching Association*, 52 Ind. 178 [1875].

⁶ In the *Matter of Gardner*, 41 Howard, 255 [1871].

¹ In the *Matter of Merriam*, 84 N. Y. 596 [1881]; In the *Matter of the Extension of Church Street*, 49 Barb. 455 [1867]; *Soens v. Racine*, 10 Wis. 271 [1860].

² In the *Matter of Merriam*, 84 N. Y. 596 [1881]; In the *Matter of the*

Extension of Church Street, 49 Barb. 455 [1867].

³ In the *Matter of the Extension of Church Street*, 49 Barb. 455 [1867].

⁴ *Soens v. City of Racine*, 10 Wis. 271 [1860].

⁵ *Swamp Land District, No. 307 v. Gwynn*, 70 Cal. 566, 12 Pac. Rep. 462 [1886].

⁶ In the *Matter of Beekman*, 31 Howard, 16 [1865].

⁷ *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 62 N. Y. 567 [1875].

§ 902. Signature of report.

In the absence of a statute specifically requiring it, it is not necessary that the report should be signed.¹ Under such statutes the fact that the report is signed by less than the entire number of commissioners does not invalidate it, since no signatures were necessary thereto.² It is often provided by statute that the report must be signed by the commissioners or other officers authorized to make the assessment and report. Under such statutes a signature is necessary, and in the absence of such signature the assessment is invalid.³ Under such statutes where joint action on the part of commissioners or other officials is contemplated, signature by less than the entire number invalidates the proceeding.⁴ Signature by initials or abbreviations does not invalidate the assessment, if it appears that the person so signing was the person who was appointed as commissioner.⁵ Thus, where "John K. Kenny" was appointed a commissioner and the assessment roll was signed "J. F. Kenny," such signature was held to be valid.⁶ If the signature is not by the name by which the commissioner was appointed and the record does not show that it was in fact the same man, the signature is insufficient.⁷ If the statute specifically authorizes action by a majority of the commissioners, a signature of a report by two out of three commissioners is sufficient.⁸ If the assessment roll is signed according to the statutory requirements, and is thus offered by the commissioners as their own act, it is immaterial by whom the manual labor

¹North River Meadow Co. v. Christ's Church at Shrewsbury, 22 N. J. L. (2 Zab.) 424, 53 Am. Dec. 258 [1850].

²North River Meadow Co. v. Christ's Church at Shrewsbury, 22 N. J. L. (2 Zab.) 424, 53 Am. Dec. 258 [1850].

³Dougherty v. Hitchcock, 35 Cal. 512 [1868]; Great Falls Ice Co. v. Dist. of Col., 19 D. C. 327 [1890]; Bensinger v. District of Columbia, 6 Mackey (D. C.) 285 [1888]; Thompson v. Honey Creek Draining Company, 33 Ind. 268 [1870]; Thompson v. City of Detroit, 114 Mich. 502, 72 N. W. 320 [1897]; Platt v. Stewart, 8 Barb. 493 [1850].

⁴Moore v. City of Mattoon, 163 Ill. 622, 45 N. E. Rep. 567 [1896]; Evart v. Village of Western Springs, 180 Ill. 318, 54 N. E. 478 [1899].

⁵People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. 10 [1897]; Casey v. People ex rel. Kochersperger, 159 Ill. 267, 49 N. E. 882 [1896].

⁶People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. 10 [1897].

⁷Harrison Bros. v. City of Chicago, 163 Ill. 129, 44 N. E. 395 [1896]; (appointed, 'John M. Dunphy' and 'J. C. Hitchcock'; signed 'John M. Dunphy' and 'James C. Hitchcock' and elsewhere 'Jonas C. Hitchcock.')

⁸In the Matter of Broadway Widening, 63 Barb. 572 [1872].

of writing out the report is done.⁹ A defect in the signature of a report must be taken advantage of by the method pointed out by statute.¹⁰ Thus, where such objection can be interposed at confirmation, it is waived if interposed at confirmation, and cannot subsequently be taken advantage of in an application for a judgment of sale under the assessment.¹¹

§ 903. Signature as indicating identity of commissioners.

The assessment proceedings must show that they are conducted by the persons who are properly appointed to make the assessment.¹ Thus, where the record shows that John M. Dunphy and J. C. Hitchcock were appointed commissioners, together with a third person, and the affidavits, oath and roll are signed by John M. Dunphy as one commissioner, and are signed alternately by James C. Hitchcock and Jonas C. Hitchcock as the other commissioner, the third signature being correct throughout, it was held that the assessment should not be confirmed.² A variance in name which does not raise a question of the identity of the commissioner is not, however, material.³ Thus, where one of the commissioners appointed was John F. Kenny and the assessment roll was signed J. F. Kenny, it was held that the assessment was regular if the person signing such roll was in fact the one who was appointed.⁴ After confirmation, an objection that the signature to the assessment roll varies from the name of the commissioner appointed by the court comes too late, and is to be regarded as waived.⁵ Thus where a commissioner was appointed by his Christian name "Alexander" and signed the assessment roll by the abbreviation "Al." it was held that no objection could be raised after confirmation.⁶

⁹ Barber v. City of Chicago, 152 Ill. 37, 38 N. E. Rep. 253 [1894].

¹⁰ Larson v. People ex rel. Kochersperger, 170 Ill. 93, 48 N. E. 443 [1897].

¹¹ Larson v. People ex rel. Kochersperger, 170 Ill. 93, 48 N. E. 443 [1897].

¹ Harrison Bros. v. City of Chicago, 163 Ill. 129, 44 N. E. 395 [1896].

² Harrison Bros. v. City of Chicago, 163 Ill. 129, 44 N. E. 395 [1896].

³ People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. 10

[1897]; Casey v. People, 159 Ill. 267, 49 N. E. 882 [1896].

⁴ People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. 10 [1897].

⁵ Casey v. People ex rel. Kochersperger, 159 Ill. 267, 49 N. E. 882 [1896]; People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. 10 [1897].

⁶ Casey v. People ex rel. Kochersperger, 159 Ill. 267, 49 N. E. 882 [1896].

§ 904. Certificate.

If the statute provides for a certificate to the assessment or report, such certificate must be made in the manner provided by statute, and if so made is sufficient.¹ Under a statute requiring a certificate authenticating the record of the assessment, diagram and warrant, the assessment need not have a separate certificate.² A certificate to the effect that "the foregoing on page seventy-nine is a true and correct record of the assessment, diagram and warrant" has been held to be valid as a mere clerical error, where the record was copied upon six pages, ending upon page seventy-nine.³ Omission to state in the certificate as required by statute that the apportionment and assessment are contained and stated in the column designated "assessment for construction" is held to invalidate the entire assessment.* In the absence of a showing to the contrary, it will be presumed that a certificate to an assessment is not made prematurely.⁵

§ 905. Affidavit.

If an affidavit is required by statute, the report is insufficient if the affidavit is omitted.¹ Under a statute requiring an affidavit that the assessment "is in all respects a true assessment to the best of their judgment and belief," an affidavit that "the foregoing appraisement is correct to the best of our judgment" is sufficient.²

§ 906. Filing report.

It is generally provided by statute that the report of the commissioners or other persons authorized to make the assessment must be filed. Filing an assessment roll consists in delivering it to the officer designated by statute for the purpose of keeping it permanently in his office.¹ Under statutes which provide for filing the assessment roll, it is necessary that it be filed in sub-

¹ *Himmelmann v. Hoadley*, 44 Cal. 213 [1872]; *The Norwich Savings Society v. City of Hartford*, 48 Conn. 570 [1881].

² *Himmelmann v. Hoadley*, 44 Cal. 213 [1872].

³ *Himmelmann v. Hoadley*, 44 Cal. 213 [1872].

* *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. 207 [1890].

⁵ *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903].

¹ *Thompson v. Honey Creek Draining Company*, 33 Ind. 268 [1870].

² *Large v. Kien's Creek Draining Co.*, 30 Ind. 263, 95 Am. Dec. 696 [1868].

¹ *The Norwich Savings Society v. City of Hartford*, 48 Conn. 570 [1881]; *Mullins v. Shaw*, 77 Miss. 900, 28 So. 958 [1900].

stantial compliance with the provisions of the statute.² Under a statute which requires the county drain commissioner to file the record of the proceedings, it is not necessary that such record be filed before the assessment is levied.³ Under a statute which provides that notice of the filing of the assessment roll must be given, failure to give the notice required by statute invalidates the assessment.⁴ Under a statute which provides that notice must be given of the completion of the report, and if exceptions are filed with the reviewers, they must name another and subsequent date for filing their report in court; and the parties objecting must have twenty days after that time to file their exceptions in court, it is improper for the viewers to file their report upon the first day named by them in their notice when exceptions have been filed with them; and such error invalidates the proceedings.⁵ A slight delay in filing the report is held under some statutes not to invalidate proceedings in the absence of a showing that property owners are prejudiced by such delay.⁶ Under other statutes the requirement fixing the time for filing the report is mandatory, and failure to file within such time so limited renders the report of no validity.⁷ If the council has extended the time for filing the report, the report may be filed within the time as extended, even though such extension was given after the expiration of the time originally fixed for filing such report.⁸ If a report of benefits and damages has been inadvertently omitted from the reports, an order for filing the same *nunc pro tunc* may be made.⁹ Though the record does not show that the report was ever filed, the statement in the remonstrance that such report was filed is held sufficient to establish that fact.¹⁰

² *People ex rel. Jeffris v. Record*, 212 Ill. 62, 72 N. E. 7 [1904]; *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893]; *Holland v. People ex rel. Miller*, 189 Ill. 348, 59 N. E. 753 [1901]; *State, Board, Pros. v. City of Hoboken*, 36 N. J. L. (7 Vr.) 378 [1873].

³ *Jones v. Gable*, — Mich. —, 113 N. W. 577 [1907].

⁴ *State, Van Solinger, Pros. v. Town of Harrison*, 39 N. J. L. (10 Vr.) 51 [1876].

⁵ *Morewood Avenue, Ferguson's Appeal*, 159 Pa. St. 39, 28 Atl. 130 [1893].

⁶ *Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410 [1886].

⁷ *State, Lemon, Pros. v. Inhabitants of the City of Trenton*, 47 N. J. L. (28 Vroom) 489, 4 Atl. Rep. 312 [1885]; *State, Gleason, Pros. v. Town of Bergen*, 33 N. J. L. (4 Vr.) 72 [1868].

⁸ *State, Central Railroad Company of New Jersey, Pros. v. Mayor, etc., of Bayonne*, 51 N. J. L. (22 Vr.) 428 [1889].

⁹ *Holland v. Spell*, 144 Ind. 561, 42 N. E. 1014 [1895].

¹⁰ *State, Hand, Pros. v. City Council of City of Elizabeth*, 31 N. J. L. (2 Vr.) 547 [1864].

§ 907. Necessity of record of assessment and of prior proceedings.

Under some statutes it is provided that the assessment when made must be recorded.¹ Such provisions are usually made in order to give constructive notice of the assessment to the owners of the property upon which such assessments are to be levied. When this is the object of the statute, failure to record the assessment, as provided for by statute, invalidates the assessment.² If the statute requires such assessment to be recorded in the mortgage record, it must be recorded there.³ If, on the other hand, the provision requiring the assessment to be recorded is not for the purpose of giving constructive notice, but simply for the preservation of the assessment, failure to have it recorded does not render it invalid.⁴ Where the council has approved the report of a committee appointed to estimate the cost of a proposed improvement, and such action is not recorded when a certain witness examines the council record, but it is recorded subsequently, such delay in recording does not invalidate the proceedings.⁵ Under a statute which provides for a record of the warrant, assessment, diagram and engineer's certificate together, recording the assessment, warrant and diagram in one book of assessments for records, and recording the engineer's certificates in another book kept in the same office, but not kept with the assessment records and not referred to therein is insufficient.⁶ Where twelve lots were omitted from the assessment records and were kept in a special register at the request of the owners of the lots, it was held that such record was insufficient as constructive notice to a bona fide grantee of such property after a tax sale.⁷

¹ State, Board, Pros. v. City of Hoboken, 36 N. J. L. (7 Vr.) 378 [1873].

² Cotton v. Watson, 134 Cal. 422, 66 Pac. 490 [1901]; Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173 [1900]; Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025 [1894]; Norton v. Courtney, 53 Cal. 691 [1879]; Himmelmann v. Danos, 35 Cal. 441 [1868]; Scott v. State for Use of Busenburg, 89 Ind. 368 [1883]; Indiana Bond Company v. Shearer, 24 Ind. App. 622, 57 N. E. Rep. 276 [1900]; Fraser v. Mulany, 129 Wis. 377, 109 N. W. 139 [1906].

³ Beck v. Tolen, 62 Ind. 469 [1878].

⁴ Fenwick Hall Company v. Town of Old Saybrooke, 69 Conn. 32, 36 Atl. 1068 [1897]; City of Bridgeport v. Giddings, 43 Conn. 304 [1876].

⁵ Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821 [1898].

⁶ Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337 [1895].

⁷ Lyon v. Alley, 130 U. S. 177, 32 L. 899, 9 S. 480 [1889]; (affirming Alley v. Lyon, 14 D. C. (Mackey) 457 [1885]). (In this case there were a number of other violations of the statute. No statement of taxes

Under a statute requiring a record of ditch improvements to be kept in a special book which was to be signed by the judge who presided, omission on the part of the judge to sign such record does not prevent the contractors from enforcing their liens for the construction of the improvement.⁸ Under a statute requiring an assessment to be recorded, the fact that the assessment was entered on loose sheets of paper, attached together with a roll, with a proper caption, which was to be kept in the office of the board and was not recorded until the assessment was confirmed, does not invalidate the assessment; as it is not an omission affecting the substantial justice between the parties, and by statute such omissions do not invalidate the assessment.⁹ Under a statute requiring a contract to be recorded after the return of a warrant if not already recorded, the fact that the contract is not recorded before the warrant is returned, does not invalidate the lien of the assessment.¹⁰ If the engineer's certificate is recorded following the record of the assessment and immediately preceding the record of the diagram and warrant, a certificate that "the foregoing record on pages seventy-nine, eighty and eighty-one is a true and correct record of the assessment, diagram and warrant recorded and issued" does not invalidate the proceedings, although mention of the engineer's certificate is omitted, if it in fact is recorded upon the pages designated.¹¹ Under a statute making the assessment *prima facie* evidence of its validity, it is to be presumed that the assessment was properly recorded in the absence of a showing to the contrary.¹² However, under a statute which provides that in an action to enforce the lien, the presumption of law shall be that all the provisions of the act have been complied with, it has been held that there will be no presumption that the schedule of benefits assessed against property has been recorded in the absence of an averment to that effect in a complaint to enforce an assessment.¹³ Under a statute which pro-

had been filed by the commissioners nor had a list of the persons taxed been placed in the hands of the collector, nor had the collector given notice thereof to such persons, all of which were required by statute.)

⁸ Dixon v. Labry, 69 S. W. 791, 24 Ky. Law Rep. 697 [1902].

⁹ State of Minnesota ex rel. Lewis v. District Court of Ramsey County, 33 Minn. 164, 22 N. W. 295 [1885].

¹⁰ Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772 [1900].

¹¹ Greenwood v. Chandon, 130 Cal. 467, 62 Pac. 736 [1900].

¹² Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901]. See also, Hoefgen v. State ex rel. Brown, 17 Ind. App. 537, 47 N. E. 28 [1896].

¹³ Welch v. Town of Roanoke, 157 Ind. 398, 61 N. E. Rep. 791 [1901].

vides that a certificate of the proper recording of the assessment, diagram and warrant signed by the superintendent must be attached thereto, the record without such certificate is of no legal effect.¹⁴ The omission from the certificate of the engineer of the words "depth being O. K.," has been held not to invalidate the proceedings where the exact depth is stated in the recorder's certificate and the assessment, diagram and warrant are recorded properly.¹⁵ If the council has approved the report of one of its committees and its record does not show the fact of such approval, the council may, at a subsequent meeting, amend its record so as to show the fact of such approval.¹⁶

It may be provided by statute as a condition precedent to the validity of the assessment that certain steps in the assessment proceeding must be recorded.¹⁷ If the statute does not specify the stage of the proceeding at which such record must be made, the fact that a given proceeding is not recorded before the subsequent proceedings are had, does not invalidate such subsequent proceedings.¹⁸ Thus, under a statute requiring the contract to be recorded after the return of the warrant if not already recorded, it is not necessary that the contract be recorded before the warrant is issued in order to make the assessment a lien.¹⁹ Accordingly, if the action of the council in approving the report of a committee which has been appointed to estimate the cost of a proposed improvement is recorded, the fact that such action was not recorded when a given witness examined the record does not invalidate such action.²⁰ If the statute requires the diagram and assessment to be recorded, the diagram must show in what direction the streets run.²¹ If the statute further requires the engineer's certificate to be recorded as a condition precedent to the existence of a lien and a diagram is drawn upon the back of such certificate, which is referred to therein, and which shows to what extent the work has been performed under the contract, and to what extent it is left unperformed, such diagram must

¹⁴ *Himmelman v. Danos*, 35 Cal. 441 [1868].

¹⁵ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900].

¹⁶ *County of Adams v. City of Quincy*, 130 Ill. 566, 6 L. R. A. 155, 22 N. E. 624 [1890].

¹⁷ *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772 [1900].

¹⁸ *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772 [1900].

¹⁹ *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772 [1900].

²⁰ *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898].

²¹ *Norton v. Courtney*, 53 Cal. 691 [1879].

be recorded as a part of the certificate, and if it is not so recorded no lien attaches.²² Under a statute which makes the assessment *prima facie* evidence of its validity, it is to be presumed in the absence of evidence that the contract and all other documents required by law to be recorded were recorded.²³ Under a statute which provides that where bonds are issued for a street improvement, they shall be conclusive evidence of the regularity of all prior proceedings, and that if no attack has been made upon such prior proceedings within thirty days, such attack is barred, the issue of such bonds cures an objection that the street superintendent recorded the assessment, but did not certify to such record in a proper manner.²⁴

§ 908. Loss or destruction of assessment roll or ordinance.

If a special assessment roll is lost or destroyed, it may be restored by the order of the court.¹ When this is done, the roll as restored becomes the assessment roll, and has the same legal effect as the original.² If the original ordinance has been destroyed, oral evidence may be used showing that it was signed by the mayor, although the ordinance as recorded fails to show such signature.³ If the assessment roll is not restored by order of the court, it is error to proceed further,⁴ even if an alleged copy not on file is offered in evidence to prove the contents of the original.⁵

§ 909. Amendment of assessment.

If an assessment has once been made, it cannot be set aside by the public corporation which made it in the absence of statutory authority.¹ If the assessment has been paid by the prop-

²² Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025 [1894].

²³ Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901].

²⁴ Chase v. Trout, 146 Cal. 350, 80 Pac. 81 [1905].

¹ Thomas v. City of Chicago, 152 Ill. 292, 38 N. E. Rep. 923 [1894].

² Thomas v. City of Chicago, 152 Ill. 292, 38 N. E. Rep. 923 [1894].

³ City of Seattle v. Doran, 5 Wash. 482, 32 Pac. 105, 1002 [1893].

⁴ Morrison v. City of Chicago, 142 Ill. 660, 32 N. E. 172 [1893].

⁵ Morrison v. City of Chicago, 142 Ill. 660, 32 N. E. 172 [1893].

¹ Campion v. City of Elizabeth, 41 N. J. L. (12 Vroom) 355 [1879]; Town of Muskego v. Drainage Commissioners, 78 Wis. 40, 47 N. W. 11 [1890]. While discussion of this specific question has been avoided it has been said that the court would have much hesitation in holding that such power did not exist. Bixler v. Board of Supervisors of the County of Sacramento, 59 Cal. 698 [1881].

erty owners, the need of specific statutory authority to justify the public corporation in setting the assessment aside is even more imperative.² In the absence of some statutory provision therefor, commissioners cannot amend their report after it is made and filed.³ An alteration may be made up to the time of filing the report.⁴ Under some statutes, neither the court nor the commissioners can amend after the report has been filed and acted upon. If any errors exist of which the property owner can complain, his remedy must then be by appeal.⁵ The reviewing court cannot amend the assessment in an appeal or error proceeding by striking out improper items.⁶ Under statutes which provide for amending the assessment, the power of amendment after the report is made is held to exist.⁷ Under some statutes, the power to amend exists up to the time that the final report is filed.⁸ Thus, amendment may be made to correct a defective description of land,⁹ or to correct a misnomer of the owner,¹⁰ or to credit to the owners the proportion of the cost of the improvement which has been otherwise pro-

² *Campion v. City of Elizabeth*, 41 N. J. L. (12 Vroom) 355 [1879].

³ *State ex rel. Wilson v. Longstreet*, 38 N. J. L. (9 Vr.) 312 [1876].

⁴ *In the Matter of the Commissioners of Central Park*, 60 Barb. (N. Y.) 132 [1870].

⁵ *The People ex rel. Barber v. Chapman*, 128 Ill. 496, 21 N. E. 507 [1890].

⁶ *Thompson v. City of Chicago*, 197 Ill. 599, 64 N. E. 392 [1902].

⁷ *McCaleb v. Cool Run Drainage and Levee District*, 190 Ill. 549, 60 N. E. 898 [1901]; *Brophy v. Harding*, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253 [1892]; *City of Chicago v. Walker*, 24 Ill. 494 [1860]; *Ager v. State ex rel. Heaston*, 162 Ind. 538, 70 N. E. 808 [1903]; *State ex rel. Ely v. Smith*, 124 Ind. 302, 24 N. E. Rep. 331 [1890]; *Bell v. Balfe*, 41 Ind. 221 [1872]; *Sand Creek Turnpike Company v. Robbins*, 41 Ind. 79 [1872]; *Temple v. Hamilton*, 134 Ia. 706, 112 N. W. 174 [1907]; *City of St. Louis v. Brown*, 155 Mo. 545, 56

S. W. 298 [1899]; *State, Pudney, Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 65 [1874]; *State, Vanderbeck, Pros. v. Mayor and Common Council of Jersey City*, 29 N. J. L. (5 Dutcher) 441 [1861]; *In re White Plains Road of City of New York*, 94 N. Y. S. 110, 106 App. Div. 133 [1905].

⁸ *City of St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298 [1899].

⁹ *Connecticut Mutual Life Insurance Company v. City of Chicago*, 217 Ill. 352, 75 N. E. 365 [1905]; *Leman v. City of Lake View*, 131 Ill. 388, 23 N. E. 346 [1890]; *Ager v. State ex rel. Heaston*, 162 Ind. 538, 70 N. E. 808 [1903]; *State ex rel. Ely v. Smith*, 124 Ind. 302, 24 N. E. Rep. 331 [1890]; *Becker v. Baltimore & Ohio South-Western Railway Company*, 17 Ind. App. 324, 46 N. E. Rep. 685 [1897].

¹⁰ *Brooks v. City of Chicago*, 168 Ill. 60, 48 N. E. 136 [1897]; *Brewer, Pros. v. City of Elizabeth*, 66 N. J. L. (37 Vr.) 547, 49 Atl. Rep. 490 [1901].

vided for after the assessment roll has been filed.¹¹ Whether the assessment can be amended by the court or council on the one hand, or whether it must be referred to the commissioners or other similar officers by whom the assessment was made, is a question which depends chiefly upon the provisions of the statute applicable thereto. Under some statutes the assessment roll must be referred to the commissioners or other officers by whom such roll was made in the first instance for the purpose of amendment.¹² The roll cannot be amended by the court or the city under such statutes,¹³ since the property owner is entitled to have the judgment of the commissioners upon the question of the amount of his assessment.¹⁴ The court may be empowered to send the report back to the commissioners or other officers by whom it was made, for correction.¹⁵ If the report is sent back for correction, it is error for the city to proceed to confirm it as originally filed, after it has been returned without correction.¹⁶ Power to return an assessment for correction upon specific objections does not confer power to return the assessment for a general rehearing.¹⁷ If the report can be referred to commissioners for correction, they need not be sworn again.¹⁸ Under some statutes

¹¹ *Thompson v. City of Highland Park*, 187 Ill. 265, 58 N. E. 328 [1900].

¹² *The People of the State of California v. Board of Supervisors of City and County of San Francisco*, 43 Cal. 91 [1872]; *People of the State of California v. Hastings*, 34 Cal. 571 [1868]. "The report upon which the judgment of the county court is to be rendered must be one which as a whole and in all its parts and details has received the approval and confirmation of the board." *The People of the State of California v. Board of Supervisors of City and County of San Francisco*, 43 Cal. 91, 104 [1872].

¹³ *Morning Side Park Case*, 10 Abb. Pr. N. S. 338 [1870].

¹⁴ *People of the State of California v. Board of Supervisors of City and County of San Francisco*, 43 Cal. 91 [1872].

¹⁵ *Brooks v. City of Chicago*, 168 Ill. 60, 48 N. E. 136 [1897]; *Browning v. City of Chicago*, 155 Ill. 314,

49 N. E. Rep. 565 [1895]; *Schemick v. City of Chicago*, 151 Ill. 336, 37 N. E. Rep. 888 [1894]; *Turner v. Lay*, 163 Ind. 103, 71 N. E. 217 [1904]; *Chaney v. State ex rel. Ely*, 118 Ind. 494, 21 N. E. Rep. 45 [1888]; *State, Hegeman, Pros. v. Mayor and City Council of the City of Passaic*, 51 N. J. L. (22 Vr.) 109, 16 Atl. 62 [1888]; *State, Ropes, Pros. v. Essex Public Road Board*, 37 N. J. L. (8 Vr.) 335 [1875]; *In the Matter of Opening Canal Street*, 8 Barb. (N. Y.) 505 [1850].

¹⁶ *State, Board, Pros. v. City of Hoboken*, 36 N. J. L. (7 Vr.) 378 [1873].

¹⁷ *Kirst v. Street Improvement District No. 120*, — Ark. —, 109 S. W. 526 [1908].

¹⁸ *Umbria Street*, 32 Pa. Super. Ct. 333 [1907]; (citing *Hempfield Township Road*, 122 Pa. St. 439; *Springdale Township Road*, 91 Pa. St. 260; *Springbrook Road*, 64 Pa. St. 451; *Hilltown Road*, 18 Pa. St. 233, *Potts' Appeal*, 15 Pa. St. 414).

the court may amend the report upon application for confirmation.¹⁹ Under some statutes it has been held that a duplicate assessment roll can be corrected only from the data contained in the original roll; and that if the original roll does not contain data for correcting the duplicate roll, oral evidence is not admissible to correct the deficiencies.²⁰ Failure of the commissioners to insert the dollar sign before the figures showing the amount of the assessment may be corrected by the court before which judgment is sought for the assessment.²¹ If the assessment roll describes two tracts of land as being in the wrong township and the record shows this to be a mere clerical error, it has been held that the foreman of the jury before which the question of the amount of benefits is tried may correct such error after the jury has been separated.²² Under some statutes, if the ordinance is valid and the assessment is defective because it includes items for which the assessment should not be levied and such items can be separated from the rest of the amount of the assessment, the court may amend the assessment by striking out the items which are unlawfully included.²³ If the ordinance provides for including improper items, but the amount of such items can be severed from the amount of improper charges, the trial court may permit the assessment roll to be recast so as to eliminate such improper items.²⁴ On the other hand, if the ordinance provides for including improper items, and the cost of such items cannot be severed from the cost of the proper items, the court cannot amend the assessment, since

¹⁹ *Connecticut Mutual Life Insurance Company v. City of Chicago*, 217 Ill. 352, 75 N. E. 365 [1905]; *Thompson v. City of Highland Park*, 187 Ill. 265, 58 N. E. 328 [1900]; *City of Jacksonville v. Hamill*, 178 Ill. 235, 52 N. E. 949 [1899]; *Brooks v. City of Chicago*, 188 Ill. 60, 48 N. E. 136 [1897]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. Rep. 688 [1894]; *Leman v. City of Lake View*, 131 Ill. 388, 25 N. E. 346 [1890]; *Ager v. State ex rel. Heaston*, 162 Ind. 538, 70 N. E. 808 [1903]; *State ex rel. Spencer v. Ensign*, 55 Minn. 278, 56 N. W. 1006 [1893]; *City of St. Louis v. Lawton*, 189 Mo. 474, 88 S. W. 80 [1905];

City of Joplin ex rel. Kee v. Freeman, 125 Mo. App. 717, 103 S. W. 130 [1907]; *Brewer v. City of Elizabeth*, 66 N. J. L. 547, 49 Atl. Rep. 480 [1901].

²⁰ *People of the State of California v. Hastings*, 34 Cal. 571 [1868].

²¹ *Brown v. City of Joliet*, 22 Ill. 123 [1859].

²² *Huston v. Clark*, 112 Ill. 344 [1885].

²³ *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904]; *Thompson v. People ex rel. Hanberg*, 207 Ill. 334, 69 N. E. 842 [1904].

²⁴ *McChesney v. City of Chicago*, 205 Ill. 528, 69 N. E. 38 [1903].

to do so would be in effect to amend the ordinance.²⁵ An amendment after the roll is filed, made by altering a lot number without leave of court, renders the assessment against the substituted lot invalid.²⁶ Power to amend an irregular or defective assessment does not authorize the court to levy a tax where none has been levied.²⁷ Under a statute authorizing the reference of a report to commissioners for amendment, a report cannot be referred after the jury has acted upon such report.²⁸ After confirmation the court cannot modify an assessment by increasing the amount.²⁹ Under some statutes the board of town trustees or other officers of the public corporation may alter or amend the report after it has been filed upon a hearing of objections thereto.³⁰ If such board rejects the report of commissioners appointed to estimate benefits and damages, such act terminates the proceedings; and the public corporation cannot proceed farther unless new proceedings have been begun by filing a petition.³¹ If the assessment is invalid the court may set it aside.³² If an ordinance has been passed providing for a local assessment, errors in such ordinance may be corrected by the adoption of a subsequent ordinance if the burden upon the property owner is not thereby increased.³³ If an assessment is modified, its date is of the year in which it is put in final form.³⁴

²⁵ *American Hide and Leather Co. v. City of Chicago*, 203 Ill. 451, 67 N. E. 979 [1903].

²⁶ *Gage v. City of Chicago*, 216 Ill. 107, 74 N. E. 726 [1905].

²⁷ *People ex rel. Jeffries v. Record*, 212 Ill. 62, 72 N. E. 7 [1904].

²⁸ *Gilkerson v. Scott*, 76 Ill. 509 [1875].

²⁹ *Hammond v. Carter*, 161 Ill. 621, 44 N. E. Rep. 274 [1896]. If the assessment is confirmed on default against certain property owners it cannot be referred to commissioners on objection of other property owners, with power to increase the assessment against the property owners as to whom it has already been confirmed. *Chicago & W. I. R. Co. v. City of Chicago*, 230 Ill. 9, 82 N. E. 399 [1907].

³⁰ *Town of Greenwood v. State*, 159 Ind. 267, 64 N. E. 849 [1902]; *Becker v. Baltimore & Ohio South-Western Railway Co.*, 17 Ind. App. 324, 46 N. E. Rep. 685 [1897]; *Temple v. Hamilton County*, 134 Ia. 706, 112 N. W. 174 [1907]; *Mayor, etc., of Jersey City v. Carson*, 43 N. J. L. (14 Vr.) 664 [1881].

³¹ *Millisor v. Wagner*, 133 Ind. 400, 32 N. E. 927 [1892].

³² *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. Rep. 15 [1892]; *People ex rel. Thompson v. Mayor, etc., of the City of Syracuse*, 6 Hun 652 [1876].

³³ *City of Fayette ex rel. Crews v. Rich*, 122 Mo. App. 145, 99 S. W. 8 [1907].

³⁴ *Brophy v. Harding*, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253 [1892].

§ 910. Nature and necessity of confirmation.

Under many of the statutes which provide for levying assessments, provision is made for a confirmation of the assessment after it has been made, as a condition precedent to its finally taking effect. Confirmation is the formal act of the court, council, board or other body authorized to confirm an assessment by which the validity and sufficiency of the assessment is determined. Where the council is authorized to confirm an assessment, the passage of a resolution providing that a special assessment roll has been reported to the council by the city engineer "be and the same is hereby accepted and adopted" is regarded as a confirmation in legal effect.¹ Under a statute providing that an assessment shall stand confirmed within thirty days after it is presented for confirmation if not confirmed sooner, and giving power to refer it back to the board of assessors for correction, an order referring it back with directions to make specific corrections, while possibly unauthorized, does not itself operate as a confirmation.² Under some statutes it is said that confirmation is not a judicial proceeding, but an administrative proceeding.³ The action of the commissioners in making the assessment is said to be ministerial in its nature.⁴ If the action of the court is invoked as one of the steps in confirmation, it is said under this theory that the action of the court is invoked merely as a matter of convenience, and that confirmation is not on that account an exercise of the judicial power.⁵ Under other statutes it is said that even if the common council is to confirm an assessment, the exercise of the power of confirmation is quasi judicial in its nature.⁶ In other cases confirmation is said to be the exercise of judicial authority.⁷ The action of the court in passing on the

¹ Auditor General v. Hoffman, 132 Mich. 198, 93 N. W. 259 [1903].

² Tone v. The Mayor, Aldermen and Commonalty of New York, 6 Daly (N. Y.) 343 [1876].

³ City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. Rep. 1117 [1895].

⁴ Rich v. City of Chicago, 59 Ill. 286 [1871].

⁵ City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. Rep. 1117 [1895]; Matter of Trustees of New York Protestant Episcopal School, 31 N. Y. 574 [1864].

⁶ Shank v. Smith, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. Rep. 932 [1901].

⁷ State ex rel. Ashby v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333 [1906]; People ex rel. Griffing v. Mayor and Common Council of the City of Brooklyn, 9 Barb. (N. Y.) 535 [1850]; The People ex rel. Monroe v. The Mayor, etc., of City of New York, 5 Barb. (N. Y.) 43 [1848].

validity of assessments is said to be, not the exercise of the taxing power, but a review of the acts of the taxing body.⁸ A review of the report of commissioners who have made the assessment is "eminently a judicial function,"⁹ and may accordingly be imposed upon a chancery court. In such action the court is, however, a court of limited, not general, jurisdiction,¹⁰ having power to pass only upon the questions specifically provided by statute.¹¹ Where confirmation is effected by the order of a court upon application for confirmation by the public corporation, a confirmation proceeding is said to be a suit at law, although at the same time a proceeding in rem.¹² Since it is the assessment roll which is to be confirmed, the existence of such roll is essential to the jurisdiction of the court or tribunal to make a finding of confirmation.¹³ If confirmation is provided for by statute as one of the steps in levying an assessment, confirmation is necessary to the validity of the assessment.¹⁴

§ 911. By what body confirmation may be had.

The statute which provides for confirmation ordinarily provides who may confirm the assessment and such provisions, of course, control. Under some statutes an assessment is confirmed upon a hearing before the council.¹ Under such statutes if a committee reports in favor of confirmation and the report of the committee is adopted by the council, the action of the committee is in fact the action of the council, and such assessment is therefore to be regarded as confirmed by the council.²

⁸ *City of St. Louis v. Brinckwirth*, 204 Mo. 280, 102 S. W. 1091 [1907]; *In the Matter of Extending Canal and Walker Streets*, 12 N. Y. 406 [1855].

⁹ *Hoertz v. Jefferson Southern Pond Draining Co.*, 119 Ky. 824, 27 Ky. Law Rep. 278, 84 S. W. 1141 [1905].

¹⁰ *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874].

¹¹ See § 271.

¹² *In re Petition of City of Mt. Vernon to Assess Cost of Local Improvements, etc.*, 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533 [1894].

¹³ *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893].

¹⁴ *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531 [1891]; *Indiana Bond Company v. Shearer*, 24 Ind. App. 622, 57 N. E. Rep. 276 [1900]; *Flint v. Webb*, 25 Minn. 93 [1878]; *Fisher v. Mayor, Aldermen and Commonalty of the City of New York*, 67 N. Y. 73 [1876]; *City of Corsicana v. Kerr*, 89 Tex. 461, 35 S. W. 794 [1896]; *Flewelling v. Proetzel*, 80 Tex. 191, 15 S. W. Rep. 1043 [1891].

¹ *Alexander v. City of Tacoma*, 35 Wash. 366, 77 Pac. 686 [1904].

² *Brown v. City of Saginaw*, 107 Mich. 643, 65 N. W. Rep. 601 [1895].

It may be provided that an assessment is to be confirmed by a board of revision.³ If two members of a board of revision confirm to an assessment and subsequently the entire board confirms it, such assessment is valid.⁴ If by statute a board of review is provided for, two members of which are to be named by the person assessed if he desires it, an assessment levied without the action of a board thus appointed is invalid.⁵ It may be provided that an assessment shall be confirmed by the council, sitting as a special board of equalization.⁶ Such determination of benefits by council as a board of equalization may be a condition precedent to its levy of an assessment as a council.⁷ Such action of the council is said to be judicial in its nature.⁸ A statute giving to the order of such council the conclusive effect of a judgment of a court is valid.⁹ Under some statutes an assessment is to be confirmed by a court, upon application to such court for a confirmation of the assessment, and a hearing of objections made to such assessment.¹⁰ If the statute provides for a confirmation by the court, the terms of the statute are of course controlling as to the court in which an application

³State ex rel. Ashby v. Three States Lumber Company, 198 Mo. 430, 95 S. W. 333 [1906]; Portsmouth Savings Bank v. City of Omaha, 67 Neb. 50, 93 N. W. 231 [1903]; People of the State of New York ex rel. Decker v. McCue, 173 N. Y. 347, 66 N. E. 15 [1903]; (reversing People ex rel. Decker v. McCue, 74 App. Div. 40); In the Matter of Roberts, 81 N. Y. 62 [1880]; In the Matter of Tappan, 54 Barb. (N. Y.) 225 [1869]; In the Matter of Tappen, 36 How. 390 [1869]; In the Matter of Palmer, 31 Howard, 42 [1865].

⁴Matter of Pearsall, 9 Abb. Pr. (N. S.) 203 [1870].

⁵Culbertson v. City of Cincinnati, 16 Ohio 574 [1847]; City of Cincinnati v. Coombs, 16 Ohio 181 [1847].

⁶Richardson v. City of Omaha, — Neb. —, 110 N. W. 648 [1907]; Wales v. Warren, 66 Neb. 455, 92 N. W. 590 [1902]; John v. Connell, 64 Neb. 233, 89 N. W. 806 [1902]; (modifying opinion in John v. Connell, 61 Neb. 267, 85 N. W. 82).

⁷Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524 [1898].

⁸Portsmouth Savings Bank v. City of Omaha, 67 Neb. 50, 93 N. W. 231 [1903].

⁹Alexander v. City of Tacoma, 35 Wash. 366, 77 Pac. 686 [1904].

¹⁰Thorn v. West Chicago Park Commissioners, 130 Ill. 594, 22 N. E. 520 [1890]; City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. Rep. 1117 [1895]; City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 S. W. 1091 [1907]; State, Van Riper, Pros. v. Township of Plainfield, 43 N. J. (14 Vroom) 349 [1881]; In the Matter of Extending Canal and Walker Streets, 12 N. Y. 406 [1855]; In the Matter of Commissioners of Central Park, 61 Barb. 40 [1871]; In the Matter of the Extension of the Bowery, 12 Howard (N. Y.) 97 [1856]; Doughty v. Hope, 3 Denio (N. Y.) 249 [1846]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874].

for confirmation must be made. If the court which is given power to confirm an assessment holds both probate and law terms and the statute requires confirmation to be made at a law term, an assessment cannot be confirmed at a probate term,¹¹ even if the commissioners may be appointed at a probate term.¹² If, however, it is provided by statute that an assessment may be confirmed at a probate term, the court has, of course, power to confirm at such term.¹³ It will not be presumed that an order was made at an irregular term.¹⁴ An application for a change of venue in a confirmation proceeding cannot be made after the case has been held and most of the objections have been decided, even if the change of venue could have been had under any circumstances.¹⁵

§ 912. Parties and procedure in confirmation.

Under some statutes it is provided that before a final hearing on confirmation, an affidavit must be filed showing compliance with certain provisions of the law on the subject of the levy of assessments.¹ If the statute requires the affidavit to show compliance with the provisions of a certain section of the statute, it is not necessary that the affidavit show compliance with the provisions of another section.² An application for confirmation must be made in the name of the public corporation by which the assessment is to be levied.³ The petition must allege the existence of a valid assessment ordinance,⁴ since the ordinance is the foundation of the assessment and in its absence no valid assessment can be made.⁵ The copy of the ordinance attached

¹¹ *Callon v. The City of Jacksonville*, 147 Ill. 113, 35 N. E. 223 [1894]; *City of Mt. Carmel v. Friedrich*, 141 Ill. 369, 31 N. E. 21 [1893]; *City of East St. Louis v. Wittich*, 108 Ill. 449 [1884].

¹² *Callon v. City of Jacksonville*, 147 Ill. 113, 35 N. E. 223 [1894]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888].

¹³ *People ex rel. Russel v. Brown*, 218 Ill. 375, 75 N. E. 989 [1905].

¹⁴ *People ex rel. Brooklyn Park Commissioners v. City of Brooklyn*, 3 Hun (N. Y.) 596 [1875].

¹⁵ *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. Rep. 750 [1894].

¹ *Washington Park Club v. City of Chicago*, 219 Ill. 323, 76 N. E. 383 [1906]; *Roberts v. City of Evanston*, 218 Ill. 296, 75 N. E. 923 [1905]; *McLennan v. City of Chicago*, 218 Ill. 62, 75 N. E. 762 [1905].

² *Howe v. City of Chicago*, 224 Ill. 95, 79 N. E. 421 [1906]; *Washington Park Club v. City of Chicago*, 219 Ill. 323, 76 N. E. 383 [1906].

³ *White v. City of Alton*, 149 Ill. 626, 37 N. E. 96 [1894].

⁴ *Ogden v. Town of Lake View*, 121 Ill. 422, 13 N. E. 159 [1889].

⁵ See § 837.

to the assessment petition is part of the record.⁶ If the statute provides that a copy of the ordinance certified by the clerk should be attached to the petition, an ordinance so certified is sufficient, although the certificate precedes the ordinance and yet refers to it as the "foregoing ordinance" as if it followed such ordinance.⁷ Under such statute it is necessary only that the ordinance be identified by proper reference and incorporated either by attaching it to the petition or filing it therewith, with a proper certificate.⁸ A statute which requires the assessment petition to recite the ordinance is complied with by attaching a copy of the ordinance to the petition and making it a part of the petition.⁹ If the petition for confirmation recites the improvement ordinance which provides that the street should be paved at the established grade, the petition need not go further and allege a prior ordinance by which such grade was established.¹⁰ If the petition alleges the passage of the ordinance and that a copy of an ordinance is attached to the petition; and a copy of the ordinance is in fact attached, the fact that a document purporting to be a copy of the report of the commissioners is also attached does not invalidate the petition.¹¹ If the certificate to an ordinance attached to an application for confirmation is not sealed with the official seal, such objection is waived if not made before the trial court.¹² The petition must aver that the ordinance was enacted, but need not recite a certificate to such ordinance by the clerk.¹³ If the petition avers that the ordinance was approved by the mayor, it is not necessary that the copy of the ordinance annexed to the petition should also show the mayor's approval.¹⁴ The statute may provide that the ordinance shall be recited in the petition or that a certified copy thereof shall be filed. Under such statute if the petition alleges the enactment of the ordinance the clerk

⁶ *Maxwell v. City of Chicago*, 185 Ill. 18, 56 N. E. 1101 [1900].

⁷ *Heiple v. City of Washington*, 219 Ill. 604, 76 N. E. 854 [1906].

⁸ *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901].

⁹ *Foss v. City of Chicago*, 184 Ill. 436, 56 N. E. 1133 [1900].

¹⁰ *Parker v. Village of La Grange*, 171 Ill. 344, 49 N. E. 550 [1898];

Haley v. City of Alton, 152 Ill. 113, 38 N. E. Rep. 750 [1894]; *White v.*

City of Alton, 149 Ill. 626, 37 N. E. 96 [1894].

¹¹ *McChesney v. People ex rel. Kochersperger*, 171 Ill. 267, 49 N. E. 491 [1898].

¹² *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897].

¹³ *Dickey v. City of Chicago*, 164 Ill. 37, 45 N. E. Rep. 537 [1896].

¹⁴ *Dickey v. City of Chicago*, 164 Ill. 37, 45 N. E. Rep. 537 [1896].

need not certify it.¹⁵ Under such a statute the fact that the certificate to the ordinance annexed to the petition is insufficient does not make the petition defective if the ordinance is properly pleaded.¹⁶ The fact that the certificate of the clerk attached to an ordinance does not show that it was passed by the council is no ground of objection to the confirmation of a special assessment.¹⁷ If the petition merely sets forth a copy of the report of the commissioner of public works, submitting to the council the draft of an improvement ordinance, without any averment that such ordinance was passed, such petition is insufficient.¹⁸ If the clerk's certificate authenticating a copy of the ordinance contains an interlineation made by the city attorney in the presence of the clerk with his consent and before the certificate was signed, such interlineation does not invalidate the certificate.¹⁹ If the clerk's certificate states that the annexed copy is a true copy of the ordinance and also a copy of the estimate of cost with order of approval, "which was duly passed by the city council of said city" on a certain date, and further states that, "the ordinance was duly approved and signed by the mayor of said city" on the same date, the words, "which was duly passed" are construed as referring to the ordinance.²⁰ If the statute provides that the clerk is the custodian of the report of the commissioners, his certificate need not recite the fact that he is such custodian.²¹ An averment that an ordinance defining the limits within which private property would be benefited by the grading of a street was duly enacted is held to state inferentially that an ordinance for grading a street was properly enacted.²² If the copy of the ordinance attached to the paving petition contains words which are not contained in the ordinance as passed, and which describe the quality of the asphalt, such words may be stricken out by amendment, and

¹⁵ *Ferris v. City of Chicago*, 162 Ill. 111, 44 N. E. 436 [1896]; *Adcock v. City of Chicago*, 160 Ill. 611, 43 N. E. 589 [1896]; *Wadlow v. City of Chicago*, 159 Ill. 176, 42 N. E. Rep. 866 [1896].

¹⁶ *Adcock v. City of Chicago*, 160 Ill. 611, 43 N. E. 589 [1896].

¹⁷ *Gage v. City of Chicago*, 162 Ill. 313, 44 N. E. 729 [1896]; *Ferris v. City of Chicago*, 162 Ill. 111, 44 N. E. Rep. 436 [1896].

¹⁸ *Hull v. City of Chicago*, 156 Ill. 381, 40 N. E. Rep. 937 [1895].

¹⁹ *Sargeant v. City of Evanston*, 154 Ill. 268, 40 N. E. Rep. 440 [1894].

²⁰ *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

²¹ *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

²² *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895].

the assessment may be confirmed if such change does not necessitate a recasting of the assessment.²³ A petition for a re-assessment need not set forth the amount of the original assessment remaining unpaid or the amount paid in,²⁴ or the cost of the original improvement.²⁵ An allegation that the commissioners appointed to estimate the cost of an improvement made a report whereby they estimated the cost of the improvement at a certain sum, which report was approved by the council and a copy of which was attached to the petition and made a part thereof, sufficiently alleges the report of the commissioners.²⁶ If the petition alleges that the report of the commissioners approved by the council is annexed thereto, such petition is not insufficient because of a defect in a superfluous certificate of the clerk to an order of approval of such report by the council.²⁷ A petition for a special assessment need not allege that a petition of the property owners for the improvement has been presented.²⁸ A petition for an assessment to pay the expense of appropriating property by condemnation proceedings need not set forth the ordinance providing for such appropriation. It need not aver a report of the commissioners as to the cost of the improvement, since the cost is determined by the condemnation judgment.²⁹ The petition need not in direct terms allege the appointment of commissioners or the fact that they were competent to act.³⁰ It need not aver where the proceeds of the assessment are to be expended.³¹ A description in an assessment petition of the property of a street railway company as the "right of way, right of occupancy, franchise and interest of the South Chicago Railway Company in and upon Ontario Avenue from Seventy-ninth Street to Eighty-third Street" is sufficiently accurate.³²

²³ *Galt v. City of Chicago*, 174 Ill. 605, 51 N. E. 653 [1898].

²⁴ *Cody v. Town of Cicero*, 203 Ill. 322, 67 N. E. 859 [1903]; *Adecock v. City of Chicago*, 172 Ill. 24, 49 N. E. 1008 [1898].

²⁵ *Cody v. Town of Cicero*, 203 Ill. 322, 67 N. E. 859 [1903].

²⁶ *Gage v. City of Chicago*, 162 Ill. 313, 44 N. E. 729 [1896].

²⁷ *Doremus v. People ex rel. Kochersperger*, 161 Ill. 26, 43 N. E. Rep. 701 [1896].

²⁸ *Richards v. City of Jerseyville*, 214 Ill. 67, 73 N. E. 370 [1905].

²⁹ *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33 [1898]; *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. Rep. 739 [1896].

³⁰ *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

³¹ *Hosmer v. The Hunt Drainage District*, 134 Ill. 360, 26 N. E. 584 [1891].

³² *South Chicago City Railway Co. v. City of Chicago*, 196 Ill. 490, 63 N. E. 1046 [1902].

Under some assessment statutes confirmation is not complete and the assessment does not become a lien until the title thereof with the date of confirmation is entered in the record of the titles of assessments.³³

§ 913. Notice of confirmation.

It is frequently provided by statute that notice of an application for the confirmation of an assessment must be given. It is generally held that such statutes must be complied with, since they are intended for the benefit of the property owners. A failure to give the notice provided for by statute invalidates the proceedings.¹ Thus, where a notice of hearing objections was given, and the objections were heard at a meeting held according to the notice, and the assessment confirmed; and such action was subsequently rescinded, it was held that the assessment could not be confirmed thereafter without giving another notice.² If the report is referred to the commissioners for correction, it cannot be confirmed thereafter without new notice.³ The notice must be given for the time specified by statute.⁴ Under a statute which requires ten days' notice of an application to confirm a special assessment, and provides that if ten days shall not elapse between the first publication and the first day of the next term of the court the hearing shall be continued, the ten days must be computed by excluding the day on which notice is first published and including the day on which the term begins.⁵ Under such statutes notice must accordingly be given ten days before the first day of the term at which the hearing is to be had.⁶ Under such statute it is sufficient to give

³³ *De Peyster v. Murphy*, 39 N. Y. Sup. Ct. Rep. 255 [1875].

¹ *Perry v. People ex rel. Kern*, 155 Ill. 307, 40 N. E. 468 [1895]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Burton v. City of Chicago*, 62 Ill. 179 [1871]; *Flint v. Webb*, 25 Minn. 93 [1878]; *State, Kellogg, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 353 [1875]; *State, Malone, Pros. v. Mayor and Common Council of Jersey City*, 27 N. J. L. (3 Dutcher) 536 [1859].

² *State, Malone, Pros. v. Mayor*

and Common Council of Jersey City, 27 N. J. L. (3 Dutcher) 536 [1859].

³ *Beach v. Mayor and Aldermen of Jersey City*, 71 N. J. L. (42 Vr.) 87, 58 Atl. 81 [1904]; *Hegeman v. City of Passaic*, 51 N. J. L. (22 Vr.) 544 18 Atl. 776 [1889].

⁴ *Le Moynes v. West Chicago Park Commissioners*, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48 [1886]; *Perry v. People ex rel. Kern*, 155 Ill. 307, 40 N. E. 468 [1895].

⁵ *Brown v. City of Chicago*, 117 Ill. 21, 7 N. E. 108 [1887].

⁶ *Maxwell v. City of Chicago*, 185 Ill. 18, 56 N. E. 1101 [1900].

the notice by a single publication ten days before the application is heard. A publication for ten successive days prior to the hearing is unnecessary.⁷ Under a statute which requires objections to a special assessment to be filed at least one day prior to the meeting of the council at which the confirmation of the assessment will be applied for, it is necessary that at least one day should intervene between the last day of the publication of the notice of such application and the day upon which council acts; and that such day must not be a Sunday.⁸ Under a statute requiring a notice to be published on five successive days, a certificate showing that the notice was published five times is insufficient; since notice may have been published five times but not on successive days.⁹ It may be provided that Sunday shall not be counted in determining what is publication for five successive days.¹⁰ Under a statute requiring publication in five successive numbers, it was held proper to publish it, omitting an intervening Sunday edition where such edition, though numbered consecutively with the issue upon week days, was furnished and sold under different terms from the week day issue.¹¹ Under a statute providing that notice shall be published at least five successive days, publication for seven successive days, including one Sunday, and a Monday, which was the Fourth of July, is sufficient.¹² If the statute provides that the court shall designate the paper in which the notice of publication for confirmation is to be published, such notice cannot be published in any other paper.¹³ The court cannot validate publication in another paper by setting aside the order designating a different paper, even if, after the order is made and before the notice is published, the statute is so amended as to make designation by the court unnecessary.¹⁴ If by statute it is provided that the commis-

⁷ *Royal Insurance Company v. South Park Commissioners*, 175 Ill. 491, 51 N. E. 558 [1898].

⁸ *Burton v. City of Chicago*, 53 Ill. 87 [1869].

⁹ *Tober v. City of Chicago*, 164 Ill. 572, 45 N. E. 1010 [1897]; *Chandler v. People ex rel. Kochersperger*, 161 Ill. 41, 43 N. E. 590 [1896]; *Evans v. The People ex rel. Kern*, 139 Ill. 552, 28 N. E. 1111 [1893].

¹⁰ *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893].

¹¹ *Voght v. City of Buffalo*, 133 N. Y. 463, 31 N. E. 340 [1892].

¹² *Rasmussen v. People ex rel. Kern*, 155 Ill. 70, 39 N. E. 606 [1895].

¹³ *Yaggy v. City of Chicago*, 194 Ill. 88, 62 N. E. 316 [1901]; (distinguished in *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902]).

¹⁴ *Yaggy v. City of Chicago*, 194 Ill. 88, 62 N. E. 316 [1901].

sioners are to give the notice of application for confirmation, a notice given by less than all the commissioners is invalid.¹⁵ It has, however, been held that notice given by less than all will be presumed to be valid unless it was shown that the commissioners were not all present or did not all have a notice of the meeting at which such notice was ordered to be given.¹⁶ If proceedings to confirm a special assessment are ordered by the public corporation to be suspended for two years and an order of confirmation is subsequently taken before the two years expire, it has been held that such order of confirmation will be valid in the absence of a showing that no notice was given of such application.¹⁷ It is not necessary that an affidavit of mailing a notice to property owners contain a copy of the notice mailed.¹⁸ If such affidavit does contain a copy of the notice mailed and such copy is defective in not giving the year in which the roll is made returnable, the copy of the notice may be treated as surplusage and the affidavit held to be valid.¹⁹ Under some statutes the notice must include so much of the report as shows what land is to be assessed and against whom as owners the assessment is to be made.²⁰ If notice specifies the improvement for which the assessment is to be levied, an assessment cannot be confirmed under such notice for a more extensive improvement.²¹ In the absence of statute a notice of confirmation is not required to contain a description of the property assessed;²² and accordingly an error in such description does not invalidate the assessment.²³ Under some statutes a default judgment of confirmation cannot be attacked by a proceeding in error, unless the applicant for the writ of error shall make an affidavit that he did not receive notice by mail of the filing of such assessment for confirmation or otherwise learn of the pendency thereof until ten days prior to the entry of his default

¹⁵ *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895]; *McChesney v. People ex rel. Kern*, 148 Ill. 221, 35 N. E. 739 [1894].

¹⁶ *In the Matter of Merriam*, 84 N. Y. 596 [1881].

¹⁷ *Brown v. City of Chicago*, 117 Ill. 21, 7 N. E. 108 [1887].

¹⁸ *West Chicago Street Railway Co. v. People ex rel. Kern*, 155 Ill. 299, 40 N. E. 599 [1895].

¹⁹ *Schemick v. City of Chicago*, 151 Ill. 336, 37 N. E. 888 [1894].

²⁰ *State, Kellogg, Pros. v. City of Elizabeth*, 37 N. J. L. (8 Vr.) 353 [1875].

²¹ *Owen v. City of Chicago*, 53 Ill. 95 [1869].

²² *City of Chicago v. Becker*, 233 Ill. 189, 84 N. E. 242 [1898].

²³ *City of Chicago v. Becker*, 233 Ill. 189, 84 N. E. 242 [1898].

therein.²⁴ This is not an unreasonable restriction of the right of appeal.²⁵ A writ of error obtained without filing such affidavit will be dismissed.²⁶

§ 914. Proof of publication.

Under a statute requiring a certificate of publication to be filed, a court has no jurisdiction to confirm an assessment without such certificate.¹ If the statute provides for making proof of the publication of the notice in some specified way, proof can only be made in the manner thus specified.² If the property owners make special appearance to object to the sufficiency of the service, it has been said that oral evidence may be used to show publication of the notice.³ In a direct attack upon a judgment of confirmation, the commissioners' affidavit of mailing the notice must show on its face that the statutory requirements were complied with.⁴ The certificate of publication must state the date of the first and the last papers in which such notice was published either expressly or by necessary implication.⁵ A showing that the notice was published for a certain number of days consecutively, beginning on a specified date is sufficient.⁶ A certificate which is dated before the last date of publication therein stated is, of course, invalid, since it cannot be truthfully stated as an existing fact that the publication will be made at a date in the future.⁷ In the absence of a statute requiring an affidavit to be made by all the commissioners, the affidavit may be made by one or more, even if the affidavit must

²⁴ *Lingle v. City of Chicago*, 212 Ill. 512, 72 N. E. 677 [1904]; *Hart Bros. v. West Chicago Park Commissioners*, 186 Ill. 464, 57 N. E. 1036 [1900].

²⁵ *Hart Bros. v. West Chicago Park Commissioners*, 186 Ill. 464, 57 N. E. 1036 [1900].

²⁶ *Lingle v. City of Chicago*, 212 Ill. 512, 72 N. E. 677 [1904].

¹ *Kearney v. City of Chicago*, 163 Ill. 293, 45 N. E. 224 [1896]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

² *Kearney v. City of Chicago*, 163 Ill. 293, 45 N. E. 224 [1896]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

³ *Lingle v. City of Chicago*, 172 Ill. 170, 50 N. E. 192 [1898].

⁴ *Sheridan v. City of Chicago*, 175 Ill. 421, 51 N. E. 898 [1898].

⁵ *Rue v. City of Chicago*, 57 Ill. 435 [1870]; *Allen v. City of Chicago*, 57 Ill. 264 [1870]; *Butler v. City of Chicago*, 56 Ill. 341 [1870].

⁶ *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *Smith v. City of Chicago*, 57 Ill. 497 [1870]; *Griffin v. City of Chicago*, 57 Ill. 317 [1870].

⁷ *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893].

state that notice has been sent to the owner whose premises have been assessed and whose name and place of residence are known to the commissioners.⁸ If an assessment is invalid only for want of notice of confirmation, it seems that the proceedings may be begun again at that point and carried on after giving due notice.⁹ A finding by the court in entering a judgment of confirmation that due notice as required by law has been given of the application, cannot be attacked collaterally,¹⁰ even if the record contains the certificate of the publisher which is defective,¹¹ or which shows that the first day of publication was on Sunday.¹² A finding that notice has been given according to law is not binding on appeal, because appeal is a direct attack upon the judgment of confirmation and not a collateral attack.¹³ If there is no finding that notice has been given in proper form and the notice of publication found in the record shows on its face that publication was insufficient, the court has no jurisdiction to confirm the assessment and its order of confirmation is a nullity.¹⁴ In some states it is held that if the proceedings are regular up to the notice for confirmation and the public corporation has jurisdiction to levy the assessment, failure to give proper notice is a mere irregularity which does not invalidate further proceedings.¹⁵

§ 915. Objections.

It is generally provided that persons affected by the assessment or the improvement may file objections to the proceed-

⁸ *Evans v. The People ex rel. Kern*, 139 Ill. 552, 28 N. E. 111 [1893].

⁹ *Burton v. City of Chicago*, 62 Ill. 179 [1871].

¹⁰ *Illinois Central R. R. Co. v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609 [1901]; *Glover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Casey v. People ex rel. Kochersperger*, 165 Ill. 49, 46 N. E. 7 [1897]. See § 986 *et seq.*

¹¹ *Glover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Casey v. People ex rel. Kochersperger*, 165 Ill. 49, 46 N. E. 7 [1897].

¹² *Illinois Central Railroad Com-*

pany v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901].

¹³ *White & Gleason v. City of Chicago*, 188 Ill. 392, 58 N. E. 917 [1900].

¹⁴ *Boynton v. People ex rel. Kern*, 153 Ill. 66, 39 N. E. 622 [1895]; *McChesney v. People ex rel. Kern*, 148 Ill. 221, 35 N. E. 739 [1894]; *McChesney v. People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893].

¹⁵ *City of Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117 [1895]; *Fitzhugh v. Duluth City*, 58 Minn. 427, 59 N. W. 1041 [1894]; *Petition of Folsom*, 2 S. (T. & C., N. Y.) 55 [1873].

ings.¹ Thus, on the hearing of a petition for forming a drainage district, parties whose lands will be damaged or benefited or through whose lands the drain will be run may be heard on the question of the necessity and utility of the work.² The right of filing objections is not restricted to the holders of legal title. Persons affected by the lien of the assessment or the sale of the property therefor, whether they hold legal or equitable title, or merely hold incumbrances upon the property may file objections.³ Thus, under statutes permitting "owners" and "persons interested" to oppose the confirmation of assessments, mortgagees may be heard in opposition to the assessment.⁴ Under some systems of procedure in levying assessments, opportunity is to be given for filing formal objections to the assessment. Objections for which provision is made by statute must be filed as required by statute.⁵ Thus, an objection to a report of drainage commissioners because they did not describe the land affected by a certain drain in a proper manner, must be made by a motion to their report and cannot be reached by motion for a new trial.⁶ It is frequently provided that a notice must be given requiring property owners to file objections within a certain time. Under a statute requiring such notice to be published in five successive numbers of the official paper and providing that objections may be filed within ten days from the first publication of the notice, the first publication may be made upon the same day that the resolution was approved by the mayor, but before it was in fact approved.⁷ A notice which requires objections to the assessment to be presented to the board of assessors instead of to the chairman of the board, as specified by statute, is an immaterial variance.⁸ Under a statute which provides for payment of a prescribed fee upon filing objections, property owners who join in filing objections cannot each be

¹ *Gauen v. Moredock and Ivy Landing Drainage District*, 131 Ill. 446, 23 N. E. 633 [1890]; *City of Chicago v. Rosenfeld*, 24 Ill. 495 [1860].

² *Gauen v. Moredock and Ivy Landing Drainage District*, 131 Ill. 446, 23 N. E. 633 [1890].

³ *City of Chicago v. Rosenfeld*, 24 Ill. 495 [1860].

⁴ *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829 [1899].

⁵ *Earhart v. Farmers' Creamery*, 148 Ind. 79, 47 N. E. 226 [1897].

⁶ *Earhart v. Farmers' Creamery*, 148 Ind. 79, 47 N. E. 226 [1897].

⁷ *Pooley v. City of Buffalo*, 122 N. Y. 592, 26 N. E. 16 [1890].

⁸ *In the Matter of Lowden*, 89 N. Y. 548 [1882].

charged such fee.⁹ In some jurisdictions the fact that the council granted relief on appeal, though such relief was not based upon objections made, does not justify the courts in reviewing the action of the council.¹⁰

§ 916. Time of making objections.

The time at which objections may be filed is usually fixed by statute. Objections are often permitted from the time the report is filed up to the time that default is entered.¹ It may be provided that objections must be filed at least one day before the meeting of the council at which such objections are to be heard.² If an additional notice for including other land in a drainage district is given, the owner of land thus brought into the district has ten days after the additional notice in which to make objection and not merely ten days from the filing of the original report.³ Under an order of the court made on February tenth that objections to the confirmation should be filed by February nineteenth, it is held that objections may be filed until the last moment of the eighteenth of February; and that in the absence of objections default may be taken upon the nineteenth.⁴ No attention is to be paid to objections not filed in time.⁵ The opportunity for filing objections which is prescribed by statute must therefore be given, or subsequent proceedings will be invalid.⁶ If the statute authorizes the court so to do, it may extend the time for filing objections beyond that fixed by statute.⁷ Whether an extension of time will be granted or not is ordinarily within the discretion of the court before which the proceedings are pending.⁸ In the absence of a statute providing for excuse for failure to file objections, sickness which prevents the property

⁹ *The People ex rel. Carroll v. Gary*, 105 Ill. 332 [1883]; *State of Washington ex rel. Rock v. Case*, 42 Wash. 658, 85 Pac. 420 [1906].

¹⁰ *Belser v. Hoffschneider*, 104 Cal. 455, 38 Pac. 312 [1894].

¹ *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

² *Burton v. City of Chicago*, 53 Ill. 87 [1869].

³ *Goodwine v. Leek*, 114 Ind. 499, 16 N. E. 816 [1887].

⁴ *Burhans v. Village of Norwood*

Park, 138 Ill. 147, 27 N. E. 1088 [1892].

⁵ *Albertson v. State ex rel. Wells*, 95 Ind. 370 [1883]; *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895].

⁶ *Monroe Avenue, Ferguson's Appeal*, 159 Pa. St. 39, 28 Atl. 130 [1893].

⁷ *Thörn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520 [1890].

⁸ *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895].

owner from filing his objections within the time limited, does not relieve him from the effect of such omission to file.⁹ The non-residence of a land owner is no excuse for his failure to file objections.¹⁰ The fact that a property owner fails to file objections to an assessment because he is misled as to the intended course of action of the tribunal which has charge of assessment matters is not an excuse for failure to file such objections.¹¹ Objections must not merely be filed, but must be called to the attention of the tribunal authorized to pass upon such objections in time to enable it to act upon such objections.¹² A statute providing that objections must be filed within sixty days from the time that a tax bill is issued and that objections not filed within such time cannot be considered, has been held to be unconstitutional.¹³ In other jurisdictions statutes limiting the time within which objection must be made, such as a limitation to thirty days after confirmation,¹⁴ have been held to be invalid.

§ 917. Form and contents of objections.

Objections are ordinarily required by statute to be made in writing and, under such statutory provision, the party who interposes objections may be compelled to file them in writing.¹ The objections to a judgment of confirmation take the place of formal pleadings.² It is not necessary, however, that objections be stated with the same strictness and precision which would be required in common law pleadings.³ The objections must, however, show the point upon which the action of the court is invoked and must so state it as to enable the adversary party

*Hays v. Tippy, 91 Ind. 102 [1883].

¹⁰ Dousman v. City of St. Paul, 23 Minn. 394 [1877]. (In this case the land owner was temporarily in the city when the improvement was presented.)

¹¹ Gorman v. State ex rel. Koester, 157 Ind. 205, 60 N. E. 1083 [1901].

¹² Gilbert v. Hall, 115 Ind. 549, 18 N. E. 28 [1888].

¹³ Barber Asphalt Paving Co. v. Mann, 185 Mo. 552, 83 S. W. 1062 [1904]; State ex rel. Curtice v. Smith, 177 Mo. 69, 75 S. W. 625

[1903]; Barber Asphalt Paving Co. v. Ridge, 169 Mo. 376, 68 S. W. 1043 [1902]; Winfrey v. Linger, 89 Mo. App. 159 [1901]; Richter v. Merrill, 84 Mo. App. 15 [1900].

¹⁴ Blackwell v. Village of Coeur D'Alene, 13 Idaho, 357, 90 Pac. 353 [1907]. See § 141.

¹ Hewetson v. City of Chicago, 172 Ill. 112, 49 N. E. 992 [1898].

² Goodwillie v. City of Lake View, 137 Ill. 51, 27 N. E. 15 [1892].

³ Barber v. Board of Supervisors of City and County of San Francisco, 42 Cal. 631 [1872].

to obviate the objection, if possible.⁴ The objections filed must include all the tracts of land owned by the objector where he wishes to object to an assessment levied upon each of said tracts.⁵ The objection that the action of the commissioners was not in compliance with the ordinance or the statute has been held to be sufficient to bring the action of the commissioners in making the assessment before the court.⁶ It has been held elsewhere, however, that an objection in the general terms of the statute to the effect that the report is not according to law does not present any issue; but that the particulars in which the report claimed is defective must be specified.⁷ A general objection in the language of the statute that the ordinance authorizing a special improvement does not specify the nature, character, locality and description of the proposed improvement is not sufficiently specific and should be amended if objected to for its lack of certainty, but if no objection is made to its form the question raised thereby should be considered by the trial court and will be reviewed on appeal.⁸ A general objection of this sort is not, however, regarded with favor by the reviewing court and the court will not search the specifications to find support for such objections.⁹ The objection that the ordinance is void for uncertainty, insufficiency and informality is broad enough to include the objection that the ordinance was uncertain as to the description of brick to be used for paving.¹⁰ The objector was accordingly not entitled to have an appeal taken by the city from a judgment refusing confirmation on that ground, dismissed on the theory that he had not raised such objection.¹¹ An objection to the effect that the ordinance is unreasonable and oppressive was attacked by a motion to strike out such objection and on the overruling of such motion by another motion to require the objectors to point out specifically wherein they claim the ordinance was unjust and oppressive. The action of the court

⁴ *Fisher v. City of Chicago*, 213 Ill. 268, 72 N. E. 680 [1904].

⁵ *Dickey v. City of Chicago*, 164 Ill. 37, 45 N. E. Rep. 537 [1896].

⁶ *County of Jefferson v. City of Mt. Vernon*, 145 Ill. 80, 33 N. E. 1091 [1893].

⁷ *Northern Indiana Land Co. v. Tyler*. — Ind. —, 84 N. E. 828 [1908]; *Hudson v. Bunch*, 116 Ind. 63, 18 N. E. 390 [1888].

⁸ *Close v. City of Chicago*, 217 Ill. 216, 75 N. E. 479 [1905]; *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824 [1900].

⁹ *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541 [1903].

¹⁰ *City of Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874 [1903].

¹¹ *City of Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874 [1903].

in overruling both motions was held not to be reversible error.¹² An objection that a sewer assessment and all proceedings relating thereto are illegal and void does not raise the objection that the assessment is irregular, because it is made in the name of the estate of a deceased person whose devisees owned the property.¹³ A general objection that an estimate is void is not sufficient to raise the question of a variance between the ordinance and the estimate if the estimate is *prima facie* made out in proper form and the variance does not affect its entire validity.¹⁴ An objection that an assessment levied against the railroad for paving is in many respects irregular, invalid and without authority of law does not raise the question whether the act of the council in estimating the number of square feet for which the railroad company should pay by including the space between the rails, the space of one foot outside the rails, and the space occupied by the rails themselves, was valid.¹⁵ An objection that the assessment was not legally confirmed does not raise the question as to the effect of the absence of a member of the board.¹⁶ An objection that a resolution should show in terms whether the improvement was to be made by special assessment or special taxation, or by either in part, and that the estimate should be incorporated in the record of the resolution over the signature of the board has been held to be sufficient.¹⁷

§ 918. Failure to object as waiver.

Under statutes which provide for filing objections and for a hearing upon the questions thus raised, the intention of the legislature is to provide a prompt and speedy method of determining the validity of the assessment and the proceedings leading up thereto. Under many of the statutes, an opportunity is thus given to determine the validity of the proceedings before any expense has been incurred for the public improvement for which it sought to levy the assessment. Under such statutes, accordingly, a failure to file objections operates as a waiver of all which can in law be waived; and if such objections are not

¹² City of Belleville v. Perrin, 225 Ill. 437, 80 N. E. 270 [1907].

¹³ Brown v. Otis, 90 N. Y. S. 250, 98 App. Div. 554 [1904].

¹⁴ Hardin v. City of Chicago, 186 Ill. 424, 57 N. E. 1048 [1900].

¹⁵ Marshalltown Light, Power &

Railway Company v. City of Marshalltown, 127 Ia. 637, 103 N. W. 1005 [1905].

¹⁶ In the Matter of Merriam, 84 N. Y. 596 [1881].

¹⁷ Zeigler v. City of Chicago, 213 Ill. 61, 72 N. E. 719 [1904].

interposed at the proper time they cannot be interposed subsequently.¹ So, if an objection has been filed and subsequently is withdrawn, questions raised by such objection are to be regarded as waived.² Defects and irregularities in the contract are waived by failure to make objection at the proper time,³ especially if they do not increase the cost of the improvement. Thus, a provision that the contractor must employ laborers residing in the city must be objected to in time or such ground of objection will be waived.⁴ Failure to object to the decision of the council as to the boundaries of the assessment district,⁵ or to an error with reference to the area of a tract of land which is assessed,⁶ are waived by failure to object. Questions

¹ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Swamp Land District No. 307 v. Glide*, 112 Cal. 85, 44 Pac. 451 [1896]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *Trigger v. Drainage District No. 1*, etc., 193 Ill. 230, 61 N. E. 1114 [1901]; *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898]; *City of Mt. Carmel v. Friedrich*, 141 Ill. 369, 31 N. E. 21 [1893]; *Blake v. The People for use of Caldwell*, 109 Ill. 504 [1884]; *Moore v. The People ex rel. Lewis*, 106 Ill. 376 [1883]; *Jenks v. City of Chicago*, 48 Ill. 296 [1868]; *Gorman v. State ex rel. Koester*, 157 Ind. 205, 60 N. E. 1083 [1901]; *Albertson v. State ex rel. Wells*, 95 Ind. 370 [1883]; *City of Greensburg v. Zoller*, 28 Ind. App. 126, 60 N. E. 1007 [1901]; *Diver v. Keokuk Sav. Bank*, 126 Ia. 691, 102 N. W. 542 [1905]; *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *Philadelphia, Wilmington, & Baltimore Railroad Company v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890]; *M'Kusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890]; *Dousam v. City of St. Paul*, 23 Minn. 394 [1877]; *Gilmore v. City of Utica*, 131 N. Y. 26, 29 N. E. 841 [1892]; *In the Matter of Bridgeford*, 65 Hun (N. Y.) 227, 20 N. Y. Supp. 281 [1892]; *People v. Com' on Coun-*

sil of City of Kingston, 99 N. Y. S. 657, 114 App. Div. 326 [1906]; *Price v. Toledo*, 25 Ohio Cir. Ct. R. 617 [1903]; *City of Chester v. Bullock*, 187 Pa. St. 544, 41 Atl. 452 [1898]; *Hutchinson v. Pittsburg*, 72 Pa. St. (22 P. F. Smith) 320 [1872]; *Wilson v. City of Salem*, 24 Ore. 504, 34 Pac. 9, 691 [1893]; *Ferry v. City of Tacoma*, 34 Wash. 652, 76 Pac. 277 [1904]; *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900]; *City of New Whatcom v. Bellingham Bay Improvement Co.*, 18 Wash. 181, 51 Pac. 360 [1897].

² *Barlow v. City of Tacoma*, 12 Wash. 32, 40 Pac. 382 [1895].

³ *Diver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542 [1905]; *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

⁴ *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

⁵ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904].

⁶ *Swamp Land District No. 307 v. Glide*, 112 Cal. 85, 44 Pac. 451 [1896].

as to the existence and amount of benefits,⁷ and as to the apportionment of the assessment,⁸ are also waived unless objection is made in time. If the property owners make default and fail to file objections, confirmation is said to follow as a matter of course.⁹ If objections are filed without leave of court after the time limited by statute, such objections may be stricken from the files and a default may be entered.¹⁰ On the same principle filing objections in which certain defects are pointed out operates as a waiver of all other defects to which such objection could have been interposed.¹¹ Thus, it is generally held that the filing of objections which attack the assessment upon its merits, operates as a waiver of defective¹² or insufficient

⁷ *Trigger v. Drainage District No. 1, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *State, Wetmore, Pros. v. City of Elizabeth*, 41 N. J. L. (12 Vr.) 152 [1879]. At least if not clearly shown to be erroneous; *Price v. City of Toledo*, 25 Ohio Cir. Ct. R. 617 [1903].

⁸ *Jenks v. City of Chicago*, 48 Ill. 296 [1868].

⁹ *Gage v. City of Chicago*, 211 Ill. 109, 71 N. E. 877 [1904]; *City of Mt. Carmel v. Friedrich*, 141 Ill. 369, 31 N. E. 21 [1893]; *Albertson v. State ex rel. Wells*, 95 Ind. 370 [1883].

¹⁰ *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895].

¹¹ *Marshall v. People ex rel. Smith*, 219 Ill. 99, 76 N. E. 70 [1905]; *Fisher v. City of Chicago*, 213 Ill. 268, 72 N. E. 680 [1904]; *Gross v. People ex rel. Raymond*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901]; *Dickey v. City of Chicago*, 164 Ill. 37, 45 N. E. Rep. 537 [1896]; *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894]; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893]; *Quick v. Village of River Forest*, 130 Ill. 323, 22 N. E. 816 [1890]; *Hunerberg v. Village of Hyde Park*, 130 Ill. 156, 22 N. E. 486 [1890]; *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890]; *Murphy v. City of Peoria*, 119 Ill. 509, 9 N. E. 895 [1888];

Turley v. The People ex rel. Mayfield, 116 Ill. 433, 6 N. E. 52 [1887]; *Moynes v. West Chicago Park Commissioners*, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48 [1886]; *Huston v. Clark*, 112 Ill. 344 [1885]; *Jerome v. City of Chicago*, 62 Ill. 285 [1871]; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Machler*, 158 Ind. 159, 63 N. E. Rep. 210 [1901]; *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330 [1897]; *Sample v. Carroll*, 132 Ind. 496, 92 N. E. 220 [1892]; *Boswell v. City of Marion*, — Ind. App. —, 79 N. E. 1056 [1907]; *Lake Erie Land & Western Railway Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. Rep. 864 [1893]; *Wood v. Hall*, — Ia. —, 110 N. W. 270 [1907]; *Crandell v. City of Taunton*, 110 Mass. 421 [1872]. Thus it is said that "objections must be made at the earliest opportunity, so that the proceeding shall not be allowed to proceed to a fruitless result with accumulation of cost; and if not so made they will be deemed waived." *City of Valparaiso v. Parker*, 148 Ind. 379, 383, 47 N. E. 330, (citing *Bradley v. City of Frankfort*, 99 Ind. 417 [1884]).

¹² *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893]; *Quick v. Village of River Forest*, 130 Ill. 323, 22 N. E. 816 [1890]; *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890]; *Murphy v. City of*

notice.¹³ So, if objections are made to the merits of the assessment and such objections are afterward withdrawn, the entry of the appearance of the parties for this purpose waives a defect in the notice of the assessment or the entire want of such notice.¹⁴ This view seems, however, not to be entertained in all jurisdictions. Thus, where a notice was defective because the heading was not type three-fourths of an inch in length while the statute required the heading to be in type not less than one inch in length, a remonstrance on the part of the property owners was held not to waive such defect.¹⁵ The filing of objections in which the jurisdiction of the person of the objectors is not attacked waives objections to the jurisdiction of the persons.¹⁶ It has been said that filing objections without attacking the jurisdiction of the court operates as a waiver of all questions pertaining to the jurisdiction of the court.¹⁷ In laying down this rule, however, the court apparently had in mind merely jurisdiction of the person. The correct rule, which is in harmony with the general principles of law concerning jurisdiction, is that an objection to the jurisdiction of the court over the subject matter is not waived by filing objections which do not specify such want of jurisdiction.¹⁸ Objection to the jurisdiction over the subject matter may be made at any time by motion to dismiss as well as by objection.¹⁹ Hence, if a petition by the property owners for an improvement is jurisdictional, the want of such petition is not waived by failure to specify it in the objections filed.²⁰ Objections which do not raise questions of jurisdiction are waived by filing objections in which such defects are not specified. Thus, defects in a description of the property,²¹ or in assessing two or more distinct tracts of land as an entirety,²² or in failing to state the

Peoria, 119 Ill. 509, 9 N. E. 895 [1888]; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Company v. Machler*, 158 Ind. 159, 63 N. E. Rep. 210 [1901].

¹³ *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893].

¹⁴ *Barlow v. City of Tacoma*, 12 Wash. 32, 40 Pac. 382 [1895].

¹⁵ *Bank of Columbia v. Portland*, 41 Or. 1, 67 Pac. 1112 [1902].

¹⁶ *Fisher v. City of Chicago*, 213 Ill. 268, 72 N. E. 680 [1904].

¹⁷ *Pittsburg, Cincinnati, Chicago &*

St. Louis Railway Co. v. Machler, 158 Ind. 159, 63 N. E. Rep. 210 [1901].

¹⁸ *Fisher v. City of Chicago*, 213 Ill. 268, 72 N. E. 680 [1904]; *Village of Hammond v. Leavitt*, 181 Ill. 416.

¹⁹ *Village of Hammond v. Leavitt*, 181 Ill. 416, 54 N. E. 982 [1899].

²⁰ *Village of Hammond v. Leavitt*, 181 Ill. 416, 54 N. E. 982 [1899].

²¹ *Marshall v. People ex rel. Smith*, 219 Ill. 99, 76 N. E. 70 [1905].

²² *Turley v. The People ex rel. Mayfield*, 116 Ill. 433, 6 N. E. 52 [1887].

name of the land owners in a drainage petition,²³ or in a defective signature of a petition for an improvement where such petition was in fact made,²⁴ or in a misnomer of the land owner,²⁵ have all been held to be waived in this way. The fact that the committeeman who made the assessments was related to certain taxpayers of the city,²⁶ or the fact that a report to the council was made by a committee of the council to which an assessment had been referred instead of by the city commissioners to whom such matter should have been referred and by whom the report should have been made,²⁷ are each waived by filing objections in which such defects are not specified. The invalidity of a term in an improvement contract requiring the contractors to purchase bonds to provide for preliminary expenses and obtain the right of way is waived by filing other specific objections in which this defect is not attacked.²⁸ A waiver of defects in one improvement does not, however, operate as a waiver of defects in another improvement. Thus, an objection of a land owner to the improvement of one street does not prevent him from objecting to the right of the town trustee to improve another street.²⁹ Where an objection has been made properly, it is not waived by the fact that the property owner filed a subsequent objection including many of the grounds of the first objection where the grounds thus included in the first objection were not passed on at the hearing of the second objection.³⁰ If a general objection is made, it will be presumed that every defect which could be included within such objection is relied upon before the trial court.³¹ Under a general objection, specific objections are, however, waived if not relied upon.³² Thus, where the trial court before which a large number of objections had been filed required the property owner to point out specifically on what objections he relied, and he did so, other objections will be regarded as waived.³³ Under a stat-

²³ *Huston v. Clark*, 112 Ill. 344 [1885].

²⁴ *Sample v. Carroll*, 132 Ind. 496, 82 N. E. 220 [1892].

²⁵ *Lake Erie & Western Railway Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. Rep. 864 [1893].

²⁶ *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330 [1897].

²⁷ *Boswell v. City of Marion*, — Ind. App. —, 79 N. E. 1056 [1907].

²⁸ *Wood v. Hall*, — Iowa, —, 110 N. W. 270 [1907].

²⁹ *Stephenson v. Town of Salem*, 14 Ind. App. 386, 42 N. E. 44, 943 [1895].

³⁰ *In the Matter of Flushing Ave.*, 98 N. Y. 445 [1885].

³¹ *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903].

³² *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358 [1905].

³³ *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358 [1905].

ute authorizing the court to permit new and additional objections to be filed or to make any order altering or continuing the hearing on confirmation, the court may permit the amendment of the objections by adding another ground of objection after the evidence has been heard and the case taken under advisement. Such action is not an abuse of discretion.³⁴ The converse of the rule that relief cannot be granted where no objections are interposed is generally true; and if no objections are interposed to an assessment, the assessment cannot be increased against the property of one or more of the property owners.³⁵ If the assessment is not merely irregular but is absolutely void, failure to object thereto does not operate as a waiver of such defense, since in a case of this sort the public corporation could not correct the defect, even if its attention had been called to it at an early stage of the proceedings.³⁶

§ 919. To whom objections must be presented.

Under some statutes objections must be presented in the first instance to the commissioners by whom the assessment is levied.¹ Objections so presented may be used at confirmation² and should be presented by the assessors together with the assessment,³ while those not so presented cannot be used.⁴ Under some statutes it is held to be the duty of the party making objections to place such objections before the body by whom such objections are to be determined and that in case of his failure so to do, he cannot complain because no hearing has been had.⁵ This view has been entertained where the council confirmed the report on the same evening that a special committee of the council, according to previous notice, gave a hear-

³⁴ *City of Belleville v. Perrin*, 225 Ill. 437, 80 N. E. 270 [1907].

³⁵ *Browning v. City of Chicago*, 155 Ill. 314, 40 N. E. Rep. 565 [1895]; *In the Matter of Opening Hamilton Avenue in the City of Brooklyn*, 14 Barb. (N. Y.) 405 [1852].

³⁶ *Carter v. Cemansky*, 126 Ia. 506, 102 N. W. 438 [1905]; *Wilson v. City of Salem*, 24 Ore. 504, 34 Pac. 9, 691 [1893].

¹ *In the Matter of Department of Public Works*, 13 Hun (N. Y.) 483 [1878].

² *In the Matter of Department of Public Works*, 13 Hun (N. Y.) 483 [1878].

³ *In the Matter of Dunning*, 60 Barb. (N. Y.) 377 [1871].

⁴ *Case of Mayor, Aldermen and Commonwealth of the City of New York*, 16 Johns. (N. Y.) 231 [1819]; *Matter of Opening Eleventh Avenue*, 49 How. Pr. (N. Y.) 208 [1875].

⁵ *Brown v. Central Bermudez Company*, 162 Ind. 452, 69 N. E. 150 [1903]; *Pooley v. City of Buffalo*, 124 N. Y. 206, 26 N. E. 624 [1891].

ing to the property owners, since the property owners had a legal right to a hearing and could have invoked action by the court to secure such hearing.⁶ Denial of a hearing has been held not to render an assessment liable to collateral attack.⁷

§ 920. Issue at confirmation.

The issues which may be heard and determined at confirmation are controlled by statute. As long as the constitutional rights of the property owners are not violated, it rests with the legislature to say to what extent they may be heard in opposition to the assessment. Accordingly, the rights of the property owners are limited to the issues provided for by statute, and a hearing cannot be had upon issues not so provided for.¹ A provision for a hearing before a jury given to any party aggrieved by the doings of the aldermen of a city under a specific statute is held to extend to the doings of such aldermen under a subsequent amendment to such statute.² It may be provided by statute that the issue to be determined by a jury on confirmation is whether the assessment upon the property of the party objecting to the assessment is more or less than the benefits to such property and more or less than his proportionate share of the cost; other objections being heard and determined by the court. Under such statute the jury can pass only upon this question of benefits.³ The jury cannot determine the question of

⁶ *Brown v. Central Bermudez Company*, 162 Ind. 452, 69 N. E. 150 [1903].

⁷ *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531 [1904].

¹ *Clark v. City of Chicago*, 166 Ill. 84, 46 N. E. 730 [1897]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886].

² *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870].

³ *Northwestern University v. Village of Wilmette*, 230 Ill. 80, 82 N. E. 615 [1907]; *Heipala v. City of Washington*, 219 Ill. 604, 76 N. E. 854 [1906]; *Wells v. City of Chicago*, 202 Ill. 448, 66 N. E. 1056 [1903]; *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *Givins v. City of Chicago*, 188 Ill.

348, 58 N. E. 912 [1900]; *Sweet v. West Chicago Park Comrs.*, 177 Ill. 492, 53 N. E. 74 [1899]; *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898]; *Brooks v. City of Chicago*, 168 Ill. 60, 48 N. E. 136 [1897]; *Clark v. City of Chicago*, 166 Ill. 84, 46 N. E. 730 [1897]; *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. Rep. 688 [1894]; *McChesney v. Chicago*, 151 Ill. 307, 37 N. E. Rep. 872 [1894]; *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894]; *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034 [1893]; *The Illinois Central Railroad Company v. The City of Chicago*, 141 Ill. 509, 30 N. E. 1036

the proportion between the assessment levied upon a specific tract of property and that levied upon another tract of property, since if a property owner is assessed according to his proportionate share of the improvement and the assessment is not in excess of benefits, he cannot complain because other property owners are assessed either too much or too little.⁴ The jury cannot consider the question of the necessity of the improvement or the propriety thereof.⁵ Under statutes of this sort, the question of the legality of the ordinance, and whether the ordinance is oppressive and unreasonable or not, is to be determined by the court.⁶ Such questions should be passed upon by the court before the case is tried to the jury.⁷ Under this statute it has been held that the jury cannot pass upon the question of the regularity of condemnation proceedings to pay the expenses of which the assessment is to be levied.⁸ It has been said that such objection must be made at confirmation and cannot be made subsequently.⁹ The true rule seems to be in cases of this sort that if the court before which the condemnation proceedings were

[1893]; *Edwards v. City of Chicago*, 140 Ill. 440, 30 N. E. 350 [1893]; *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704 [1893]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *De Koven v. City of Lake View*, 131 Ill. 541, 23 N. E. 240 [1890]; *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. 602 [1890]; *Mascall v. Commissioners Drainage District*, 122 Ill. 620, 14 N. E. 47 [1889]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

⁴ *Clark v. City of Chicago*, 166 Ill. 84, 46 N. E. 730 [1897]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

⁵ *Northwestern University v. Village of Wilmette*, 230 Ill. 80, 82 N. E. 615 [1907]; *Lingle v. West Chicago Park Com'rs.*, 222 Ill. 384, 78 N. E. 794 [1906]; *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *Givins v. City of Chicago*, 188 Ill. 348, 56 N. E. 912 [1900]; *Cram v. City of Chicago*, 139 Ill. 265, 28 N. E. 758 [1893].

⁶ *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1906]; *Title Guarantee & Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896]; *McChesney v. City of Chicago*, 151 Ill. 307, 37 N. E. Rep. 872 [1894]; *The City of Bloomington v. The Chicago and Alton R. R. Company*, 134 Ill. 451, 26 N. E. 366 [1891].

⁷ *Title Guarantee & Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896].

⁸ *Thomas v. City of Chicago*, 204 Ill. 611, 68 N. E. 653 [1903]; *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034 [1893].

⁹ "A valid and legal award of compensation for property taken or damaged lies at the foundation of the supplemental proceeding and the proper time to make the objection that there is no valid judgment of condemnation is when the application is made to confirm the assessment." *Bass v. The People ex rel. Raymond*, 203 Ill. 206, 208, 67 N. E. 806 [1903].

conducted had jurisdiction, its jurisdiction is final and conclusive and cannot be attacked collaterally in the assessment proceedings.¹⁰ It is in any event a question of law, and not for the jury.¹¹ If an assessment can be levied for improving a street the title to which had not then been acquired, want of title thereto is not a valid objection to the confirmation of the assessment.¹² The jury cannot consider the method by which the benefits were ascertained, if, in fact, the correct result has been reached.¹³ Under other statutes it is said that the issue at confirmation is as to the regularity and validity of the assessment and whether the assessment is properly apportioned.¹⁴ Under some statutes the court cannot consider the propriety of the improvement, since this power is one which is conferred by statute upon the public corporation; and as long as the improvement is one for which it is legally possible to levy assessments, the city is the sole judge of the propriety of making such improvement in the particular case.¹⁵ Under a petition to revise an assessment the petitioner cannot claim that the original assessment was invalid.¹⁶ All the issues must, by statute, be settled before final judgment, including issues settled under other provisions of the act.¹⁷ If the organization of a drainage district is a determination that all the land included in such district is benefited, the jury has no power to determine that a part thereof is not benefited.¹⁸

§ 921. Hearing at confirmation.

Since objections must be sustained by evidence, the practice of demurring to objections has been condemned, since their truth should not be conceded as it must be by demurrer.¹ If a motion

¹⁰ Thomas v. City of Chicago, 204 Ill. 611, 68 N. E. 653 [1903].

¹¹ Gage v. City of Chicago, 146 Ill. 499, 34 N. E. 1034 [1893].

¹² Holmes v. Village of Hyde Park, 121 Ill. 128, 13 N. E. 540 [1889].

¹³ Pike v. City of Chicago, 155 Ill. 656, 40 N. E. 567 [1895].

¹⁴ Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339 [1899]; State of Minnesota ex rel. Merrick v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625 [1885]; *In re Opening of East*

176th St., 83 N. Y. S. 433, 85 App. Div. 347 [1903].

¹⁵ In the Matter of Extension of Church Street in New York, 49 Barb. 455 [1867].

¹⁶ Crandell v. City of Taunton, 110 Mass. 421 [1872].

¹⁷ Shurtleff v. City of Chicago, 190 Ill. 473, 60 N. E. 870 [1901].

¹⁸ Gauen v. Moredock & Ivy Land- ing Drainage District, 131 Ill. 446, 23 N. E. 633 [1890].

¹ The People ex rel. Barber v. Chapman, 127 Ill. 387, 19 N. E. 872 [1890].

is made to strike out all the objections as being irrelevant, such motion is properly overruled unless none of the objections present a valid defense.² The court may refuse a continuance which is requested by the objectors on the ground that a material witness is absent, if it is not shown that objectors were diligent in preparing for trial, and it is not shown why such witnesses were absent.³ Whether a jury trial should be had upon the question of benefits depends entirely upon the provisions of the statute, since no constitutional right to the jury trial in cases of this sort exists.⁴ If the statute does not provide for a jury trial, the objector is not entitled to one on the question of the assessment of benefits,⁵ though he cannot be constitutionally denied a jury trial in the assessment of damages in eminent domain.⁶ Under a statute so providing, the property owner is, of course, entitled to a trial by jury.⁷ If the property owner waives a trial by jury and the case is heard by the court, he cannot subsequently complain because his case was not tried to a jury.⁸ A statutory provision giving the property owner the right of a trial by jury does not prevent him from obtaining other relief,⁹ as by a proceeding in certiorari.¹⁰ Persons who filed objections are not entitled to separate hearings; but the jury may be required to render a verdict on the question of the relation of the assessment to the

² *The City of Bloomington v. The Chicago and Alton Railroad Company*, 134 Ill. 451, 26 N. E. 366 [1891].

³ *Village of Franklin Park v. Franklin*, 231 Ill. 380, 83 N. E. 214 [1907].

⁴ See § 201 *et seq.*

⁵ *Harris v. People ex rel. Knight*, 218 Ill. 439, 75 N. E. 1012 [1905]; *Trigger v. Drainage District No. 1*, etc., 193 Ill. 230, 61 N. E. 1114 [1901]; *The Chicago and Alton Railway Co. v. City of Joliet*, 153 Ill. 649, 39 N. E. Rep. 1077 [1894]; *Briggs v. Union Drainage District No. 1*, 140 Ill. 53, 29 N. E. 721 [1893].

⁶ *Stack v. People ex rel. Talbott*, 217 Ill. 220, 75 N. E. 347 [1905].

⁷ *Brooks v. City of Chicago*, 168 Ill. 60, 48 N. E. 136 [1897]; *Palmer v. City of Danville*, 166 Ill. 42, 46 N. E. 629 [1897]; *Bradford v. City*

of Pontiac, 165 Ill. 612, 46 N. E. 794 [1897]; *Title Guarantee & Trust Co. v. City of Chicago*, 162 Ill. 505, 44 N. E. 832 [1896]; *Robeson v. People ex rel. Curry*, 161 Ill. 176, 43 N. E. 619 [1896]; *Mascall v. Commissioners Drainage District*, 122 Ill. 620, 14 N. E. 47 [1889]; *Crandell v. Taunton*, 110 Mass. 421 [1872]; *Jones v. Board of Aldermen of City of Boston*, 104 Mass. 461 [1870].

⁸ *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892].

⁹ *State, Walls, Pros. v. Mayor and Aldermen of Jersey City*, 55 N. J. L. (26 Vroom) 511, 26 Atl. Rep. 828 [1893].

¹⁰ *State, Walls, Pros. v. Mayor and Aldermen of Jersey City*, 55 N. J. L. (26 Vroom) 511, 26 Atl. Rep. 828 [1893].

benefits, and what is a proportionate share of the assessment with reference to each specific tract.¹¹ It is within the power of the court, however, to allow separate jury trials and separate final judgments.¹² A party who acquiesces in separate hearings of the different classes of legal objections to a special assessment can have a bill of exceptions only as to the evidence offered by himself and the other objectors who took part in the hearing of legal objections of the same class.¹³ Improper remarks made by counsel tending to prejudice the jury have been held to be reversible error, even if the court has instructed the jury to disregard such remarks.¹⁴ If, however, the verdict shows that the jury were not affected by such remarks, they will not constitute reversible error.¹⁵ If the city has become convinced that an assessment against specific property cannot be upheld, since such property is not benefited by the assessment, it may confess the fact in court and the court on hearing the objections may set such assessment aside.¹⁶ Such conduct does not make invalid the assessment against other property, if it is not shown that there is collusion between the city and the owner of property thus released and that such property was in fact benefited.¹⁷

§ 922. Evidence at confirmation.

The evidence offered at confirmation must tend to substantiate the respective claims of the parties and if offered by the property owners, must tend to show the invalidity of the assessment with respect to one or more of the questions which can be considered at confirmation. Evidence on issues which are to be tried by the court cannot be submitted to the jury.¹ Evidence of fraud or corruption or that the cost was excessive or that improper items entered into the consideration of the commission-

¹¹ *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

¹² *Philadelphia & Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Browning v. City of Chicago*, 155 Ill. 314, 40 N. E. Rep. 565 [1895].

¹³ *People ex rel. Fisher v. Carter*, 210 Ill. 122, 71 N. E. 369 [1904].

¹⁴ *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704 [1893].

¹⁵ *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704 [1893].

¹⁶ *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904]; *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898].

¹⁷ *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904]; *Culver v. City of Chicago*, 171 Ill. 399, 49 N. E. 573 [1898].

¹ *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

ers making the assessment should not go to the jury, since questions of this sort are for the court.² An objector is not allowed to offer evidence in contradiction of facts alleged by him in an objection.³ Thus, if the objection is that the original proceedings were not pending when a subsequent statute took effect, the objector cannot be heard to claim subsequently that such proceedings were then pending.⁴ If the objection is that the improvement is not in conformity with the ordinance, the ordinance must be offered in evidence.⁵ Failure to offer it makes a judgment for the property owner impossible.⁶ The assessment roll is admissible in evidence.⁷ It is to be admitted, even if the amount assessed against the city for public benefits is divided into installments instead of being payable in one lump sum.⁸ If the original roll is lost or destroyed, it may be restored by proper order of the court.⁹ It is error to proceed without a proper restoration of the roll.¹⁰ If there is no evidence that the original roll was ever filed, or that it was ever lost, mislaid or destroyed and no order is made substituting a copy for the original, such copy is inadmissible in evidence.¹¹ If the jury is to determine whether the assessment equals or exceeds the special benefits, evidence of the increased value of the property due to the improvement is admissible.¹² Evidence of the distance of the property assessed from the improvement is admissible as bearing on the question of benefits.¹³ The fact that the property assessed is at a considerable distance from the improvement does not show as a matter of law that property is not benefited.¹⁴ Whether the jury may view the property assessed or not, is within the discretion of the trial court.¹⁵ The parties

² *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894].

³ *Cratty v. City of Chicago*, 217 Ill. 453, 75 N. E. 343 [1905].

⁴ *Cratty v. City of Chicago*, 217 Ill. 453, 75 N. E. 343 [1905].

⁵ *People ex rel. Price v. Lyon*, 218 Ill. 577, 75 N. E. 1017 [1905].

⁶ *People ex rel. Price v. Lyon*, 218 Ill. 577, 75 N. E. 1017 [1905].

⁷ *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 369 [1903].

⁸ *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 369 [1903].

⁹ *Thomas v. City of Chicago*, 152

Ill. 292, 38 N. E. Rep. 923 [1894]; *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893].

¹⁰ *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893].

¹¹ *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893].

¹² *Fahnestock v. City of Peoria*, 171 Ill. 454, 49 N. E. 496 [1898].

¹³ *Felly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894].

¹⁴ *Felly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894].

¹⁵ *Pi'le v. City of Chicago*, 155 Ill. 656, 40 N. E. Rep. 567 [1895].

may agree that the trial judge shall view the street which is to be improved.¹⁶ If he does so his finding should not be reversed, except on a clear showing of error.¹⁷ Evidence offered on behalf of a city as to the condition of the street and the necessity of improving it is not a reversible error. The property owner cannot be prejudiced thereby, since without such evidence the jury would be bound by the act of the city in determining that such improvement was necessary.¹⁸ Evidence which was offered at a former hearing to meet an objection not then passed upon, may be considered at a later hearing without re-introduction of the witness,¹⁹ even where, after such former hearing, the assessment was annulled on the ground that one of the commissioners was interested and the cause was continued and a new roll subsequently filed.²⁰ If the pecuniary interest of the commissioner who makes the assessment invalidates it, property owners may introduce evidence tending to show that the commissioner appointed to spread the assessment was also employed to make the estimate of the cost of the improvement for which he was to receive as compensation a percentage of the cost of the contract work.²¹ In a proceeding to confirm a supplemental estimate, the judgment rendered at the confirmation of the original assessment showing that the property was then assessed its proper proportion,²² or determining what the just share of the property assessed was,²³ should be admitted and is conclusive as to such facts. Since it is immaterial who wrote out the assessment roll and where it was made, evidence upon this question is inadmissible.²⁴ If the determination of the public corporation as to the performance of a contract is conclusive, evidence tending to show that the contract was not in fact properly performed is inadmissible at confirmation.²⁵ The assessment roll is competent

¹⁶ Wells v. City of Chicago, 202 Ill. 448, 66 N. E. 1056 [1903].

¹⁷ Wells v. City of Chicago, 202 Ill. 448, 66 N. E. 1056 [1903].

¹⁸ Chicago & Northern Pacific R. R. Co. v. City of Chicago, 172 Ill. 66, 49 N. E. 1006 [1898].

¹⁹ Evart v. Village of Western Springs, 180 Ill. 318, 54 N. E. 478 [1899].

²⁰ Evart v. Village of Western Springs, 180 Ill. 318, 54 N. E. 478 [1899].

²¹ Murr v. City of Naperville, 210 Ill. 371, 71 N. E. 380 [1904].

²² Wickett v. Town of Cicero, 152 Ill. 575, 38 N. E. Rep. 909 [1894].

²³ Greeley v. The Town of Cicero, 148 Ill. 652, 36 N. E. Rep. 603 [1894].

²⁴ Barber v. Chicago, 152 Ill. 37, 38 N. E. Rep. 253 [1894].

²⁵ Haley v. City of Alton, 152 Ill. 113, 38 N. E. 750 [1894].

evidence to show the width of the street improved.²⁶ This evidence is not overcome by the testimony of a witness as to the width of the street if he bases his estimate in part upon measurements found in maps which are not shown to be accurate.²⁷ If a continuous improvement is divided into several sections and the cost of each section thereby reduced below the sum at which publication and a delay in action on the part of the council is necessary, though the aggregate cost exceeds such sum, direct evidence by a member of the improvement board as to the propriety of the motives of the board in so dividing the improvement is immaterial.²⁸ If the legislature or the city has laid out an assessment district, evidence that property outside of such district is benefited by such improvement is inadmissible.²⁹ In many jurisdictions the determination of the public corporation as to the necessity of the improvement is final, if the improvement is one for which local assessments may be levied, at least if the ordinance is not unreasonable.³⁰ Accordingly, evidence is inadmissible which tends to show that another form of improvement would have answered the same purpose at a less cost.³¹ A question calling for the opinion of a witness as to the necessity of an improvement is inadmissible.³² Evidence that the city has already paid for the improvement is inadmissible, since, if the improvement is begun on the assessment plan, the city may pay therefor and levy an assessment to reimburse itself.³³ Evidence at a prior informal hearing that the judge was of the opinion that the improvement was not needed; and thereupon the attorney for the city and the property owners agreed that the old pavement should be dressed instead of being replaced, was incompetent, since such agreement has no legal validity.³⁴ Under statutes which permit the comparison of the assessment on a specific tract with the assessment on other tracts, evidence tending to compare two tracts is not sufficient to justify

²⁶ *White v. City of Alton*, 149 Ill. 626, 37 N. E. 96.

²⁷ *White v. City of Alton*, 149 Ill. 626, 37 N. E. 96.

²⁸ *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101 [1902].

²⁹ *Bigelow v. City of Chicago*, 90 Ill. 49 [1878].

³⁰ See § 293 *et seq.*

³¹ *McChesney v. Village of Hyde Park*, 151 Ill. 634, 37 N. E. 858 [1894].

³² *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901].

³³ *Sweet v. West Chicago Park Comrs.*, 177 Ill. 492, 53 N. E. 74 [1899].

³⁴ *Howe v. City of Chicago*, 224 Ill. 95, 79 N. E. 421 [1906].

an interference with the assessment unless the two tracts are shown to be similarly situated.³⁵ The trial court may exercise a reasonable discretion in limiting the number of witnesses on the various questions involved in confirmation.³⁶ If the discretion of the court is abused, however, it is reversible error.³⁷ Affidavits of persons interested in the question only, and not in the result of the proceedings may be read in opposition to the motion to confirm.³⁸ The city may offer evidence to rebut the evidence offered by the property owners upon the question of benefits.³⁹ The jury is not bound by the estimates of witnesses as to questions of quantity or value, but it is to determine questions of benefits and damages from all the evidence.⁴⁰

§ 923. Burden of proof.

At confirmation it is said that the burden of proof is upon the city or other public corporation to make out a *prima facie* case establishing the jurisdictional facts.¹ By statute, however, official acts may be *prima facie* valid. The certificate of the city clerk under his official seal is *prima facie* evidence of the passage of the ordinance for a special assessment.² If the adversary party wishes to show that the ordinance was not passed by a majority call of the vote of the ayes and noes, he must overcome a *prima facie* case made out by such certificate, by producing the journal of the council.³ If park commissioners have exercised control of a street on other occasions, the propriety of such control will be presumed; and it is not necessary for them to show the proceedings by which they have obtained control.⁴ In the ab-

³⁵ *In re Opening of East 176th St.*, 83 N. Y. S. 433, 85 App. Div. 347 [1903].

³⁶ *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892].

³⁷ *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892].

³⁸ *In the Matter of Flatbush Ave. in City of Brooklyn*, 1 Barb. 286 [1847].

³⁹ *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. Rep. 739 [1896].

⁴⁰ *Watson v. Crowsore*, 93 Ind. 220 [1883].

¹ *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520 [1890]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

² *McChesney v. City of Chicago*, 159 Ill. 223, 42 N. E. Rep. 894 [1896]; *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443 [1886].

³ *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443 [1886].

⁴ *Royal Insurance Co. v. South Park Commissioners*, 175 Ill. 491, 51 N. E. Rep. 558 [1898]; *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898]; *Bass v. South Park Commissioners*, 171 Ill. 370, 49 N. E. Rep. 549 [1898].

sence of such exercise of power on prior occasions, the park commissioners must show that they have acquired jurisdiction over the street in question.⁵ If, by statute, the recommendation of a board of improvement is *prima facie* evidence that the preliminary requirements have been complied with, a property owner, who claims that the proceedings are invalid because no objection was filed, as required by law, has the burden of establishing such facts.⁶ The legislature may, if it chooses, make the report of the commissioners, or other persons empowered to make the assessment, *prima facie* evidence of the regularity of the proceedings and the validity of the assessment. Such statutes do not deny equal protection of the laws, nor do they constitute a taking of property without due process of law.⁷ Under such statutes the report is *prima facie* evidence of its validity.⁸ It is necessary that one who attacks the report must sustain his claim by evidence.⁹ In some jurisdictions it has been said that confirmation should not be refused, except upon a clear showing that the confirmation would work injustice.¹⁰ In other cases, including an attack upon a report outside of confirmation, it has been said that the report should not be disturbed except for manifest error,¹¹ or on proof

⁵ *Thorn v. West Chicago Park Commissioners*, 130 Ill. 594, 22 N. E. 520 [1890].

⁶ *Guyer v. City of Rock Island*, 215 Ill. 144, 74 N. E. 105 [1905]; *Wells v. City of Chicago*, 202 Ill. 448, 66 N. E. 1056 [1903]; *McVey v. City of Danville*, 188 Ill. 428, 58 N. E. 955 [1900].

⁷ *Eyerman v. Blaksley*, 78 Mo. 145 [1883]; *City of St. Louis to Use of Creamer v. Oeters*, 36 Mo. 456 [1865].

⁸ *Iroquois & Crescent Drainage Dist. v. Harroun*, 222 Ill. 489, 78 N. E. 780 [1906]; *Pinkstaff v. Allison Ditch District No. 2 of Lawrence County*, 213 Ill. 186, 72 N. E. 715 [1904]; *Wells v. City of Chicago*, 202 Ill. 448, 66 N. E. 1056 [1903]; *Porter v. City of Chicago*, 176 Ill. 605, 52 N. E. 318 [1898]; *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33 [1898]; *Peyton v. Village of Morgan Park*, 172 Ill. 102, 49 N. E. 1003

[1898]; *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311 [1897]; *Illinois Central Railway Co. v. City of Kankakee*, 164 Ill. 608, 45 N. E. Rep. 971 [1897]; *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892]; *De Koven v. Lake View*, 131 Ill. 541, 23 N. E. 240 [1890]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

⁹ *Iroquois & Crescent Drainage Dist. v. Harroun*, 222 Ill. 489, 78 N. E. 780 [1906]; *Peyton v. Village of Morgan Park*, 172 Ill. 102, 49 N. E. 1003 [1898]; *De Koven v. Lake View*, 131 Ill. 541, 23 N. E. 240 [1890]; *The People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872 [1890]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876]; *Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277 [1892].

¹⁰ *In the Matter of Commissioners of Public Parks*, 47 Hun, 302 [1888].

¹¹ *Heman's Heirs v. Municipality No. 2*, 15 La. 597 [1840].

of great force,¹² or on satisfactory proof,¹³ or on convincing evidence.¹⁴ If the commissioners are authorized to pass upon questions of fact, their report can be attacked only upon showing that they have adopted an erroneous principle,¹⁵ or that they have been guilty of fraud.¹⁶ The report is not, however, conclusive but is merely *prima facie* evidence of its validity, subject to be rebutted by evidence establishing its invalidity.¹⁷ If the property owner claims only that his land is assessed for too much, the burden is upon him to establish such facts.¹⁸ In some jurisdictions substantially the same result is reached by a different rule. It is said that the assessment is not to be reduced unless it is shown by a fair preponderance of the evidence that it is incorrect, and that on this question the assessment is "not evidence, either *prima facie* or in any other way."¹⁹

§ 924. Charge, finding and verdict.

The charge to the jury must submit to their determination the true issues upon which there is a conflict in the evidence. Where the question of the amount of benefit is material, and this amount is measured by the increase in market value due to the improvement, such question should be submitted to the jury.¹ An instruction that the jury will find in favor of the assessment, if they believe, from the evidence, that it is "correct and just," is defective as it does not tell the jury what a correct and just assessment is.² A verdict to the effect that the property of the

¹² State, Moran, Pros. v. Mayor and Aldermen of Jersey City, 58 N. J. L. (29 Vr.) 144, 35 Atl. 284 [1895]; State, Hunt, Pros. v. Mayor and Common Council of Rahway, 39 N. J. L. (10 Vroom) 646 [1877].

¹³ State, Skinkle, Pros. v. Inhabitants of Township of Clinton, 39 N. J. L. (10 Vroom) 656 [1877].

¹⁴ State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark, 48 N. J. L. (19 Vroom) 101, 2 Atl. Rep. 627 [1886].

¹⁵ State, Wilkinson, Pros. v. Inhabitants of the City of Trenton, 36 N. J. L. (7 Vroom) 499 [1873].

¹⁶ Latham v. Village of Wilmette, 168 Ill. 153, 48 N. E. 311 [1897].

¹⁷ Lower Kings River Reclamation District No. 531 v. Phillips, 108 Cal.

305, 39 Pac. 630, 41 Pac. 335 [1895]; Eel River Draining Association v. Topp, 16 Ind. 242 [1861]; People ex rel. Parker v. Jefferson Co. Court, 55 N. Y. 604 [1874]; In the Matter of Commissioners of Public Parks, 47 Hun, 302 [1888]; In the Matter of Opening 138th Street, 61 Howard (N. Y.) 284 [1881]; Friedrich v. City of Milwaukee, 118 Wis. 254, 95 N. W. 126 [1903].

¹⁸ Rogers v. Venis, 137 Ind. 221, 36 N. E. 841 [1893].

¹⁹ Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339 [1899].

¹ The Kankakee Stone and Lime Co. v. City of Kankakee, 128 Ill. 173, 20 N. E. 670 [1890].

² Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894].

objectors is not assessed more than it will be benefited nor more than its proportionate share of the cost of the improvement, is sufficient, although there is no finding that the property was specially benefited.³ A request that the jury find specially how much the premises of certain named persons ought to be assessed respectively for such improvement, was properly refused by the court. A verdict that the amount assessed is equal to the benefits is sufficient.⁴ If the jury find that property is assessed more or less than it is benefited, or more or less than its proportionate share of the cost, the jury should state in their verdict the amount for which such property should be assessed.⁵ An instruction to the jury that, if they found in favor of the city, the form of their verdict should be, that "the jury find the premises of the objectors are not assessed more or less than their proportionate share of the cost of the improvement, and that they are not assessed more or less than they will be benefited by the proposed improvement," was held not to be subject to the objection that it deprived the jury of the right to reduce the assessment, if they found in favor of the property owners.⁶ If the jury find in favor of the property owners, they should not bring in a general verdict in their favor, but should report by their verdict the amount of benefits received by each property owner.⁷ A verdict contrary to the evidence cannot be sustained.⁸ Thus, if the evidence is undisputed that a ditch across certain property will make it necessary to construct a bridge to get access from one part of the property to the other, a finding that such property is not damaged in any way should be set aside.⁹ The fact that the witnesses on each side on the question of benefits are equal in number does not prevent the court from finding that there is a preponderance of evidence in favor of the assessment.¹⁰ If the jury has viewed the premises assessed and no error of law has

³ *McLannan v. City of Chicago*, 218 Ill. 62, 75 N. E. 762 [1905].

⁴ *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890].

⁵ *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890].

⁶ *Maywood Co. v. Village of Maywood*, 140 Ill. 216, 29 N. E. 704 [1893].

⁷ *The Illinois Central Railroad*

Company v. The City of Chicago, 141 Ill. 509, 30 N. E. 1036 [1893].

⁸ *Pinkstaff v. Allison Ditch Dist. No. 2 of Lawrence County*, 213 Ill. 186, 72 N. E. 715 [1904].

⁹ *Pinkstaff v. Allison Ditch Dist. No. 2 of Lawrence County*, 213 Ill. 186, 72 N. E. 715 [1904].

¹⁰ *Conway v. City of Chicago*, 219 Ill. 295, 76 N. E. 384 [1906].

intervened, a new trial will not be granted, unless the verdict is clearly against the weight of the evidence.¹¹

§ 925. Judgment or decree of confirmation.

A judgment or decree of confirmation must be in substantial compliance with the statute applicable to such proceedings. As has been stated already,¹ it is not necessary that there should be separate trials as to each separate tract of property in a confirmation proceeding.² Whether separate hearings and judgments could be rendered is a question upon which there was once some doubt; and it was held that if a judgment was entered confirming an assessment as against certain property, and leaving the assessment against other property to be determined later, and to be confirmed by a second judgment, such action might or might not be erroneous; but, if erroneous, it was not injurious to objectors whose lands were not affected by the first judgment.³ It has subsequently been held, as has been stated elsewhere,⁴ that separate hearings may be had as to each tract of land, and that an assessment may be confirmed as to certain tracts; and by a subsequent decree the assessment may be confirmed as to other tracts.⁵ This view, however, is entertained under statutes which provide for apportioning the assessment according to benefits and for restricting it to benefits *eo nomine*. Under such statutes, if an assessment is levied upon each tract up to the full amount of benefits, any reduction of the assessment levied against one tract does not result in any increase of the burdens upon other tracts, but in an increase of the amount to be paid by a public corporation. Under statutes of a different type, in which there is a legislative determination that the property which is benefited, is benefited in an amount equal to the cost of the improvement and which provide, accordingly, for assessing the entire cost upon the property benefited, a reduction cannot be

¹¹ Maywood Company v. Village of Maywood, 140 Ill. 216, 29 N. E. 704 [1893].

¹ See § 921.

² Fagan v. City of Chicago, 84 Ill. 227 [1876].

³ Sargeant v. City of Evanston, 154 Ill. 258, 40 N. E. Rep. 440 [1894]. In Guild v. City of Chicago, 82 Ill. 472 [1876] it was said that a "single

hearing and a single judgment several in effect was contemplated by the law."

⁴ See § 921.

⁵ Doremus v. People ex rel. Kochersperger, 173 Ill. 63, 50 N. E. 686 [1898]; Delamater v. City of Chicago, 158 Ill. 575, 42 N. E. Rep. 444 [1895]; Bliss v. City of Chicago, 156 Ill. 584, 41 N. E. Rep. 160 [1895].

made as to one tract without a corresponding increase as to some other tract; and there cannot be a confirmation of the assessment as to some tracts leaving the assessment as to other tracts to be determined later, and to be confirmed by another judgment.⁶ The judgment in confirmation is, in effect, several as to each tract of land.⁷ If some property owners object and some do not, it is held to be proper to render default judgment as to the property with reference to which no objection is filed, and to proceed with the trial as to the other property,⁸ even if such assessments are determined at one hearing and are entered in one decree of confirmation.⁹ If the assessment is limited by the benefits, and a reduction as to one assessment merely increases the share to be paid by the public corporation, the setting aside of an assessment as to one tract,¹⁰ or taking appeal or error as to one tract,¹¹ has no effect upon the assessment levied against the other tracts. If, however, the entire sum which has been assessed is to be apportioned among the tracts of land assessed, and a change in the assessment as to one tract necessarily causes a change as to other tracts, an order setting aside "both the proceedings and the assessment," vacates the entire assessment and not merely the assessment as to those parties who took the assessment before the reviewing court.¹² A decree confirming a report assessing benefits and damages, which is made conditional upon the payment by the parties benefited, of the damages awarded, has been held to be invalid, since the decree is thus put in abeyance until the performance of the act, which is not a matter of record.¹³ The judgment when entered is a judgment *in*

⁶ *City of St. Louis v. Nelson*, 169 Mo. 461, 69 S. W. 466 [1902].

⁷ *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894].

⁸ *Delamater v. City of Chicago*, 158 Ill. 575, 42 N. E. 444 [1895].

⁹ *Gibler v. City of Mattoon*, 167 Ill. 18, 47 N. E. 319 [1897]; *Delamater v. City of Chicago*, 158 Ill. 575, 42 N. E. Rep. 444 [1895]; *Philadelphia & Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Beach v. People ex rel. Kern*, 157 Ill. 659, 41 N. E. 1117 [1895]; *Bliss v. City of Chicago*, 156 Ill. 584, 41 N. E. Rep. 160 [1895];

Rasmussen v. People ex rel. Kern, 156 Ill. 574, 42 N. E. Rep. 161 [1895]; *Zeigler v. People ex rel. Kern*, 156 Ill. 133, 40 N. E. Rep. 607 [1895]; *Browning v. City of Chicago*, 155 Ill. 314, 40 N. E. 565 [1895]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894].

¹⁰ *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894].

¹¹ *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894].

¹² *Long Branch Police, Sanitary and Improvement Commission v. Dobbins*, 61 N. J. L. 659, 40 Atl. 599 [1898].

¹³ *In re Road in Lathrop Township*, 84 Pa. St. (3 Norris) 126 [1877].

*rem.*¹⁴ If the statute provides that the clerk shall certify the roll and the judgment of confirmation to the city clerk, the judgment of confirmation need not include such order.¹⁵ A judgment is not invalid because it refers to a schedule which follows the judgment and is made a part thereof, instead of referring to a schedule which precedes the judgment as the "aforesaid" schedule in accordance with the terms of the statute.¹⁶ The council or other body before which a hearing is had at confirmation, is not bound to decide the question of the confirmation upon the day fixed for the hearing. It may take a sufficient time for deliberation in order to determine the question in a proper manner.¹⁷ Thus, the court may take the case under advisement for a reasonable time.¹⁸ Whether a court may postpone its determination of a confirmation proceeding until after the term at which such proceedings was heard, and then enter judgment as of such term, is a question which has been raised but not decided, since no injury resulting from such delay was shown.¹⁹ Where an order was adopted by a city postponing confirmation proceedings for two years no steps were taken to confirm the assessment for one year, but an order of confirmation was taken before the expiration of the two years, such order was valid in the absence of a showing that the property owners had no notice of the hearing and confirmation.²⁰ Under some statutes, it is provided that an assessment must be completed and confirmed within a certain time after an order is received from the appropriate board to make the assessment.²¹ Such statute is held to be mandatory, and if the assessment is not made within the time specified, the board loses its jurisdiction to confirm the assessment.²² It may be provided by statute that if no action is taken to confirm an assessment or set it aside within a specified time, the assessment shall be deemed to be confirmed. Whether, under such a statute an assesment can be remanded for revision

¹⁴ *Gibler v. City of Mattoon*, 167 Ill. 18, 47 N. E. 319 [1897].

¹⁵ *Zeigler v. People ex rel. Kern*, 156 Ill. 133, 40 N. E. 607 [1859].

¹⁶ *Gage v. People ex rel. Hanburg*, 219 Ill. 369, 76 N. E. 498 [1906].

¹⁷ *City of Ottawa v. Fisher*, 20 Ill. 422 [1858].

¹⁸ *Hosmer v. The Hunt Drainage District*, 134 Ill. 360, 26 N. E. 584 [1891].

¹⁹ *Hosmer v. The Hunt Drainage District*, 134 Ill. 360, 26 N. E. 584 [1891].

²⁰ *Brown v. City of Chicago*, 117 Ill. 21, 7 N. E. 108 [1887].

²¹ *State ex rel. City of St. Paul v. District Court of Ramsey County*, 75 Minn. 292, 77 N. W. 968 [1899].

²² *State ex rel. City of St. Paul v. District Court of Ramsey County*, 75 Minn. 292, 77 N. W. 968 [1899].

after the expiration of the time specified, is a question which has been raised but not decided.²³ Whether a proceeding in confirmation is pending or has been decided, is a question of fact.²⁴ A judgment of confirmation which is not properly entitled is void on its face.²⁵ If the order of confirmation is lost it may be supplied by other evidence.²⁶ If, by reason of an order of the court changing the assessment roll, the decree of confirmation leaves it uncertain what the amount of the assessment is, such judgment is erroneous.²⁷

§ 926. Power to amend or set aside judgment.

The court has the power to amend or correct the judgment of confirmation and the record of the proceedings so as to make it conform to the rulings of the court at any time during the term in which the confirmation judgment was rendered.¹ A judgment of confirmation may be entered, set aside, and re-instated at the same term of court.² If the ordinance is valid and the court has jurisdiction to confirm, a judgment of confirmation cannot be set aside at a subsequent term,³ even if the city has repealed the improvement ordinance after the first judgment of confirmation.⁴ A judgment of confirmation cannot be set aside at a subsequent term.⁵ A default judgment may be set aside by the court which renders it, and it may set the judgment aside by referring the matter to commissioners to recast the assessment.⁶ If a confirmation judgment has been entered on a void ordinance, it may be set aside at a subsequent term.⁷ An application to set aside a default judgment, without showing either a meritorious defense or an excuse for permitting such default, is properly overruled.⁸

²³ *People ex rel. Doyle v. Green*, 3 Hun (N. Y.) 755 [1875].

²⁴ *Cratty v. City of Chicago*, 217 Ill. 453, 75 N. E. 343 [1905].

²⁵ *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898].

²⁶ *Fisher v. Mayor, Aldermen and Commonalty of New York*, 67 N. Y. 73 [1876].

²⁷ *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893].

¹ *McChesney v. City of Chicago*, 226 Ill. 238, 80 N. E. 770 [1907].

² *People ex rel. Kochersperger v. Colvin*, 165 Ill. 67, 46 N. E. Rep. 14 [1897].

³ *People ex rel. McCornack v. McWethy*, 165 Ill. 222, 46 N. E. 187 [1897].

⁴ *People ex rel. McCornack v. McWethy*, 165 Ill. 222, 46 N. E. 187 [1897]; *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. 702 [1896].

⁵ *Keeler v. People ex rel. Kern*, 160 Ill. 179, 43 N. E. Rep. 342 [1896].

⁶ *Browning v. City of Chicago*, 155 Ill. 314, 40 N. E. Rep. 565 [1895].

⁷ *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774 [1903].

⁸ *Citizens' Saving Bank & Trust Company v. City of Chicago*, 215 Ill. 235, 74 N. E. 115 [1905].

If, however, it is shown that the property owner filed objections, and died while such objections were pending, and his heirs had no knowledge of such pending proceedings in time to be substituted as parties, a default should be set aside.⁹ An agreement entered into between the city and a property owner that the assessment shall be confirmed and that, if the cost of the improvement shall be less than the estimated cost, the judgment shall be vacated and judgment against the lot entered for the exact amount does not invalidate the judgment, since no more than the proportionate share of the cost of the improvement could be collected in any event.¹⁰

§ 927. Effect of confirmation.

Where confirmation is had by proceedings in a court and a judgment or decree therefor is rendered, such decree of confirmation is controlled as to its effect and validity by the principles of law applicable to judgments in general.¹ Even if confirmation is not had by proceedings in court, but is effected by proceedings before the council or other corresponding body of the public corporation by which the assessment is levied, the order of such body may be made by statute to have the same effect as the judgment of a court.² This is true, even if it may be held that confirmation by such body is not a judicial act, and hence is not in violation of the constitutional provision which confers judicial power upon the courts alone.³ The act of the common council or other corresponding body in confirming an assessment is said to be an exercise of quasi judicial power.⁴ Where this effect is given to an order or decree of confirmation, such order or decree is final and conclusive as between the parties and cannot be

⁹ Nicholes v. City of Chicago, 184 Ill. 43, 56 N. E. 351 [1900].

¹⁰ Billings v. City of Chicago, 167 Ill. 337, 47 N. E. 731 [1897].

¹ Hause v. City of St. Paul, 94 Minn. 115, 102 N. W. 221 [1905]; State of Minnesota ex rel. Merrick v. District Court of Hennepin County, 33 Minn. 235, 22 N. W. 625 [1885].

² Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; White v. Fleming, 114 Ind. 560, 16 N. E. 487 [1887]; Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410 [1886]; Million v. Board of Commis-

sioners of Carroll County, 89 Ind. 5 [1883]; Mayor v. The Mayor, Aldermen and Commonalty of New York, 101 N. Y. 284, 4 N. E. 336 [1886]; Bellingham Bay Improvement Company v. City of New Whatcom, 20 Wash. 53, 54 Pac. 774 [1898].

³ Bellingham Bay Improvement Co. v. City of New Whatcom, 20 Wash. 53, 54 Pac. 774 [1898].

⁴ Shank v. Smith, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. Rep. 932 [1901].

attacked collaterally by any of the parties thereto, unless the proceedings or the order of confirmation are absolutely void.⁵ If the record shows that the court or other tribunal by which an assessment is confirmed, has jurisdiction, a judgment, decree or order of confirmation made by such court or other tribunal is final and conclusive between the parties and is not subject to collateral attack.⁶ Irregularities which do not affect the jurisdiction

⁵ Board of Education of City of Chicago v. People, 219 Ill. 83, 76 N. E. 75 [1905]; Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884 [1904]; Lyman v. City of Chicago, 211 Ill. 209, 71 N. E. 832 [1904]; Gage v. People ex rel. Hanberg, 207 Ill. 61, 69 N. E. 635 [1904]; People ex rel. Raymond v. Fuller, 204 Ill. 290, 68 N. E. 371 [1903]; Bass v. People ex rel. Raymond, 203 Ill. 206, 67 N. E. 806 [1903]; Fischback v. People ex rel. Tetherington, 191 Ill. 171, 60 N. E. 887; [1901]; Gauen v. Moredock & Ivy Landing Drainage District No. 1, 131 Ill. 446, 23 N. E. 633 [1890]; Chicago & Northwestern Railway Co. v. People ex rel. Seip, 120 Ill. 104, 11 N. E. 418 [1887]; Moore v. The People ex rel. Lewis, 106 Ill. 376 [1883]; Lux & Talbott Stone Company v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; Hibben v. Smith, 158 Ind. 206, 62 N. E. 447 [1901]; (affirmed, Hibben v. Smith, 191 U. S. 310, 24 S. 88 [1903]); Wray v. Fry, 158 Ind. 92, 62 N. E. 1004 [1901]; Shank v. Smith, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. Rep. 932 [1901]; Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92 [1886]; Osborn v. Sutton, 108 Ind. 443, 9 N. E. 410 [1886]; Deegan v. State for use of Stoddard, 108 Ind. 155, 9 N. E. 148 [1886]; Owens v. City of Marion, Iowa, 127 Ia. 469, 103 N. W. 381 [1905]; Tuttle v. Polk & Hubbel, 92 Ia. 433, 60 N. W. 733 [1894]; Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666 [1892]; Fuller v. City of Elizabeth, 42 N. J. L. (13 Vroom) 427 [1880]; Treasurer of City of Camden v. Mulford, 26 N. J. L. (2

Dutcher) 49 [1856]; Dows v. Village of Irvington, 66 Howard (N. Y.) 93 [1883]; In the Matter of Proceedings to Open 65th Street, 23 Howard (N. Y.) 256 [1862]; Morewood v. Corporation of New York, 6 Howard (N. Y.) 386 [1851]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874]; Sandford v. Mayor, etc., of the City of New York, 33 Barb. (N. Y.) 147 [1860]; Meserole v. Mayor and Common Council of Brooklyn, 8 Paige's Chan. 198 [1840]; Morning Side Park Case, 10 Abb. Pr. N. S. 338 [1870].

⁶ Hale v. Moore, 82 Ark. 75, 100 S. W. 742 [1907]; In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; People ex rel. Price v. Wiemers, 225 Ill. 17, 80 N. E. 45 [1907]; People ex rel. Hanberg v. Second Ward Savings Bank, 224 Ill. 191, 79 N. E. 628 [1906]; Noonan v. People ex rel. Hanberg, 221 Ill. 567, 77 N. E. 930 [1906]; People ex rel. Hanberg v. Cohen, 219 Ill. 200, 76 N. E. 388 [1906]; Board of Education of City of Chicago v. People ex rel. Commissioners of Lincoln Park, 219 Ill. 83, 76 N. E. 75 [1905]; People ex rel. Russel v. Brown, 218 Ill. 375, 75 N. E. 989 [1905]; Harman v. People ex rel. Munsterman, 214 Ill. 454, 73 N. E. 760 [1905]; Sumner v. Village of Milford, 214 Ill. 388, 73 N. E. 742 [1905]; People ex rel. Merriman v. Illinois Central Railroad Co., 213 Ill. 367, 72 N. E. 1069 [1904]; Lyman v. City of Chicago, 211 Ill. 209, 71 N. E. 832 [1904]; Gage v. People

of the court to confirm cannot be made the basis of an attack

ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904]; Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904]; Bass v. People ex rel. Raymond, 203 Ill. 206, 67 N. E. 806 [1903]; Bass v. The People ex rel. Raymond, 203 Ill. 206, 67 N. E. 806 [1903]; Chew v. People ex rel. Raymond, 202 Ill. 380, 66 N. E. 1069 [1903]; Johnson v. People ex rel. Reed, 202 Ill. 306, 66 N. E. 1081 [1903]; Walker v. People ex rel. Raymond, 202 Ill. 34, 66 N. E. 827 [1903]; Young v. People ex rel. Raymond, 196 Ill. 603, 63 N. E. 1075 [1902]; Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902]; The People ex rel. Raymond v. Whidden, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; Fischback v. The People ex rel. Tetherington, 191 Ill. 171, 60 N. E. 887 [1901]; Conlin v. People ex rel. Lassig, 190 Ill. 400, 60 N. E. 55 [1901]; Illinois Central Railroad Company v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901]; Johnson v. People ex rel. Raymond, 189 Ill. 83, 59 N. E. 515 [1901]; Clover v. People ex rel. Raymond, 188 Ill. 576, 59 N. E. 429 [1901]; Halsey v. Town of Lake View, 188 Ill. 540, 59 N. E. 234 [1901]; Blount v. People ex rel. Raymond, 188 Ill. 538, 59 N. E. 241 [1901]; Fiske v. People ex rel. Raymond, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985 [1900]; Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306 [1900]; Perisho v. People ex rel. Ganaway, 185 Ill. 334, 56 N. E. 1134 [1900]; Thomson v. People ex rel. Foote, 184 Ill. 17, 56 N. E. 383 [1900]; Leitch v. People ex rel. Ganaway, 183 Ill. 569, 56 N. E. 127 [1900]; Pipher v. People ex rel. Ganaway, 183 Ill. 436, 56 N. E. 84 [1900]; McManus v. People ex rel. Raymond, 183 Ill. 391, 55 N. E. 886 [1899]; Johnson v. People ex rel. Kochersperger, 177 Ill. 64, 52 N. E. 308 [1898]; Kunst v. People ex rel.

Kochersperger, 173 Ill. 79, 50 N. E. 168 [1898]; Larson v. City of Chicago, 172 Ill. 298, 50 N. E. 179 [1898]; Nicholes v. People ex rel. Kochersperger, 171 Ill. 376, 49 N. E. 574 [1898]; Young v. People ex rel. Kochersperger, 171 Ill. 299, 49 N. E. 503 [1898]; Larson v. People ex rel. Kochersperger, 170 Ill. 93, 48 N. E. 443 [1897]; Walker v. People ex rel. Kochersperger, 169 Ill. 473, 48 N. E. 694 [1897]; Hammond v. People, for Use, etc., 169 Ill. 545, 48 N. E. 573 [1897]; O'Neill v. People ex rel. Kochersperger, 166 Ill. 561, 46 N. E. 1096 [1897]; People ex rel. Kochersperger v. Markley, 166 Ill. 48, 46 N. E. 742 [1897]; People ex rel. McCornack v. McWethy, 165 Ill. 222, 46 N. E. 187 [1897]; People ex rel. Kochersperger v. Colvin, 165 Ill. 67, 46 N. E. Rep. 14 [1897]; People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. Rep. 10 [1897]; People ex rel. Kochersperger v. Eggers, 164 Ill. 515, 45 N. E. Rep. 1074 [1897]; Steenberg v. People ex rel. Kochersperger, 164 Ill. 478, 45 N. E. Rep. 970 [1897]; Culver v. People ex rel. Kochersperger, 161 Ill. 89, 43 N. E. Rep. 812 [1896]; Doremus v. People ex rel. Kochersperger, 161 Ill. 26, 43 N. E. Rep. 701 [1896]; Keeler v. People ex rel. Kern, 160 Ill. 179, 43 N. E. Rep. 342 [1896]; Kirchman v. People ex rel. Kochersperger, 159 Ill. 321, 42 N. E. 883 [1896]; Hertig v. People ex rel. 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879 [1896]; People ex rel. Mannen v. Green, 158 Ill. 594, 42 N. E. Rep. 163 [1895]; West Chicago St. Ry. Co. v. People ex rel. Kern, 156 Ill. 18, 40 N. E. 605 [1895]; The Chicago West Division Railway Co. v. People ex rel., 154 Ill. 256, 40 N. E. 342 [1894]; Gartside Coal Company v. Turk, 147 Ill. 120, 35 N. E. 467 [1894]; Clerk v. The People ex rel. Kern, 146 Ill. 348, 35 N. E. 60 [1893]; Gauen v. Moredock & Ivy

upon the ordinance after confirmation in any collateral pro-

Landing Drainage District, 131 Ill. 446, 23 N. E. 633 [1890]; Commissioners of the Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District, 127 Ill. 581, 21 N. E. 206 [1890]; Chicago & Northwestern Railway Co. v. People, 120 Ill. 104, 11 N. E. 418; Blake v. The People for use of Caldwell, 109 Ill. 504 [1884]; Moore v. The People ex rel. Lewis, 106 Ill. 376 [1883]; Schertz v. The People ex rel. Taylor, 105 Ill. 27 [1882]; Gage v. Parker, 103 Ill. 528 [1882]; Andrews v. People ex rel. Rumsey, 83 Ill. 529 [1876]; The Chicago and Northwestern Railroad Company v. The People ex rel. Miller, 83 Ill. 467 [1876]; Prout v. The People ex rel. Miller, 83 Ill. 154 [1876]; Lehmer v. The People ex rel. Miller, 80 Ill. 601 [1875]; Calkins v. Spraker, 26 Ill. App. 159 [1887]; Boyce v. Tuhey, 163 Ind. 202, 70 N. E. 531 [1904]; Gorman v. State ex rel. Koester, 157 Ind. 205, 60 N. E. 1083 [1901]; Duncan v. Lankford, 145 Ind. 145, 44 N. E. 12 [1896]; Million v. Board of Commissioners of Carroll County, 89 Ind. 5 [1883]; Tolin v. Jones, 33 Ind. App. 423, 71 N. E. 678 [1904]; Jamison v. City of New Orleans, 12 La. Ann. 346 [1857]; Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. Rep. 601 [1895]; Nelson v. City of Saginaw, 106 Mich. 659, 64 N. W. 499 [1895]; Davies v. City of Saginaw, 87 Mich. 439, 49 N. W. 667 [1891]; Hause v. City of St. Paul, 94 Minn. 115, 102 N. W. 221 [1905]; Morey v. City of Duluth, 75 Minn. 221, 77 N. W. Rep. 829 [1899]; State of Minnesota ex rel. City of Duluth v. District Court of St. Louis County, 61 Minn. 542, 64 N. W. 190 [1895]; State v. Norton, 63 Minn. 497, 58 Am. St. Rep. 549, 65 N. W. 935 [1896]; McKusick v. City of Stillwater, 44 Minn. 372, 46 N. W. 769 [1890]; State of Minnesota ex rel. Merrick v. District Court of Hen-

nepin County, 33 Minn. 235, 22 N. W. 625 [1885]; Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666 [1892]; In the Matter of Munn, 165 N. Y. 149, 53 N. E. 881 [1900]; (reversing, *In re Munn*, 49 App. Div. 232); Miller v. City of Amsterdam, 149 N. Y. 288, 43 N. E. 632 [1896]; Mayor v. The Mayor, Alderman and Commonalty of the City of New York, 101 N. Y. 284, 4 N. E. 336 [1886]; Astor v. The Mayor, Aldermen and Commonalty of the City of New York, 62 N. Y. 580 [1875]; Dolan v. The Mayor, 62 N. Y. 472 [1875]; In the Matter of Commissioners of Central Park, 60 Barb. (N. Y.) 132 [1870]; Buell v. Trustees of Lockport, 11 Barb. 602 [1852]; Murray v. Graham, 6 Paige Ch. (N. Y.) 622 [1837]; In the Matter of Brainard, 51 Hun (N. Y.) 380, 3 N. Y. Sup. 889 [1889]; Lythe v. City of Buffalo, 48 Hun (N. Y.) 175 [1888]; Methodist Episcopal Church of Harlem v. Mayor, etc., of the City of New York, 55 Howard (N. Y.) 57 [1877]; Morewood v. Corporation of New York, 6 Howard (N. Y.) 386 [1851]; Opening of Sheridan Street, Bellevue Bor., 138 Pa. St. 264, 22 Atl. 22 [1890]; Opening of Park Avenue, Appeal of Luce Bros., 83 Pa. St. 175 [1876]; Pittsburg v. Cluley, 74 Pa. St. (24 P. F. Smith) 262 [1873]; City of Aberdeen v. Lucas, 37 Wash. 190, 79 Pac. 632 [1905]; Potter v. City of Whatcom, 25 Wash. 207, 65 Pac. 197 [1901]; Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900]; Northwestern and Pacific Hypotheek Bank v. City of Spokane, 18 Wash. 456, 51 Pac. 1070 [1898]; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898]; Bellingham Bay Improvement Company v. City of New Whatcom, 20 Wash. 53, 54 Pac. 774 [1898]; City of New Whatcom v. Bellingham Bay Improvement Company, 18 Wash. 181, 51 Pac. 360 [1897].

ceedings.⁷ On the other hand, a judgment, decree or order of confirmation made by a court or other tribunal which has no jurisdiction to render such judgment, decree or order is an absolute nullity and may be resisted collaterally in any proceedings in which it is attempted to enforce such assessment.⁸ Under some statutes, the decree of confirmation is *prima facie* valid.⁹

⁷ *Schertz v. The People ex rel. Taylor*, 105 Ill. 27 [1882]. "This is nothing more nor less than collateral attack upon the proceedings of a court of competent jurisdiction. Such an attack cannot be maintained, be the proceedings ever so erroneous." *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12 [1896].

⁸ *People ex rel. Price v. Wiemers*, 225 Ill. 17, 80 N. E. 45 [1907]; *People ex rel. Hanberg v. Second Ward Savings Bank*, 224 Ill. 191, 79 N. E. 628 [1906]; *People ex rel. Russel v. Brown*, 218 Ill. 375, 75 N. E. 989 [1905]; *Thompson v. People ex rel. Hanberg*, 207 Ill. 334, 69 N. E. 842 [1904]; *Chew v. People ex rel. Raymond*, 202 Ill. 380, 66 N. E. 1069 [1903]; *Johnson v. People ex rel. Reed*, 202 Ill. 306, 66 N. E. 1081 [1903]; *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903]; *Vandersyde v. People ex rel. Raymond*, 195 Ill. 200, 62 N. E. 806 [1902]; *Illinois Central R. R. Co. v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609 [1901]; *Clover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Blount v. People ex rel. Raymond*, 188 Ill. 538, 59 N. E. 241 [1901]; *Fiske v. People ex rel. Raymond*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985 [1900]; *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898]; *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898]; *People ex rel. Kochersperger v. Warneke*, 173 Ill. 40, 50 N. E. 221 [1898]; *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *Walker v. People ex rel. Kochersperger*, 169

Ill. 473, 48 N. E. 694 [1897]; *People ex rel. Kochersperger v. Hurford*, 167 Ill. 226, 47 N. E. 368 [1897]; *O'Neill v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897]; *People ex rel. Kochersperger v. Clifford*, 166 Ill. 165, 46 N. E. 770 [1897]; *People ex rel. Kochersperger v. Markley*, 166 Ill. 48, 46 N. E. Rep. 742 [1897]; *People ex rel. Kochersperger v. Lingle*, 165 Ill. 65, 46 N. E. Rep. 10 [1897]; *Culver v. People ex rel. Kochersperger*, 161 Ill. 89, 43 N. E. Rep. 812 [1896]; *Doremus v. People ex rel. Kochersperger*, 161 Ill. 26, 43 N. E. Rep. 701 [1896]; *Keeler v. People ex rel. Kern*, 160 Ill. 179, 43 N. E. Rep. 342 [1896]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. Rep. 163 [1895]; *Boynnton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895]; *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893]; *Jacksonville Railroad Co. v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886]; *Schertz v. The People ex rel. Taylor*, 105 Ill. 27 [1882]; *Glos v. Cannata*, 121 Ill. App. 215 [1905]; *Thomson v. City of Detroit*, 114 Mich. 502, 72 N. W. 320 [1897]; *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053 [1904]; *Miller v. City of Amsterdam*, 149 N. Y. 288, 43 N. E. 632 [1896]; *People ex rel. Nosstrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064 [1890]; *Hopkins v. Mason*, 42 Howard (N. Y.) 115 [1871]; *Riker v. Mayor, Aldermen and Commonalty of New York*, 3 Daly (N. Y.) 174 [1869]; *Breed v. Allegheny*, 85 Pa. St. 214 [1877]; *City of Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632 [1905].

⁹ *Driver v. Moore*, 81 Ark. 80, 98 S. W. 734 [1906].

§ 928. Jurisdictional and non-jurisdictional defects.

Accordingly, in determining the validity of an order or judgment of confirmation when attacked collaterally, it is necessary to know whether the defect alleged is such as to deprive the court or other tribunal by which such assessment was confirmed, of jurisdiction to confirm it. If the proceedings of confirmation are had before a court of general jurisdiction having authority to pass upon the question of the existence or non-existence of its own jurisdiction, it is generally said that want of jurisdiction must appear on the record in order to render the assessment subject to collateral attack.¹ An objection to a judgment of confirmation which does not appear upon the record cannot be interposed subsequently for the purpose of showing that the court had no jurisdiction.² Questions of this sort can not be raised collaterally.³ On the other hand, an express finding of jurisdictional facts, which is contradicted by the record of the proceedings, is not conclusive as against collateral attack.⁴

§ 929. Defective ordinance.

Since a valid ordinance is the foundation of assessment proceedings,¹ it follows that if the ordinance itself is void and not merely irregular, a decree or order of confirmation passed thereon is itself void.² If the assessment itself is void, it cannot be cured by confirmation.³ Thus, if the statute provides for assess-

¹ *People v. Second Ward Savings Bank*, 224 Ill. 191, 79 N. E. 628 [1906]; *Thompson v. People ex rel. Hanberg*, 207 Ill. 334, 69 N. E. 842 [1904]; *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904]; *Leitch v. People ex rel. Gannaway*, 183 Ill. 569, 56 N. E. 127 [1900]; *Kunst v. People ex rel. Kochersperger*, 173 Ill. 79, 50 N. E. 168 [1898]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898].

² *People ex rel. Merriman v. Illinois Central Railroad Co.*, 213 Ill. 367, 72 N. E. 1069 [1904].

³ *State ex rel. Wilcox v. Jackson*, 118 Ind. 553, 21 N. E. 321 [1888].

⁴ *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898].

¹ See § 837.

² *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903]; *People ex rel. Kochersperger v. Warneke*, 173 Ill. 40, 50 N. E. 221 [1898]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *People ex rel. Kochersperger v. Hurford*, 167 Ill. 226, 47 N. E. 368 [1897]; *O'Neill v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897]; *The Jacksonville Railroad Co. v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886].

³ *Cass v. People, Kochersperger*, 166 Ill. 126, 46 N. E. Rep. 729 [1897]; *Klein v. Nugent Gravel Co.*, 162 Ind. 509, 70 N. E. 801 [1903]; (reversing — *Ind. App.* —, 66 N. E. 486 [1903]).

ing lots on both sides of the street for a street improvement, it has been held that an assessment against the lots upon one side of the street only for an improvement upon the part of the street on that side is void and is not cured by confirmation.⁴ If the tax is absolutely void, it is not cured by confirmation.⁵ If the ordinance is not void, however, and the tribunal before which confirmation is had, has jurisdiction to render a decree or order of confirmation, such decree or order is not subject to collateral attack.⁶ An ordinance which is merely defective but not void is cured by confirmation.⁷ The defect that the ordinance in providing that the city shall pay for intersections, exceeds the constitutional limit of taxation is one of which advantage cannot be taken after confirmation.⁸ Since the ordinance must specify the nature and locality of the proposed improvement and must describe it,⁹ an ordinance entirely wanting in such description is void, and such defect is not cured by confirmation.¹⁰ If the description of the improvement is in some respects vague or inaccurate, but the description is not so absolutely wanting as to render it void, such defect is cured by confirmation.¹¹ Thus, an insufficient description of the termini of the improvement,¹² or failure to describe the "flat stones" on which the ordinance provides that the curbs are to rest,¹³ renders a judgment of confirmation erroneous but not void, and not subject to collateral attack. The rule that if the ordinance is void an assessment based

⁴ *Flein v. Nugent Gravel Co.*, 162 Ind. 509, 70 N. E. 701 [1903]; (reversing — Ind. App. —, 66 N. E. 486 [1903]).

⁵ *Clos v. Cannata*, 121 Ill. App. 215 [1905].

⁶ *Clew v. People ex rel. Raymond*, 202 Ill. 380, 66 N. E. 1069 [1903].

⁷ *People ex rel. Mennen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895].

⁸ *People ex rel. Mennen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895].

⁹ See § 856 *et seq.*

¹⁰ *People ex rel. Kochersperger v. Warneke*, 173 Ill. 40, 50 N. E. 221 [1898]; *People ex rel. Kochersperger v. Hurford*, 167 Ill. 226, 47 N. E. 368 [1897]; *Jacksonville Railroad Company v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886].

¹¹ *People ex rel. Price v. Wiemers*, 225 Ill. 17, 80 N. E. 45 [1907]; *Walker v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694 [1897]; *Johnson v. People ex rel. Raymond*, 189 Ill. 83, 59 N. E. 515 [1901]; *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306 [1900]; *Nicholes v. People ex rel. Kochersperger*, 171 Ill. 376, 49 N. E. 574 [1898]; *Steenberg v. People ex rel. Kochersperger*, 164 Ill. 478, 45 N. E. Rep. 970 [1897].

¹² *Nicholes v. People ex rel. Kochersperger*, 171 Ill. 376, 49 N. E. 574 [1898]; *Steenberg v. People ex rel. Kochersperger*, 164 Ill. 478, 45 N. E. Rep. 970 [1897].

¹³ *Johnson v. People ex rel. Raymond*, 189 Ill. 83, 59 N. E. 515 [1901]; *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306 [1900].

thereon is void, even after confirmation, is usually invoked to protect the property owner. It may, however, operate against him in particular cases. If the ordinance is void the determination of benefits thereunder is void, even after confirmation, and, accordingly, is no bar to a different determination under a new assessment.¹⁴

§ 930. Defective notice.

If the different notices required by law in assessment proceedings preliminary to confirmation are not given, it is held, in many jurisdictions, that such defects are cured by confirmation,¹ at least if substantial notice is given.² Thus, failure to publish a resolution as required by statute,³ or a premature notice of the making of an assessment roll,⁴ are defects cured by confirmation. If no notice or a defective notice of the confirmation proceedings has been given, such defect is a sufficient ground for resisting confirmation collaterally.⁵ If a decree of confirmation is rendered in spite of such defect, and no express finding of the sufficiency of the notice is made, such decree of confirmation is of no effect, since jurisdiction is lacking.⁶ If, however, confirmation is had before a court having power to determine its own jurisdiction and an express finding of notice is made by such court, such finding, if erroneous, is ground for proceedings in appeal or error, but such judgment cannot be attacked collaterally.⁷ In collateral attack upon a judgment of confirmation, it will be pre-

¹⁴ *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898].

¹ *Calkins v. Spraker*, 26 Ill. App. 159 [1887].

² *City of Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632 [1905].

³ *Dolan v. The Mayor, Aldermen and Commonalty of the City of New York*, 62 N. Y. 472 [1875].

⁴ *Lyth v. City of Buffalo*, 48 Hun, 175 [1888].

⁵ *Phillips v. People ex rel. Goedtnner*, 218 Ill. 450, 75 N. E. 1016 [1905]; *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898]; *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895]; *Busenback v. Clements*, 22 Ind. App. 557, 53 N. E. 665 [1899].

⁶ *Payson v. People ex rel. Parsons*,

175 Ill. 267, 51 N. E. 588 [1898]; *Busenback v. Clements*, 22 Ind. App. 557, 53 N. E. 665 [1899]; *Watson v. Borough of Sewickley*, 91 Pa. St. (10 Norris) 330 [1879].

⁷ *Illinois Central R. R. Co. v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609 [1901]; *Glover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898]; *Larson v. People ex rel. Kochersperger*, 170 Ill. 93, 48 N. E. 443 [1897]; *Kirchman v. People ex rel. Kochersperger*, 159 Ill. 321, 42 N. E. 883 [1896]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503; *Case v. People ex rel. Kochersperger*, 165 Ill. 49, 46 N. E. 7; *Dickey v. People ex rel. Kochersperger*, 160 Ill. 633, 43 N. E.

sumed in the absence of evidence to the contrary that jurisdictional facts, such as giving notice of the confirmation, have been established by proper evidence.⁸ This is true, even if the court permitted an affidavit of giving notice to be filed *nunc pro tunc*.⁹ If there is a special finding of due notice, the fact that the record contains an insufficient certificate of the publisher, or one showing a defective publication, does not contradict the record so as to make it liable to collateral attack. Such defects may have been cured by other evidence.¹⁰

§ 931. Defects in petition.

Where it is necessary that a petition for an ordinance be filed as a condition precedent to making an improvement, it is held, in some jurisdictions, that such defect must be taken advantage of at confirmation, and that a decree of confirmation cures such defect.¹ In other jurisdictions it is held that since a petition is jurisdictional to the authority of the public corporation to make the improvement, failure to file the petition required by statute renders subsequent proceedings void and is not cured by judgment of confirmation.²

§ 932. Defects in estimate.

The lack of a preliminary estimate,¹ or the fact that such estimate was not included in the record of the improvement board's

701; *Hertig v. People ex rel. Kochersperger*, 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879 [1896]; *West Chicago St. Ry. Co. v. People ex rel. Kern*, 156 Ill. 18, 40 N. E. 605 [1895]; *The Chicago West Division Railway Co. v. People ex rel.*, 154 Ill. 256, 40 N. E. 342 [1894]; *Clark v. The People ex rel.*, 146 Ill. 348, 35 N. E. 60 [1893].

⁸ *Merriam v. People ex rel. Kochersperger*, 160 Ill. 555, 43 N. E. 705 [1896]; *City of Seattle v. Smith*, 8 Wash. 387, 36 Pac. 280 [1894].

⁹ *Merriam v. People ex rel. Kochersperger*, 160 Ill. 555, 43 N. E. 705 [1896].

¹⁰ *Glover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898]; *Larson v. People ex rel.*

Kochersperger, 170 Ill. 93, 48 N. E. 443 [1897].

¹ *Phillips v. People ex rel. Goedtnner*, 218 Ill. 450, 75 N. E. 1016 [1905]; *Harman v. People ex rel. Munsterman*, 214 Ill. 454, 73 N. E. 760 [1905]; *Sumner v. Village of Milford*, 214 Ill. 388, 73 N. E. 742 [1905]; *Coulin v. People ex rel. Lassig*, 190 Ill. 400, 60 N. E. 55 [1901]; *Perisho v. People ex rel. Gannaway*, 185 Ill. 334, 56 N. E. 1134 [1900]; *Pipher v. People ex rel. Gannaway*, 183 Ill. 436, 56 N. E. 84 [1900]; *McManus v. People ex rel. Raymond*, 183 Ill. 391, 55 N. E. 886 [1899].

² *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053 [1904]; *Henderson v. City of South Omaha*, 60 Neb. 125, 82 N. W. 315 [1900].

³ *M'Kusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890].

first resolution for an improvement,² or irregularities in such estimate,³ or the fact that such estimate is made prior to the passage of the improvement ordinance,⁴ or the fact that the amount of the assessment exceeds the amount of the estimate, where it is not shown that the actual cost of the improvement is less than the amount of the assessment,⁵ are all defects which are cured by confirmation.

§ 933. Objections to amount of assessment.

Objections to the amount of the assessment,¹ as that the assessment exceeds the cost of the improvement,² or that it exceeds the percentage of the valuation of the property assessed which is prescribed by statute,³ or that it exceeds the benefits conferred,⁴ or that it is inadequate to cover the cost of the improvement,⁵ are all defects which are cured by confirmation. Where property used for railway purposes may be assessed, if specially benefited, a judgment of confirmation is conclusive upon the question of such benefits.⁶ Where the commissioners or viewers are to make allowance for work already done and to deduct such allowance from the assessment, no such allowance can be made after their report is filed and confirmed.⁷

§ 934. Objection to apportionment.

An objection to the method of apportioning the assessment,¹ as that the assessment is apportioned according to the valuation

² Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904].

³ Noonan v. People ex rel. Hanberg, 221 Ill. 567, 77 N. E. 930 [1906]; Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904].

⁴ People ex rel. Kochersperger v. Colvin, 165 Ill. 67, 46 N. E. Rep. 14 [1897].

⁵ Hammond v. People, for use, etc., 169 Ill. 545, 48 N. E. 573 [1897].

¹ Duncan v. Lankford, 145 Ind. 145, 44 N. E. 12 [1896].

² People ex rel. Thompson v. Judson, 233 Ill. 280, 84 N. E. 233 [1908]; Andrews v. People ex rel. Rumsey, 83 Ill. 529 [1876]; Town of Tumwater v. Pix, 18 Wash. 153, 51 Pac. 353.

³ Methodist Episcopal Church of Harlem v. Mayor, etc., of the City of

New York, 55 How. (N. Y.) 57 [1877].

⁴ Andrews v. People ex rel. Rumsey, 83 Ill. 529 [1876]; Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900]; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898].

⁵ Potter v. City of Whatcom, 25 Wash. 207, 65 Pac. 197 [1901].

⁶ Chicago & Northwestern Railway Co. v. People, ex rel. Seip, 120 Ill. 104, 11 N. E. 418 [1887].

⁷ Tolin v. Jones, 33 Ind. App. 423, 71 N. E. 678 [1904].

¹ Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601 [1895]; Northwestern & Pacific Hypotheek Bank v. City of Spokane, 18 Wash. 456, 51 Pac. 1070 [1898].

of the property instead of according to benefits,² is cured by confirmation. An error of the court at confirmation in not recasting the assessment after discharging certain property from the assessment on the ground that it was not benefited thereby, cannot be taken advantage of by collateral attack.³ At a time when assessments in general were held to be invalid as not apportioned according to value,⁴ a decree of confirmation was held to render the assessment valid, notwithstanding such constitutional objection.⁵

§ 935. Objections to commissioners.

The objection that the commissioners are not properly appointed,¹ or are not qualified,² as not being freeholders,³ or as being financially interested in the proceeding,⁴ or that they failed to take the oath required by statute,⁵ or that they failed to act as a body,⁶ or that less than all certified to the assessment roll⁷ are all defects cured by confirmation.

§ 936. Objections to assessment roll.

Since the existence of an assessment roll is essential to the jurisdiction of the court confirming the assessment,¹ an assessment confirmed without such assessment roll,² or with an unsigned assessment roll,³ is absolutely void and is not cured by confirmation. The fact that an assessment roll is signed by two out of three commissioners is said, on the other hand, to be

² *Northwestern & Pacific Hypotheek Bank v. City of Spokane*, 18 Wash. 456, 51 Pac. 1070 [1898].

³ *Johnson v. People ex rel. Kochersperger*, 177 Ill. 64, 52 N. E. 308 [1898].

⁴ See § 155. *White v. Municipality Number Two*, 9 La. Ann. 446; which was overruled on this point in *Yeatman v. Crandall*, 11 La. Ann. 220.

⁵ *Jamison v. City of New Orleans*, 12 La. Ann. 346 [1857].

¹ *Harman v. People ex rel. Munsterman*, 214 Ill. 454, 73 N. E. 760 [1905]; *Astor v. The Mayor, Aldermen and Commonalty of the City of New York*, 62 N. Y. 580 [1875].

² *Pittsburg v. Cluley*, 74 Pa. St. (24 P. F. Smith) 262 [1873].

³ *Pittsburg v. Cluley*, 74 Pa. St.

(24 P. F. Smith) 262 [1873]; *Nutwood Drainage and Levee District v. Reddish*, 234 Ill. 130, 84 N. E. 750 [1908]; *Commissioners of Union Drainage District No. 1 v. Smith*, 233 Ill. 417, 84 N. E. 376 [1908].

⁴ *Brown v. City of Saginaw*, 107 Mich. 643, 65 N. W. 601 [1895].

⁵ *Walker v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694 [1897].

⁶ *Morewood v. Corporation of New York*, 6 Howard (N. Y.) 386 [1851].

⁷ *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898].

¹ See § 880 *et seq.*; and § 908.

² *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172 [1893].

³ *Thompson v. City of Detroit*, 114 Mich. 502, 72 N. W. 320 [1897].

erroneous, but not void, and to give the court jurisdiction to confirm the assessment. The judgment of confirmation thus rendered is, accordingly, not subject to collateral attack.*

§ 937. Objections to nature of improvement.

If the record shows on its face that the improvement is one for which the public corporation has no authority to levy the assessment,¹ as where an assessment is levied for improving a turnpike toll road as a city street, in jurisdictions where no assessment can be levied for such a purpose,² such defect is not cured by confirmation. If the improvement is one for which the public corporation has authority to levy an assessment, irregularities in prescribing the nature and kind of the improvement,³ as by making the streets so wide that the property owners have no sidewalk,⁴ or by providing for constructing a street in conformity to the established grade, where no ordinance has been passed establishing the grade of such street,⁵ or in locating a street on private ground, where such ground may subsequently be condemned,⁶ may render the order of confirmation erroneous, but do not render it void so as to be subject to collateral attack.

§ 938. Errors in description of property.

A defective description of the property assessed,¹ as an error in levying an assessment as an entirety against two or more tracts owned by different owners,² or against supposed lots by numbers when the entire tract has never, in fact, been divided into lots,³ are each defects which are cured by confirmation. On

¹ *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *Larson v. People ex rel. Kochersperger*, 170 Ill. 93, 48 N. E. 443 [1897]; *People ex rel. Kochersperger v. Markley*, 166 Ill. 48, 46 N. E. 742 [1897].

² *The City of Bloomington v. The Chicago and Alton R. R. Company*, 134 Ill. 451, 26 N. E. 266 [1891].

³ *Breed v. Allegheny*, 85 Pa. St. (4 Norris) 214 [1877].

⁴ *Fischback v. The People ex rel. Tethrington*, 191 Ill. 171, 60 N. E. 887 [1901].

⁵ *Fischback v. The People ex rel. Tethrington*, 191 Ill. 171, 60 N. E. 887 [1901].

⁶ *People ex rel. Russel v. Brown*, 218 Ill. 375, 75 N. E. 989 [1905]; *Walker v. People ex rel. Raymond*, 202 Ill. 34, 66 N. E. 827 [1903].

¹ *Lehmer v. The People ex rel. Miller*, 80 Ill. 601 [1875].

² *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. Rep. 163 [1895].

³ *Thompson v. People ex rel. Foote*, 184 Ill. 17, 56 N. E. 383 [1900].

⁴ *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. Rep. 1074 [1897].

the other hand, it has been held that the court has no jurisdiction to enter a judgment confirming an assessment when the property is described with reference to a plat which has not been recorded.⁴ If a lot is assessed, which is, in fact, outside of the assessment district, confirmation does not make such assessment valid.⁵

§ 939. Effect of judgment in eminent domain.

If the assessment is levied for the purpose of paying the cost of land appropriated by proceedings in eminent domain, and the court has jurisdiction in the proceeding in eminent domain, the judgment of the court fixing the amount to be paid for the land and appropriating the same cannot be attacked collaterally.¹ If the proceedings in eminent domain are had before a court having no jurisdiction, the sufficiency of such judgment may be attacked in a proceeding to confirm an assessment to pay the expense of such appropriation.² If, however, this objection is not made at confirmation, the decree of confirmation cannot be subsequently attacked collaterally for such defect.³ Thus, where land which is subject to a mortgage was appropriated without first extinguishing the mortgage lien, it has been held that if such assessment was made prematurely, such error was cured by confirmation.⁴

§ 940. Defects in performance.

Defects in performance consisting of a variance from an improvement as ordered, if made before confirmation, are cured by confirmation and cannot subsequently be the ground of collateral attack upon such decree.¹ If the ordinance provides for making an assessment payable in installments, when the statute

⁴ *People ex rel. Kochersperger v. Clifford*, 166 Ill. 165, 46 N. E. 770 [1897].

⁵ *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064 [1890].

¹ *Brown v. City of Saginaw*, 107 Mich. 643, 65 N. W. Rep. 601 [1895].

² "All questions pertaining to the damages sustained or benefits conferred by the proposed condemnation of land or other property for public use may be raised and tried in the court in which judgment is sought upon the warrants, and the right to raise for decision any question going to

the jurisdiction of the court is one which pertains to all judicial proceedings and cannot be denied in these cases." *Rich v. City of Chicago*, 50 Ill. 286, 295, 296 [1871]; (citing *Creote v. City of Chicago*, 56 Ill. 422).

³ *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903].

⁴ *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. Rep. 829 [1899].

¹ *People ex rel. Price v. Wiemers, Manus v. People ex rel. Raymond*, 225 Ill. 17, 80 N. E. 45 [1907]; *Mc-183 Ill. 391, 55 N. E. 886 [1899].*

gives no authority for such method of payment, the ordinance is not void, and the judgment confirming such assessment renders it valid as against collateral attack.²

§ 941. Other defects prior to confirmation.

If the defect is apparent on the record, a decree of confirmation does not cure it, since the record thus contradicts itself in showing the defect and in declaring that it does not exist.¹ Thus, if the proceedings show on their face that the ordinance has been departed from materially, some cases hold that confirmation does not cure such defect.² If partial and preliminary assessments have been levied and confirmed, the property owner cannot resist the final assessment on grounds which he could have used to defeat the first assessment.³ If, by statute, one who buys a lot bounded on a public street as laid down on the official map cannot be assessed subsequently in order to pay his vendor for land afterward taken by the corporation for the purpose of opening a street, such right of exemption must be urged prior to confirmation and error in including such tract is cured by such confirmation.⁴ After a judgment of confirmation, the sufficiency of the petition for the levy of the assessment cannot be questioned collaterally.⁵ If a certificate of the board of local improvements, showing the cost of the improvement is necessary, and provision is made for a trial of objections thereto; and it is provided that the order of the court shall be conclusive on all parties, an order of the court approving a certificate which recites the completion of the improvement substantially in compliance with the terms of the ordinance, is conclusive upon the parties in a subsequent proceeding to collect the assessment.⁶

²Harman v. People ex rel. Munsterman, 214 Ill. 454, 73 N. E. 760 [1905]; O'Neill v. People ex rel. Kochersperger, 166 Ill. 561, 46 N. E. 1096 [1897]; Culver v. People, Kochersperger, 161 Ill. 89, 43 N. E. Rep. 812 [1896].

¹City of Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39 [1903]; Lill v. City of Chicago, 29 Ill. 31 [1862].

²Hassan v. City of Rochester, 67 N. Y. 528 [1876]; In the Matter of Turfler, 44 Barb. 46 [1865]; Turfler's Case, 19 Abb. Prac. 140 [1865].

³State of Minnesota ex rel. Duluth v. District Court of St. Louis County, 61 Minn. 542, 64 N. W. 190 [1895].

⁴Murray v. Graham, 6 Paiges' Chan. Rep. 622 [1837].

⁵William Riebling v. The People for the Use of the Columbian Levee and Drainage District, 147 Ill. 120, 35 N. E. 467 [1894].

⁶People ex rel. Hanberg v. Cohen, 219 Ill. 200, 76 N. E. 388 [1906].

§ 942. Defects in confirmation proceedings.

If a judgment of confirmation is not properly entitled, such judgment is a nullity and has no effect in making the assessment valid.¹ If two judgments of confirmation have been rendered and the first is valid, the fact that the second judgment is invalid as attempting to set aside the first judgment after the term at which it is rendered, does not invalidate the first judgment.² If two or more assessments are confirmed in one proceeding, such action, if erroneous, does not render the decree of confirmation void.³

§ 943. Judgment of confirmation conclusive against public corporation.

The rule that a judgment of confirmation is final as between the parties is most frequently used to prevent a property owner from making a subsequent collateral attack upon a judgment or decree of confirmation. The rule, however, operates in favor of both parties and may be invoked to protect the property owner from a further assessment.¹ Thus, where successive assessments may be levied in case the prior assessments do not raise a fund sufficient to pay the cost of the improvement, a judgment confirming the first assessment as being for an amount equal to the benefits, protects the property owners from further assessment in jurisdictions where the assessment cannot exceed the benefits.² If a judgment confirming an assessment has been entered, a subsequent judgment of confirmation is invalid, while the first remains in full force.³ If the city, of its own motion, obtains orders vacating a confirmation judgment, after it has repealed the improvement ordinance, when it does not intend to abandon the improvement but has the ordinance re-enacted in order to attempt to obtain judgments for a larger amount, such former judgments are adjudications as to the benefits and pro-

¹ *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898].

² *Keeler v. People ex rel. Kern*, 160 Ill. 179, 43 N. E. 342 [1896].

³ *Prout v. The People ex rel. Miller*, 83 Ill. 154 [1876].

¹ *Sheriffs v. City of Chicago*, 213 Ill. 620, 73 N. E. 367 [1905]; *Wickett v. Town of Cicero*, 152 Ill. 575, 38 N. E. Rep. 909 [1894]; *Greeley v.*

The Town of Cicero, 148 Ill. 632, 36 N. E. Rep. 603 [1894].

² *Sheriffs v. City of Chicago*, 213 Ill. 620, 73 N. E. 367 [1905]; *Wickett v. Town of Cicero*, 152 Ill. 575, 38 N. E. Rep. 909 [1894]; *Greeley v. The Town of Cicero*, 148 Ill. 632, 36 N. E. Rep. 603 [1894].

³ *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306 [1900].

tect the property owner from a subsequent assessment.⁴ A similar view has been held where a condemnation proceeding was dismissed on the application of one property owner after a special assessment fixing the benefits from such condemnation had been confirmed; and subsequently a new proceeding was instituted to condemn such land for the same improvement. Such order of dismissal did not prevent the confirmation from being final as to the property owners who are not parties to the dismissal.⁵

§ 944. Confirmation binding only upon parties.

The rule that confirmation is conclusive as between the parties, limits its operation to the parties to the proceeding.¹ In litigation between the contractor and the city, the contractor cannot take advantage of the confirmation of the assessments as between the city and the property owner to establish the validity of his contract, and the fact that he has performed the same.² If, however, confirmation exhausts the power of the public corporation, third persons may take advantage thereof.³ Thus, if, after confirmation, commissioners are not authorized to order the assessment of additional land, such confirmation may be taken advantage of by property owners whose land was not included in the assessment thus confirmed.⁴

§ 945. Confirmation not operative as to facts not before the court.

The rule that confirmation operates as an adjudication, necessarily implies also that it operates as adjudication only as to facts existing when the proceedings in confirmation were heard. Such judgment cannot be regarded as final where the defects

⁴ *McChesney v. City of Chicago*, 188 Ill. 423, 58 N. E. 982 [1900].

⁵ *LeMoyne v. City of Chicago*, 175 Ill. 356, 51 N. E. Rep. 718 [1898]; *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. Rep. 702 [1896].

¹ *State of Washington on the Relation of the Barber Asphalt Paving Company v. City of Seattle*, 42 Wash. 370, 85 Pac. 11 [1906].

² *Brady v. Mayor, etc., of the City of New York*, 18 Howard, 343

[1859]; (affirming, *Brady v. Mayor, Aldermen and Commonalty of New York*, 16 How. Pr. (N. Y.) 432)]; *State of Washington on Relation of Barber Asphalt Paving Company v. City of Seattle*, 42 Wash. 370, 85 Pac. 11 [1906].

³ *Glenn v. Waddel*, 23 O. S. 605 [1873].

⁴ *Glenn v. Waddel*, 23 O. S. 605 [1873].

complained of arise after the judgment of confirmation.¹ Thus, where the improvement is entirely abandoned after confirmation, the property owner may show such fact in order to resist the assessment.² If the ordinance provides for a street sixty-one feet wide and after confirmation the width is reduced to fifty-three feet, this is in legal effect a different improvement from that which was ordered. Such defense is not, accordingly, barred by a confirmation of the assessment for the street as originally laid out.³ If, after confirmation, enough has been collected on prior installments of the assessment to pay the entire cost of the improvement, such fact may be shown as a defense to the collection of subsequent installments, and is not barred by confirmation.⁴ If the improvement is not completed and the cost thereof is not accurately determined, the court has no power to reduce the assessment to the amount equal to the cost of the part already completed, and the estimated amount necessary to complete the improvement.⁵ If an improvement of a different nature is made from that authorized by the ordinance, and the change is made after confirmation, such defense is not barred by confirmation. Accordingly, if the ordinance calls for a foundation layer of broken limestone six inches in depth and after confirmation the city changes it to a layer of rolling mill slag seven inches in depth, such fact may be shown as a defense.⁶ On the other hand, the fact that less cement was used than was required by the specifications, that screenings were used in place of sand and that the curb walls were not plastered down far enough, does not change the character of the improvement, but merely affects the performance thereof, and if the determination of the city on questions of performance is conclusive the property owner cannot interpose such defenses.⁷ He is not, however, barred in a

¹ *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747 [1898]; *Hammond v. Carter*, 161 Ill. 621, 44 N. E. Rep. 274 [1896]; *Pells v. People ex rel. Holmgrain*, 159 Ill. 580, 42 N. E. Rep. 784 [1896]; *City of Bloomington v. Blodgett*, 24 Ill. App. 650 [1886].

² *Pells v. People ex rel. Holmgrain*, 159 Ill. 580, 42 N. E. Rep. 784 [1896].

³ *Pells v. People ex rel. Holmgrain*, 159 Ill. 580, 42 N. E. 784 [1896].

⁴ *People ex rel. McCornack v. McWethy*, 165 Ill. 222, 46 N. E. 187 [1897].

⁵ *Connecticut Mutual Life Insurance Company v. People ex rel. Kochersperger*, 172 Ill. 31, 49 N. E. 989 [1898].

⁶ *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902].

⁷ *The People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901].

case of this sort by a prior confirmation, if the defect occurs after confirmation.⁸ Confirmation is not conclusive as to questions which were not before the court rendering the decree of confirmation, and which could not have been submitted to it, even if they were in existence at the decree of confirmation.⁹ Thus, if no provision is made for a hearing at confirmation on the question of the sufficiency of the petition, a judgment of confirmation is not conclusive as to the sufficiency thereof.¹⁰

§ 946. Statutory provisions as to effect of confirmation.

The conclusive effect of confirmation is, however, entirely a matter of statute, and if the statute permits defenses to be made after confirmation no constitutional objection exists to permitting the property owner to avail himself of such defenses.¹ Confirmation by the council may, accordingly, be made valid *prima facie* but not conclusive.² The conclusive effect of a decree in confirmation may be limited to certain matters.³ Thus, the confirmation may be conclusive only as to matters contained in the report of the board of public works; and other defects, such as the want of a petition of the property owners for the improvement,⁴ may be taken advantage of notwithstanding confirmation. A judgment confirming a report awarding damages and assessing benefits may, by statute, be made final as to the amount of damages, but not final as to the amount of benefits.⁵

§ 947. Effect of decree of confirmation as against direct attack.

A means is frequently provided by statute for making a direct attack upon a decree of confirmation either by appeal or error. The nature of such attack as this is considered in detail elsewhere.¹ It may be noted here that a judgment or decree of confirmation is not, of course, conclusive on appeal.² If it were, ap-

⁸ The People ex rel. Raymond v. Whidden, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901].

⁹ Miller v. City of Amsterdam, 149 N. Y. 288, 43 N. E. 632 [1896]; In the Matter of the Department of Public Parks, 85 N. Y. 459 [1881].

¹⁰ Miller v. City of Amsterdam, 149 N. Y. 288, 43 N. E. 632 [1896].

¹ In the Matter of Palmer to Have Assessment for Building Sewer in 34th St. Vacated, 31 Howard (N. Y.) 42 [1865].

² City of Chicago v. Burtice, 24 Ill. 489 [1860].

³ Zeigler v. Hopkins, 117 U. S. 683, 29 L. 1019, 6 S. 919 [1886].

⁴ Zeigler v. Hopkins, 117 U. S. 683, 29 L. 1019, 6 S. 919 [1886].

⁵ City of St. Louis v. Brinckwirth, 204 Mo. 28, 102 S. W. 1091 [1907].

¹ See § 1347 *et seq.*; § 1367 *et seq.*

² White v. City of Chicago, 188 Ill. 392, 58 N. E. 917 [1900].

peal would be futile. Thus, if the evidence in the record shows that three of the four notices were posted on the same tree, such notice will be held insufficient on appeal under a statute requiring notices of confirmation to be posted in four public places, even though the trial court found that due notice had been given.³ Since the action of a trial court is ordinarily presumed to be correct, a decree or judgment of confirmation will be presumed on error or appeal to be correct,⁴ and such finding must clearly be shown to be wrong in order to have the judgment of confirmation set aside.⁵ This is especially true, where the court has by consent of the parties viewed the premises and has based his findings in part on such view.⁶ It will be presumed that the decree of confirmation included only proper items.⁷ Thus, if an ordinance providing for an assessment for street intersections has been repealed, it will be presumed on appeal that the cost thereof was not included by the commissioners in their estimate, and that if it was so included, the court reduced such estimate on confirmation.⁸ If the trial court found that due notice had been given,⁹ or that the ordinance was sufficient in law,¹⁰ such finding will be presumed to be correct, if there is no bill of exceptions showing the evidence on which the trial court acted. If

³ *White & Gleason v. City of Chicago*, 188 Ill. 392, 58 N. E. 917 [1900].

⁴ *Piper's Appeal in the Matter of Widening Kearney St.*, 32 Cal: 530 [1867]; *Wells v. City of Chicago*, 202 Ill. 448, 66 N. E. 1056 [1903]; *Trigger v. Drainage District, No One*, etc., 193 Ill. 230, 61 N. E. 1114 [1901]; *Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899]; *Cramer v. City of Charleston*, 176 Ill. 507, 52 N. E. 73 [1898]; *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898]; *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *Illinois Central Railway Co. v. City of Kankakee*, 164 Ill. 608, 45 N. E. Rep. 971 [1897]; *Gage v. City of Chicago*, 162 Ill. 313, 44 N. E. 729 [1896]; *Perry v. People ex rel. Kern*, 155 Ill. 307, 40 N. E. 468 [1895]; *Jerome v. City of Chicago*, 62 Ill. 285 [1871]; *McAuley v. City of Chicago*, 22 Ill. 563 [1859];

City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117 [1895]; *Dickson v. City of Racine*, 65 Wis. 306, 27 N. W. 58 [1886].

⁵ *Trigger v. Drainage District, No. 1*, etc., 193 Ill. 230, 61 N. E. 1114 [1901].

⁶ *Wells v. City of Chicago*, 202 Ill. 448, 66 N. E. 1056 [1903].

⁷ *Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899].

⁸ *Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899].

⁹ *Cramer v. City of Charleston*, 176 Ill. 507, 52 N. E. 73; *Larson v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *Perry v. People ex rel. Kern*, 155 Ill. 307, 40 N. E. 468 [1895].

¹⁰ *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898]; *Gage v. City of Chicago*, 162 Ill. 313, 44 N. E. 729 [1896].

the evidence is preserved in the record and is conflicting, the action of the trial court will not be set aside.¹¹ The exercise of discretion by the trial court will not be reviewed by the appellate court, unless such discretion has clearly been abused. Thus, if leave is asked to file objections at hearing and is refused, the action of the trial court will ordinarily not be reviewed.¹² If a judgment of confirmation is reversed on a specified ground, new objections can not be urged when the cause is re-docketed, except those which have come into existence since the prior decree of confirmation.¹³ A decree of confirmation is not conclusive in case of an application to the court rendering such decree, to set it aside. A decree of confirmation may be set aside as obtained by a fraudulent promise to appropriate land so as to secure the benefit of the improvement to the property owners who are assessed.¹⁴ A statute making confirmation "final and conclusive,"¹⁵ even in case of appeal does not prevent a motion to set aside such decree for irregularity, mistake or fraud.¹⁵

§ 948. Conclusive effect of other steps in assessment.

Under statutes similar to those already discussed it may be provided that in case of an appeal from a precept of sale, the property owners objecting to the assessment cannot go back of the time of making the contract, and cannot attack the assessment for defects occurring prior thereto.¹ The legislature may make the issuing of bonds for the purpose of paying for the improvement *prima facie* evidence of the validity of the assessment and conclusive as to facts which are not jurisdictional in their nature, though it cannot make such issuing of bonds conclusive evidence of jurisdictional facts.² By the provisions of some statutes the formal certificate of some specified public officer may be final as to the questions upon which he is, by stat-

¹¹ Illinois Central Railway Company v. City of Kankakee, 164 Ill. 608, 45 N. E. Rep. 971 [1897].

¹² Jerome v. City of Chicago, 62 Ill. 285 [1871].

¹³ Lusk v. City of Chicago, 211 Ill. 183, 71 N. E. 878 [1904].

¹⁴ Dempster v. City of Chicago, 175 Ill. 278, 51 N. E. Rep. 710 [1898].

¹⁵ In the Matter of the Mayor of New York City, 49 N. Y. 150 [1872].

¹ Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889 [1891]; (overruling Kretch v. Helm, 45 Ind. 438 [1874]); McEwen v. Kilker, 38 Ind. 233 [1871]; and Moberry v. City of Jeffersonville, 38 Ind. 198 [1871]).

² Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920 [1899].

ute, given authority to pass.³ Such certificate is inoperative as to other questions.⁴

§ 949. Bill of costs.

Under some statutes, it is necessary that a bill should be filed showing in separate items the cost of grading, materials, laying down, and supervision. Such provision is intended for the benefit of the property owner and failure to comply therewith invalidates the assessment.¹ Under such statute the assessment is invalid if the bill which is filed does not show the cost of the separate items,² as where it shows that the improvement was constructed under a contract to do the work for a certain amount per lineal foot.³ A contract for laying a sidewalk at a certain amount per square foot does not comply with the provisions of such statute, since the contract gives no means of determining separately the cost of materials and labor.⁴ A contract for constructing a sidewalk at a certain price per square foot for materials, and a certain price per square foot for labor complies with a statute which requires a cost bill to be filed showing separately the cost of material and the cost of labor embraced in the assessment upon each lot.⁵ If a tax is to be levied by issuing a warrant to the marshal to collect the bill of costs, no levy exists where the bill of costs is handed to the marshal for collection but no warrant issues therefor.⁶ The city is not obliged to construct such improvement itself by the employment of labor and the purchase of material.⁷ Such a statute does not prevent the city from letting a contract for the construction of such improvement.⁸ If the statute requires the city to file a statement showing the cost of grading, materials, laying a sidewalk and supervision thereof, the contract in order to be valid must specify

³ In the Matter of Johnson, 103 N. Y. 260, 8 N. E. 399 [1886]; Matter of Peugnet, 67 N. Y. 441; Matter of Peugnet, 5 Hun (N. Y.) 434 [1875]; In the Matter of Marsh, 21 Hun, 582 [1880].

⁴ In the Matter of the Metropolitan Gas Light Company, 23 Hun, 327 [1880].

¹ Holland v. People ex rel. Miller, 189 Ill. 348, 59 N. E. 753 [1901].

² Meservey v. People, 208 Ill. 646, 70 N. E. 678 [1904].

³ People ex rel. Hanberg v. Peyton, 214 Ill. 376, 73 N. E. 768 [1905].

⁴ People ex rel. Hanberg v. Peyton, 214 Ill. 376, 73 N. E. 768 [1905].

⁵ Ronan v. People ex rel. Shafter, 193 Ill. 631, 61 N. E. 1042 [1901].

⁶ People ex rel. Jeffries v. Record, 212 Ill. 62, 72 N. E. 7 [1904].

⁷ People ex rel. Hanberg v. Peyton, 214 Ill. 376, 73 N. E. 768 [1905].

⁸ People ex rel. Hanberg v. Peyton, 214 Ill. 376, 73 N. E. 768 [1905].

separately the sum to be paid for each of these items. A contract at a given price per square foot is invalid under such a statute.⁹

§ 950. Effect of change of statute.

Cases are occasionally presented in which the legislature has made some change in the statutory provisions applicable to the method of levying assessment. If such change is made before the assessment proceedings have been instituted and the improvement begun, it is clear that the later statute applies, to the exclusion of the earlier statute.¹ If an improvement is constructed and completed before a change of law takes effect, the assessment should be levied under the law in force when the contract was let and the improvement constructed.² It has been held, however, that if the statute shows specifically the intention of the legislature to apply such provision to an improvement already constructed, full effect must be given to such intention.³ If a contract has been let and improvement commenced before a change of law, and the work is suspended and is not resumed and completed until some time after the change of law, it has been held proper to levy the assessment under the law in force when the contract was let and the improvement begun.⁴ If the validity of a contract depends upon the question whether it was let before or after a change of law, it will not be presumed in the absence of any evidence on that point, that it was let after the adoption of a law which made such contract invalid.⁵ If the change is made in the statute after the assessment proceedings have been instituted or the improvement commenced, a question of greater difficulty is presented as to whether the new statute should apply to so much of such proceedings as is incomplete when the statute takes effect, or whether such proceedings

⁹ *People ex rel. Hanberg v. Peyton*, 214 Ill. 376, 73 N. E. 768 [1905].

¹ *Phillips v. Lewis*, 109 Ind. 62, 9 N. E. 395 [1886]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *City of St. Louis to use of Creamer v. Oeters*, 36 Mo. 456 [1865]. For effect of a change in constitutional provisions as invalidating prior statutes see, *Thompson v. Ruggles*, 69 Cal. 465, 11 Pac. 20

[1886]; *McDonald v. Patterson*, 54 Cal. 245 [1880].

² *People ex rel. Johnson v. City of Brooklyn*, 23 Barb. (N. Y.) 180 [1856].

³ *In the Matter of Sackett, Douglas and DeGraw Streets*, 73 N. Y. 95 [1878].

⁴ *Kirwan v. Fisher*, 4 Mo. App. 574 [1877].

⁵ *Irwin v. Mayor, etc., of Mobile*, 57 Ala. 6 [1876].

should be controlled throughout by the old statute. The legislature may change the statutes governing assessments so as to apply to pending proceedings, as long as the burden upon the property owners is not thereby increased.⁶ Accordingly, if a statute is passed while an assessment is pending, the subsequent steps in such assessment proceeding may be governed by such new statute if the legislature so intends.⁷ Thus, statutes which deny appeals on certain issues, on which appeal was given by the original statute,⁸ or change the method of appointing commissioners,⁹ or provide that the cost of making and collecting an assessment shall no longer be included therein¹⁰ or which do away with the necessity of describing the improvement district,¹¹ or which provide for a re-hearing for the benefit of property owners,¹² or which relieve property owners from the burden of the assessment altogether, casting it upon the public corporation,¹³ have all been held to apply to the subsequent steps of proceedings pending when the new statute took effect, if such appears to have been the legislative intent. The original statute provided that the council should fix the assessment district. While proceedings were pending the statute was so modified as to provide that the board of public works should fix the assessment district. Two days after such amendment had taken effect the council, not knowing of such amendment, adopted a resolution fixing such district. When they learned of the new statute, the council referred the assessment district as fixed by them to the

⁶ See § 166 *et seq.*

⁷ *Taylor v. Strayer*, 167 Ind. 23, 78 N. E. 236 [1906]; *Wardens and Vestry of Christ's Church v. City of Burlington*, 39 Ia. 224 [1874]; *City of Leavenworth v. Mills*, 6 Kan. 288 [1870]; *Durrett v. Davison*, — Ky. —, 8 L. R. A. (N. S.) 546, 93 S. W. 25 [1906]; *Tappan v. Board of Street Commissioners of Boston*, 193 Mass. 498, 79 N. E. 796 [1907]; *State, Estate of Brown, Pros. v. Town of Union*, 62 N. J. L. 142, 40 Atl. 632 [1898]; *In re Commissioners of Elizabeth*, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; *State, Harris, Pros. v. Mayor, Aldermen, etc., of Jersey City*, 38 N. J. L. (9 Vr.) 85 [1875]; *Elwood v. City of Rochester*, 43 Hun (N. Y.) 102 [1887]; *Fen-*

elon's Petition, 7 Pa. St. (7 Barr.) 173 [1847].

⁸ *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510 [1902].

⁹ *Bakman v. Hackensack Commission*, 70 N. J. L. (41 Vr.) 499, 57 Atl. 141 [1904]; *State, Copeland, Pros. v. Village of Passaic*, 36 N. J. L. (7 Vr.) 382 [1873].

¹⁰ *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184 [1902].

¹¹ *Field v. City of Chicago*, 198 Ill. 224, 64 N. E. 840 [1902].

¹² *In the Matter of Widening Broadway in the City of New York*, 42 Howard (N. Y.) 220 [1872].

¹³ *Durrett v. Davison*, — Ky. —, 8 L. R. A. (N. S.) 546, 93 S. W. 25 [1906].

board of public works. That body fixed a district having the same limits as those fixed by the council, but certified that they did not regard themselves as bound by the act of the council. This was held to be a compliance with the new statute.¹⁴ The same result has been reached where a borough, after commencing an improvement, was merged in a city, the charter of which prescribed a somewhat different mode of procedure.¹⁵ If statutes are passed which are intended to cure prior irregularities in assessment proceedings, such statutes must necessarily apply to prior proceedings or they cannot accomplish their purpose.¹⁶ An assessment cannot be enforced under a statute passed after the improvement is completed and imposing a heavier burden on the property owners than was imposed by the original statute; and yet not saving rights under the original statute.¹⁷ In some cases it has been suggested as a principle controlling the question of the application of a new statute to pending proceedings, that if the change is made before the report is filed, the new statute is applicable,¹⁸ but otherwise not.¹⁹ However, where a report had been filed and exceptions were filed thereto which were not disposed of when the new statute took effect, subsequent proceedings were held to be controlled by the new statute.²⁰ If an order for an improvement is made while a statute is in force and is made by virtue of such statute, such improvement is controlled thereby, in the absence of a statutory provision clearly showing the later statute is to control.²¹ In the absence of anything to show the intention of the legislature to make the new statute apply to pending proceedings, it will be presumed that compliance with the old statute is intended in case of

¹⁴ *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895].

¹⁵ *Gilpin v. City of Ansonia*, 68 Conn. 72, 35 Atl. 777 [1896].

¹⁶ *Bolten v. The City of Cleveland*, 35 O. S. 319 [1880]; *Reed v. City of Cincinnati*, 8 Ohio C. C. 393 [1894]; *Commonwealth to Use of Allegheny City v. Marshall*, 69 Pa. St. (19 P. F. Smith) 328 [1871]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

¹⁷ *City of Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895].

¹⁸ *Illinois Central Railroad Co. v.*

City of Wenona, 163 Ill. 288, 45 N. E. 265 [1896]; *In re Mayor, etc., of City of New York*, 83 App. Div. (N. Y.) 513, 82 N. Y. S. 417 [1903].

¹⁹ *Illinois Central Railroad Company v. City of Wenona*, 163 Ill. 288, 45 N. E. 265 [1896]; *In re Mayor, etc., of City of New York*, 83 App. Div. (N. Y.) 513, 82 N. Y. S. 417 [1903].

²⁰ *Fenelon's Petition*, 7 Pa. St. (7 Barr.) 173 [1847].

²¹ *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870].

proceedings begun before the new statute took effect.²² Hence, the city cannot act under the new statute.²³ A general act, providing that assessments shall be levied upon lands benefited thereby, does not repeal an exemption from assessments as contained in the charter of a private corporation.²⁴ The special requirements of the new statute may show affirmatively that the legislature did not intend such statute to apply to prior proceedings.²⁵ Thus, even if the statute specifically provides that the new act shall apply to collecting installments under prior acts, a section of the new act requiring the board of local improvements to certify the cost of the improvement within thirty days after its final completion and acceptance, cannot from its nature be applicable to improvements completed and accepted more than thirty days before the section became effective.²⁶ In some cases the new statute is not by terms applicable to proceedings already begun.²⁷ A clause saving pending proceedings may prevent the new statute from applying thereto.²⁸ If a petition for an improvement has been filed and commissioners to estimate its cost have been appointed, such proceeding is held to be pending with-

²² *Anderson v. Cortelyou*, — N. J. L. —, 68 Atl. 118 [1907]; (reversing *Cortelyou v. Anderson*, 73 N. J. L. (44 Vr.) 427, 63 Atl. 1095 [1906]); *Kline v. Hagey*, — Ind. —, 81 N. E. 209 [1907]; *Starr v. City of Burlington*, 45 Ia. 87 [1876]; *Yaggy v. City of Chicago*, 194 Ill. 88, 62 N. E. 316 [1901]; *Hoertz v. Jefferson Southern Pond Draining Co.*, 119 Ky. 824, 84 S. W. 1141, 27 Ky. Law Rep. 278 [1905]; *Dashiell v. Mayor and City Council of Baltimore*, Use of Hax, 45 Md. 615 [1876]; *Risley v. City of St. Louis*, 34 Mo. 404 [1864]; *People ex rel. Johnson v. City of Brooklyn*, 23 Barb. 180 [1856]; *Matter of Deering*, 14 Daly (N. Y.) 89 [1886]; (as to time of levying assessment); *Hays v. City of Cincinnati*, 62 Ohio St. 116, 56 N. E. 658 [1900]; *Ehni v. City of Columbus*, 3 Ohio C. C. 494 [1889]; *Matthews v. Wagner*, — Wash. —, 94 Pac. 759 [1908].

²³ *People ex rel. Johnson v. City of Brooklyn*, 23 Barb. 180 [1856].

²⁴ *Hudson County Catholic Protective v. Board of Township Committee of the Township of Kearney*, 56 N. J. L. (27 Vr.) 385, 28 Atl. 1043 [1894].

²⁵ *Morse v. Charles*, — Mass. —, 83 N. E. 891 [1908].

²⁶ *Gage v. People ex rel. Hanberg*, 219 Ill. 369, 76 N. E. 498 [1906].

²⁷ *Keiser v. Mills*, 162 Ind. 366, 69 N. E. 142 [1903]; *Hoertz v. Jefferson Southern Pond Draining Co.*, 119 Ky. 824, 84 S. W. 1141, 27 Ky. Law Rep. 278 [1905]; *Morse v. Charles*, — Mass. —, 83 N. E. 891 [1908].

²⁸ *Gage v. People ex rel. Hanberg*, 225 Ill. 144, 80 N. E. 90 [1907]; *Gray v. Town of Cicero*, 177 Ill. 459, 53 N. E. 91 [1899]; *Dunkle v. Heron*, 115 Ind. 470, 18 N. E. 12 [1888]; *Sand Creek Turnpike Company v. Robbins*, 41 Ind. 79 [1872]; *Palmer v. Stumph*, 29 Ind. 329 [1868]; *Ellison v. Branstrator*, 34 Ind. App. 410, 73 N. E. 146 [1904].

in the meaning of the saving clause.²⁹ Under a statute which repeals all existing laws in conflict with it but provides that such repeal shall not "affect any act done or right accruing or established, but the same shall remain in full force and be preserved and enforced and enjoyed," an assessment levied after such statute takes effect for an improvement which was commenced before the statute took effect, must be levied under the old statute.³⁰ On the other hand, the mere fact that the council has passed a resolution of the necessity of the improvement, has required bids to be advertised, and has declared that the cost should be assessed on the owners of abutting property, does not make the proceeding a pending one within the meaning of such statutes,³¹ nor does the fact that an order has been made establishing a ditch, from which an appeal has been taken, operating as a vacation of such order, make the proceeding a pending one in which the construction of a ditch has been ordered.³² If a change of grade has been ordered but not made before the adoption of a constitutional provision which regulates the assessment of damages and benefits, such constitutional provision applies to the change when made.³³ If the public corporation fails to comply with either the old or the new statute, it cannot, of course, levy an assessment.³⁴

§ 951. Presumption as to regularity of assessment proceedings.

Whether an assessment is conclusive of such facts as the legislature can determine conclusively, whether it is *prima facie* evidence of such facts, or whether it is evidence at all, depends upon the provisions of the statute. The report of the commissioners is said to be conclusive unless made only *prima facie* evidence.¹ Assessment proceedings which do not appear upon the face of the record to be irregular or defective will be presumed to be reg-

²⁹ Gray v. Town of Cicero, 177 Ill. 459, 53 N. E. 91 [1899].

³⁰ City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178 [1893]; City of Toledo v. Marlow, 28 Ohio C. C. 298 [1906]; (affirmed without report, City of Toledo v. Marlow, 75 O. S. 574, 80 N. E. 1124 [1906]).

³¹ Wardens and Vestry of Christ's Church v. City of Burlington, 39 Ia. 224 [1874].

³² Taylor v. Strayer, 167 Ind. 23, 78 N. E. 236 [1906].

³³ City of St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54 [1895].

³⁴ Ardrey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726 [1896].

¹ City of St. Louis v. Excelsior Brewing Co., 96 Mo. 677, 10 S. W. 477 [1888].

ular in the absence of a showing to the contrary.² If, however, the proceedings show upon the face of the record that they are irregular or defective, their regularity is not presumed.³ Except where a formal judgment of confirmation operates as an estoppel to deny the validity of an assessment, the record of the assessment proceedings is not conclusive.⁴ If an ordinance purports on its face to be enacted in compliance with the requirements of the statute, it will be presumed in the absence of a showing to the contrary that it was legally enacted.⁵ Under many statutes, an assessment which purports on its face to have been levied in compliance with law is presumptively valid, although it may be in fact invalid as being levied in violation of the statutes on the subject.⁶ Under some statutes a certificate of certain officers is made conclusive as to the regularity of the proceedings. Such certificate is limited to facts disclosed by an inspection of the record and does not include extrinsic facts, such as questions of ownership of land assessed.⁷ Under some statutes, the report of the commissioners or other persons who are empowered to make the assessment and report upon the question of benefits, is in the nature of a verdict or a finding of facts.⁸ Objections to a report

² *Hobbs v. Board of Commissioners of Tipton County*, 116 Ind. 376, 19 N. E. 186 [1888]; *Auditor General v. Hoffman*, 132 Mich. 198, 93 N. W. 259 [1903]; *City of St. Louis to use of Creamer v. Oeters*, 36 Mo. 456 [1865]; *Morse v. City of Omaha*, 67 Neb. 426, 93 N. W. 734 [1903]; *Kirtland v. Parker*, — N. J. —, 68 Atl. 913 [1908]; *In the Matter of Phillips v. Mayor, Aldermen and Commonalty of New York*, 2 Hun (N. Y.) 212 [1874]; *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407 [1894]; *Dowell v. City of Portland*, 13 Or. 248, 10 Pac. 308 [1886]; *Taylor v. Boyd*, 63 Tex. 533 [1885].

³ *Welch v. Town of Roanoke*, 157 Ind. 398, 61 N. E. Rep. 791 [1901]; *Hamilton v. Chopard*, 9 Wash. 352, 37 Pac. 472 [1894].

⁴ *City of New Whatcom v. Bellingham Bay Improvement Co.*, 9 Wash. 639, 38 Pac. 163 [1894].

⁵ *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443 [1886]; *Pittsburg, Cincinnati, Chicago & St. Louis*

Railway Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E. Rep. 741 [1897]; *Cabell v. City of Henderson*, (Ky.), 88 S. W. 1095, 28 Ky. Law Rep. 89 [1903]; *City of Lexington v. Headley*, 68 Ky. (5 Bush.) 508 [1869]; *Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56 [1904].

⁶ *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301 [1901]; *State ex rel. Butler v. City of Passaic*, 44 N. J. L. (15 Vr.) 171 [1882]; *Rumsey v. City of Buffalo*, 97 N. Y. 114 [1884]; *Pittsburg v. Walter*, 69 Pa. St. (19 P. F. Smith) 365 [1871].

⁷ *Marsh v. The City of Brooklyn*, 59 N. Y. 280 [1874]; *Newell v. Wheeler*, 48 N. Y. 486 [1872].

⁸ *Blemel v. Shattuck*, 133 Ind. 498, 33 N. E. 277 [1892]; *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890].

under this theory must be made in the same way in which objections are made to a verdict in a motion for a new trial,⁹ and such objections have the same effect as objections to a verdict.¹⁰ Under a statute providing that a reclamation district is to determine the question of benefits and that its record is *prima facie* evidence, full effect must be given to such statute and the property owner may contradict such action by showing that the assessment was made arbitrarily and without reference to the benefits conferred by the improvement,¹¹ the statute providing that the assessment must be apportioned according to benefits.

⁹ Blemel v. Shattuck, 133 Ind. 498, 33 N. E. 277 [1892].

¹⁰ Manor v. Board of Commissioners of Jay County, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893].

¹¹ Reclamation District No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156 [1898]; Reclamation District No. 551 v. Runyan, 117 Cal.

164, 49 Pac. 131 [1897]; Lower Kings River Reclamation District No. 531 v. Phillips, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; Swamp Land District No. 307 v. Gwynn, 70 Cal. 566, 12 Pac. 462 [1886]; People of the State of California v. Hagar, 52 Cal. 171 [1877].

CHAPTER XVI.

SUPPLEMENTAL AND PROPORTIONAL ASSESSMENTS.

§ 952. Power to levy supplemental assessment dependent on statute.

The power of a public corporation to levy a supplemental assessment where the original assessment has not raised a fund sufficient to pay the cost of the improvement for which the assessment was levied, is occasionally presented for determination. Cases of this sort arise most frequently where the original assessment is based upon a preliminary estimate, and is levied before the improvement is completed, or before the cost thereof is determined as a finality. In rarer instances, the exercise of the power is sought where, owing to some mistake, the cost of the improvement has been computed erroneously, and the assessment has been levied for too small an amount to meet the cost of the improvement. In some cases it is held that if there is no statutory authority conferred in express terms, or by fair implication, to levy a supplemental assessment in case of a deficiency, the power to levy supplemental assessments does not exist.¹ This result has been reached under statutes which apparently contemplate but one levy for a given improvement,² or which provide specifically for a supplemental assessment upon delinquent property, thereby implying that no supplemental assessment can be levied upon property which is not delinquent,³ or in case of mistake as to the cost of the improvement, and as to the amount of money to be raised therefor.⁴ In many statutes the power of levying supplemental assessments is either given expressly or is conferred by fair implication; and, under such statutes, the

¹ *Danenhower v. District of Columbia*, 7 Mackey (D. C.) 99 [1889]; *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870]; *Howell v. City of Buffalo*, 15 N. Y. 512 [1857].

² *Howell v. City of Buffalo*, 15 N. Y. 512 [1857].

³ *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870].

⁴ *Danenhower v. District of Columbia*, 7 Mackey (D. C.) 99 [1889].

power of levying supplemental assessments undoubtedly exists.⁵ Under a statute, which provides for levying an assessment, and also for levying a "further assessment," the power of levying a supplemental assessment exists.⁶ If authority is given for a supplemental assessment, a second supplemental assessment may be levied if the first supplemental assessment proves insufficient.⁷ Where authority is given to levy a proportional assessment to pay for part of the improvement when it is completed, such authority cannot be used to levy an assessment for the purpose of paying a contractor who has abandoned his contract after partial performance, and under the statute has lost all rights against the city.⁸ A statute authorizing a re-assessment within five years, against property upon which the city has failed to collect the assessment does not apply to supplemental assessments.⁹

⁵ *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877]; (affirming *In the Matter of the Commissioners of the First Draining District Praying for the Homologation of the Assessment Roll*, 27 La. Ann. 20 [1875]); *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884]; *Hagar v. Board of Supervisors of Yolo County*, 51 Cal. 474 [1876]; *Vandalia Levee and Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715 [1908]; *People ex rel. Thompson v. Judson*, 233 Ill. 280, 84 N. E. 233 [1908]; *Commissioners of Fountain Head District v. Wright*, 228 Ill. 208, 81 N. E. 849 [1907]; *City of Chicago v. Baldwin*, 227 Ill. 534, 81 N. E. 542 [1907]; *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904]; *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878 [1904]; *Cody v. Town of Cicero*, 203 Ill. 322, 67 N. E. 859 [1903]; *South Chicago City Ry. Co. v. City of Chicago*, 196 Ill. 490, 63 N. E. 1046 [1902]; *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901]; *Briggs v. Union Drainage District No. 1*, 140 Ill. 53, 29 N. E. 721 [1893]; *Morrell v. Union Drainage District No. 1*, 118 Ill. 139, 8 N. E. 675 [1887]; *Andrews v. The People ex rel. Rumsey*, 84 Ill. 28 [1876]; *Osborn v. Maxinkuckee Lake Ice Company*, 154 Ind. 101, 56 N. E. 33 [1899]; *Good-*

win v. Board of Commissioners of Warren County, 146 Ind. 164, 44 N. E. 1110 [1896]; *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531 [1891]; *Campbell v. Board of Commissioners of Monroe County*, 118 Ind. 119, 20 N. E. 772 [1888]; *Board of Commissioners of Montgomery County v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887]; *Dean v. Treasurer of Clinton County*, 146 Mich. 645, 13 Detroit Leg. N. 897, 109 N. W. 1131 [1906]; *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 226 [1890]; *State ex rel. St. Anthony Park North Trust Co. v. Dist. Court of Ramsey County*, 95 Minn. 183, 103 N. W. 881 [1905]; *City of Sedalia v. Coleman*, 82 Mo. App. 560 [1899]; *Meech v. City of Buffalo*, 29 N. Y. 198 [1864]; *Stone v. Little Yellow Drainage District*, 118 Wis. 338, 95 N. W. 405 [1903].

⁶ *Meech v. City of Buffalo*, 29 N. Y. 198 [1864].

⁷ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899].

⁸ *John Kelso Co. v. Gillette*, 136 Cal. 603, 69 Pac. 296 [1902]; *Kelso v. Cole*, 121 Cal. 121, 53 Pac. 353 [1898].

⁹ *Cody ex rel. Gannaway v. Town of Cicero*, 203 Ill. 322, 67 N. E. 859 [1903].

§ 953. Supplemental assessment levied only in case of deficiency.

A supplemental assessment can be levied only where there is a deficiency.¹ The fact that a jury which has power to review the apportionment of the assessment has reduced the assessment against certain property owners, does not of itself constitute a deficiency, if the amount raised by the assessment, after deducting the reduction made by the jury, is sufficient to pay the cost of the improvement.² If a supplemental assessment includes property which was not assessed originally, an owner of such property cannot object on the ground that enough money has already been collected to pay the contractor. Such assessment may have been levied for other purposes, as to pay a rebate to property owners.³ While the original assessment may, under some statutes, be levied before the improvement is completed, and may be based upon an estimate of the cost, it is held that a supplemental assessment must be based upon the actual deficiency, and therefore cannot be levied until the improvement is completed.⁴ If some of the property owners have paid their assessments before maturity, and have thus received an abatement of interest, and the fund, accordingly, is not sufficient at maturity to pay the outstanding vouchers by reason of such abatement of interest, no deficiency exists, and a supplemental assessment can not be levied.⁵ If, by statute, a supplemental assessment can be levied only for the purpose of raising money to pay for future obligations, such assessment can be levied only for such purpose,⁶ and it cannot be levied to pay part of the expenses of the original assessment,⁷ or an indebtedness already incurred in constructing the improvement.⁸ Where a second supplemental assessment is authorized, it must be shown that the original assessment and

¹ *City of Jacksonville v. Hamill*, 178 Ill. 235, 52 N. E. 949 [1899].

² *City of Jacksonville v. Hamill*, 178 Ill. 235, 52 N. E. 949 [1899].

³ *People ex rel. Thompson v. Judson*, 233 Ill. 280, 84 N. E. 233 [1908].

⁴ *City of Chicago v. Richardson*, 213 Ill. 96, 72 N. E. 791 [1904]; *City of Chicago v. Noonan*, 210 Ill. 18, 17 N. E. 32 [1904].

⁵ *Village of Wilmette v. People ex rel. Farm Land Mortgage Company*, 214 Ill. 107, 73 N. E. 327 [1905].

⁶ *Vandalia Levee and Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715 [1908]; *Drainage Commissioners v. Kinney*, 233 Ill. 67, 84 N. E. 34 [1908].

⁷ *Vandalia Levee and Drainage District v. Hutchins*, 234 Ill. 31, 84 N. E. 715 [1908]. (Such as fees of the attorney, engineer, surveyor and commissioners.)

⁸ *Drainage Commissioners v. Kinney*, 233 Ill. 67, 84 N. E. 34 [1908].

the first supplemental assessment will leave a deficiency.⁶ A mere showing that the original assessment will leave a deficiency, and that the second supplemental assessment, together with the original assessment, will make up the amount necessary to pay for the improvement, is insufficient.¹⁰

§ 954. Effect of original assessment.

The judgment of confirmation of the original assessment is not a bar to a supplemental assessment, if it is not shown that the assessment as levied originally was for the full amount of the benefits conferred by the improvement.¹ The existence of the prior assessment does not prevent the supplemental assessment.² Since an assessment is limited to the amount of benefits,³ the amount of the assessment cannot be increased by dividing it between the original and the supplemental assessment. Accordingly, a supplemental assessment cannot be levied for an amount which, when added to the original assessment, will in the aggregate exceed the amount of the benefits.⁴ Accordingly, if the judgment of confirmation of the original assessment shows that the assessment is levied for the full amount of the benefits, no supplemental assessment can be levied.⁵ If the original judgment of confirmation does not show expressly that the assessment is for an amount less than the amount of benefits, it is held that it will be presumed that the assessment was for the full amount of benefits, and that a supplemental assessment cannot, accordingly, be levied.⁶ In some jurisdictions it is held that in the proceedings to levy a supplemental assessment, the only question open for discussion is the validity of the additional assessment. The validity of the original assessment cannot be inquired into.⁷ No

⁶ Town of Cicero v. Andren, 224 Ill. 617, 79 N. E. 962 [1907].

¹⁰ Town of Cicero v. Andren, 224 Ill. 617, 79 N. E. 962 [1907].

¹ Cody ex rel. Gannaway v. Town of Cicero, 203 Ill. 322, 67 N. E. 859 [1903].

² Butler v. City of Toledo, 5 O. S. 225 [1855].

³ See §§ 118, 651 *et seq.*

⁴ West Chicago Park Commissioners v. Metropolitan West Side Elevated Railway Company, 182 Ill. 246, 55 N. E. 344 [1899]; Greeley v. The Town of Chicago, 148 Ill. 632, 36 N. E. 603 [1894]; Goodwillie v. City

of Lake View, 137 Ill. 51, 27 N. E. 15 [1892]; Campbell v. Board of County Commissioners of Monroe County, 118 Ind. 119, 20 N. E. 772 [1888].

⁵ Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884 [1904]; Greeley v. The Town of Cicero, 148 Ill. 632, 36 N. E. Rep. 603 [1894].

⁶ Sheriffs v. City of Chicago, 213 Ill. 620, 73 N. E. 367 [1905].

⁷ Conway v. City of Chicago, 219 Ill. 295, 76 N. E. 384 [1906]; Goodwin v. Board of County Commissioners of Warren County, 146 Ind. 164, 44 N. E. 1110 [1896].

grounds which were available as against the original assessment, can be used against the supplemental assessment.⁸ In other cases, however, it is held with some show of reason that if the original assessment is void, a subsequent assessment which does not purport to be a re-assessment, but merely to be levied to supply deficiencies in the original assessment, is itself void.⁹

§ 955. Method of levying supplemental assessment.

Under some statutes authorizing assessments payable in installments, a separate levy may be made for each annual installment, and the levy for the first annual installment does not exhaust the power of the taxing officials.¹ In some jurisdictions a supplemental assessment may be levied for a distinct part of the original improvement, which for some proper reason was not included in the original assessment.² A supplemental assessment may be levied for a continuation and extension of the original improvement,³ or for keeping it in repair.⁴ The expense of employing a person to estimate damages to buildings resulting from the improvement is not an item for which a supplemental assessment can be levied.⁵ If a number of distinct improvements have been made, as to some of which there is a deficit, the proper method is to return the surplus on each improvement, and levy a supplemental assessment where a deficit exists. The city can not set off against the share of a property owner in a surplus, his proportion of a deficiency.⁶ A supplemental assessment may be

⁸ State of Minnesota ex rel. City of Duluth v. District Court of St. Louis County, 61 Minn. 542, 64 N. W. 190 [1895].

⁹ Beygeh v. City of Chicago, 65 Ill. 189 [1872]; Union Building Association v. City of Chicago, 61 Ill. 439 [1871]; Workman v. City of Chicago, 61 Ill. 463 [1871]; Bowen v. City of Chicago, 61 Ill. 268 [1871].

¹ Boul v. The People ex rel. Baker, 127 Ill. 240, 20 N. E. 1 [1890]; Andrews v. The People ex rel. Rumsey, 84 Ill. 28 [1876].

² Halsey v. Town of Lake View, 188 Ill. 540, 59 N. E. 234 [1901]; City of Sedalia v. Coleman, 82 Mo. App. 560 [1899].

³ Briggs et al. v. Union Drainage District, 140 Ill. 53, 29 N. E. 721 [1893]; Shannon v. City of Omaha, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905]. See also Ireland v. City of Rochester, 51 Barb. 414 [1868].

⁴ McMillan v. Board of County Commissioners of Freeborn County, 93 Minn. 16; *sub nomine*, In re McRae, McMillan et v. Board of Commissioners of Freeborn County, 100 N. W. 384, 1125 [1904].

⁵ City of Chicago v. Cook, 105 Ill. App. 353 [1903]; (judgment affirmed, Chicago v. Cook, 204 Ill. 373, 68 N. E. 538 [1903]).

⁶ Thayer v. City of Grand Rapids, 82 Mich. 298, 46 N. W. 228 [1890].

levied, even if a city cannot be held liable to the contractor, in case the fund raised by assessment proves insufficient.⁷ If the original assessment is held invalid, a case arises for a re-assessment, and not for a supplemental assessment.⁸ If an assessment has been made and collected, and the improvement has been completed, and nine years thereafter the territory which contains a part of such improvement is annexed to another municipality, a supplementary assessment cannot be levied for a deficiency under a statute permitting such assessment in case of annexation, except where the proceedings have been carried to a finality.⁹ If the statute concerning supplemental assessments has been changed, but by its express terms it is not to apply to pending proceedings, an assessment is held not to be a pending proceeding where it has been confirmed before such act is passed, and error proceedings are not instituted until two years after such act is passed. If the original judgment of confirmation is reversed, subsequent proceedings must be brought under the new statute.¹⁰ If notice is given of the original assessment proceedings, and under the statute a supplemental assessment will follow in the ordinary course of procedure if a deficiency exists, notice of supplemental proceedings has been held not to be necessary.¹¹ If, however, the statute provides for notice of supplemental proceedings, such notice must be given.¹² A formal petition is held not to be necessary for a supplemental assessment, but it may be levied upon motion.¹³ If a petition for a supplemental assessment is filed, it need not give the facts in detail.¹⁴ If the original assessment was made in proportion to the benefits conferred by the im-

⁷ *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904].

⁸ *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903].

⁹ *Town of Cicero v. Hill*, 193 Ill. 226, 61 N. E. 1020 [1901].

¹⁰ *City of Chicago v. Baldwin*, 227 Ill. 534, 81 N. E. 542 [1907]. As to effect of change of statute see also *South Chicago City Ry. Co. v. City of Chicago*, 196 Ill. 490, 63 N. E. 1046 [1902].

¹¹ *Stone v. Little Yellow Drainage District*, 118 Wis. 388, 95 N. W. 405 [1903].

¹² *Board of Commissioners of Wells County v. Gruver*, 115 Ind. 224, 17 N. E. 290 [1888]; *Board of Commissioners of Wells County v. Fahlor*, 114 Ind. 176, 15 N. E. 830 [1887].

¹³ *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531 [1891]; *Board of Commissioners of Montgomery County v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887].

¹⁴ *Cody v. Town of Cicero*, 203 Ill. 322, 67 N. E. 859 [1903].

provement upon the property assessed, the supplemental assessment should be apportioned in the same way as the original assessment.¹⁵ The judgment of confirmation of the former assessment may be used to show what the proper apportionment of benefits is.¹⁶ A supplemental petition for assessing land omitted from the original assessment, may be filed in vacation.¹⁷ A supplemental assessment may be levied by county commissioners at a special term, as well as at a regular term.¹⁸ Objection to a supplemental assessment should be made at confirmation, where a provision is made for a formal confirmation.¹⁹ It cannot subsequently be attacked on the ground that the original assessment should have been deducted from the supplemental assessment.²⁰

¹⁵ *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878 [1904]; *Morrell v. Union Drainage District No. 1*, 118 Ill. 139, 8 N. E. 657 [1887].

¹⁶ *Wickett v. Town of Cicero*, 152 Ill. 575, 38 N. E. 909 [1894]; (following *Greeley v. Town of Cicero*, 148 Ill. 632, 36 N. E. 603 [1894]).

¹⁷ *Osborn v. Maxinkuckee Lake Ice*

Company, 154 Ind. 101, 56 N. E. 33 [1899].

¹⁸ *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893].

¹⁹ *Moore v. The People ex rel. Lewis*, 106 Ill. 376 [1883].

²⁰ *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12 [1896].

CHAPTER XVII.

RE-ASSESSMENT.

§ 956. Power of legislature to provide for re-assessment.

In many jurisdictions it is provided, either expressly or by fair implication from the language used by the legislature, that where an improvement has been constructed, and the public corporation has attempted to construct it at the cost of the owners of the property benefited thereby, but the assessment which has been levied has proved to be invalid, such public corporation shall have power to levy a second assessment to pay the cost of such public improvement, if not in excess of the benefits conferred upon the property owner thereby. These statutes are held to be valid, and where they are in force the power to levy re-assessments exists.¹ The validity of these statutes has, however, been

¹City of Seattle v. Kelleher, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; Wurts v. Hoagland, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; (affirming Matter of Drainage of Great Meadows on Pequest River, 42 N. J. L. (13 Vr.) 553 [1880]), which was affirmed without report in Hoagland v. State, Simonton, Pros., 43 N. J. L. (14 Vr.) 456 [1881]. The original assessment was set aside in Hoagland v. Wurts, 41 N. J. L. (12 Vr.) 175 [1879]; affirming Matter of Commissioners to Drain Great Meadows, 39 N. J. L. (10 Vr.) 433 [1877]; Creed v. McCombs, 146 Cal. 449, 80 Pac. 679 [1905]; District of Columbia v. Wormley, 15 App. D. C. 58 [1899]; Goodrich v. City of Chicago, 218 Ill. 18, 75 N. E. 805 [1905]; Gorton v. City of Chicago, 201 Ill. 534, 66 N. E. 541 [1903]; Markley v. City of Chicago, 190 Ill. 276, 60 N. E. 512 [1901]; People ex rel. Talbot Paving Co. v.

City of Pontiac, 186 Ill. 437, 56 N. E. 1114 [1900]; Foster v. City of Alton, 173 Ill. 587, 51 N. E. 76 [1898]; Cummings v. West Chicago Park Commissioners, 181 Ill. 136, 54 N. E. 941 [1899]; Palmer v. City of Danville, 166 Ill. 42, 46 N. E. 629 [1897]; The Freeport Street Railroad Company v. City of Freeport, 151 Ill. 451, 38 N. E. 137 [1894]; Schemick v. City of Chicago, 151 Ill. 336, 37 N. E. 888 [1894]; Lafin v. City of Chicago, 48 Ill. 449 [1868]; Pittsburg, C. C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; Hibben v. Smith, 158 Ind. 206, 62 N. E. 447 [1901]; (affirmed Hibben v. Smith, 191 U. S. 310, 24 S. 88 [1903]); Etchison Ditching Association v. Hillis, 40 Ind. 408 [1872]; Nevins & Otter Creek Township Draining Co. v. Alkire, 36 Ind. 189 [1871]; Helm v. Witz, 35 Ind. App. 131, 73 N. E. 846 [1904]; Tuttle v. Polk, 84 Ia. 12, 50 N. W.

conceded by some courts with considerable reluctance, it being said that while it is probably too late to question the validity of the power of the legislature to authorize re-assessments, statutes authorizing re-assessments are in derogation of the rights

38 [1891]. (Assessment held invalid in *Coggeshall v. City of Des Moines*, 78 Ia. 236, 41 N. W. 617, 42 N. W. 650); *Richman v. Supervisors of Muscatine County*, 77 Ia. 513, 14 Am. St. Rep. 308, 4 L. R. A. 445, 42 N. W. 422 [1889]; *Kansas City v. Silver*, 74 Kan. 851, 85 Pac. 805 [1906]; *City of Emporia v. Norton*, 13 Kan. 569 [1874]; *Board of Councilmen of Frankfort v. Mason & Foard Company*, 100 Ky. 48, 37 S. W. 290 [1896]; *Smith v. Abington Savings Bank*, 171 Mass. 178, 50 N. E. 545 [1898]; *Coburn v. Litchfield*, 132 Mass. 449; *Corliss v. Village of Highland Park*, 132 Mich. 152, 10 Detroit Leg. N. 236, 93 N. W. 254 [1903]; (affirmed on rehearing, 93 N. W. 610, 95 N. W. 416); *Smith v. City of Detroit*, 120 Mich. 572, 79 N. W. 808 [1899]; *Lundborn v. City of Manistee*, 93 Mich. 170, 53 N. W. 161; *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882]; *State ex rel. Koch v. District Court of Ramsey County*, 98 Minn. 63, 107 N. W. 726 [1906]; *State ex rel. St. Anthony Park North Trust Co. v. District Court of Ramsey County*, 95 Minn. 183, 103 N. W. 881 [1905]; *State ex rel. Gotzian v. District Court of Ramsey County*, 77 Minn. 248, 79 N. W. 971 [1899]; *State of Minnesota ex rel. Minnesota Transfer R. Co. v. District Court*, 68 Minn. 242, 71 N. W. 27 [1896]; *Carpenter v. City of St. Paul*, 23 Minn. 232 [1876]; *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904]; *City of Fayette ex rel. Crews v. Rich*, 122 Mo. App. 145, 99 S. W. 8 [1907]; *S. D. Mercer Co. v. City of Omaha*, — Neb. —, 107 N. W. 565 [1906]; *State, Frevert, Pros. v. Mayor and*

Council of the City of Bayonne, 63 N. J. L. (34 Vr.) 202, 42 Atl. 773 [1899]; *Long Branch Police, Sanitary and Improvement Commission, v. Dobbins*, 61 N. J. L. (32 Vr.) 659, 40 Atl. 599 [1898]; *State, Pardee Works, Pros. v. City of Perth Amboy*, 59 N. J. L. (30 Vr.) 335, 36 Atl. 666 [1896]; *State, Sanford, Pros. v. The Board of Township Committee of the Township of Kearney*, 51 N. J. L. (22 Vr.) 473, 18 Atl. 349 [1889]; *In Report of Commissioners of Elizabeth*, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; *State, Souther, Pros. v. Village of South Orange*, 46 N. J. L. (17 Vr.) 317 [1884]; *State, Aldridge, Pros. v. Essex Public Road Board*, 46 N. J. L. (17 Vr.) 126 [1884]; *State, Bergen County Savings Bank, Pros. v. Inhabitants of the Township of Union*, 44 N. J. L. (15 Vr.) 599 [1882]; *State, Johnson, Pros. v. Inhabitants of City of Trenton*, 43 N. J. L. (14 Vr.) 166 [1881]; *State, Randolph, Pros. v. Inhabitants of City of Plainfield*, 38 N. J. L. (9 Vr.) 93 [1875]; *State, Graham, Pros. v. Mayor, etc., of Paterson*, 37 N. J. L. (8 Vr.) 380 [1875]; *State, Copeland, Pros. v. Village of Passaic*, 36 N. J. L. (7 Vr.) 382 [1873]; *State ex rel. Doyle v. Mayor and Common Council of the City of Newark*, 34 N. J. L. (5 Vr.) 236 [1870]; *State, Becker, Pros. v. Gardner*, 34 N. J. L. (5 Vr.) 327 [1870]; *Newark v. Schuh*, 34 N. J. Eq. (7 Stew.) 262 [1881]; *In the Matter of Hollister*, 180 N. Y. 518, 72 N. E. 1143 [1904]; (affirming 89 N. Y. S. 518, 96 App. Div. 501 [1904]); *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280 [1899]; *Tift v. City of Buffalo*, 82 N. Y. 204 [1880]; *In the Matter of Sackett, Douglas and*

of the property owners, and are to be considered strictly.² In other cases, however, it has been said that such statutes are highly remedial and should be construed liberally as being in furtherance of justice.³ In some cases the statute authorizing re-assessments has been enacted before the defective assessment was levied, so that at the time of such levy the city had an existing remedy in case of a defective assessment in the form of a re-assessment. Under such statutes the right of levying a second assessment clearly exists.⁴

§ 957. Re-assessment statute must itself be constitutional.

The statute which provides for re-assessment must itself be constitutional to be effective. If the statute which provides for

DeGraw Streets, 74 N. Y. 95 [1878]; In the Matter of Van Antwerp, 56 N. Y. 261 [1874]; People ex rel. Thompson v. Mayor, etc., of the City of Syracuse, 6 Hun. 652 [1876]; Walsh v. Barron, Treas., 61 O. S. 15, 76 Am. St. Rep. 354, 55 N. E. 164 [1899]; Raymond v. Cleveland, 42 O. S. 522 [1885]; (original assessment held invalid in Chamberlain v. Cleveland, 34 O. S. 551); Upington et al. v. Oviatt, 24 O. S. 232 [1873]; Bailey v. City of Zanesville, 20 Ohio C. C. 236 [1900]; Mocker v. Cincinnati, 7 Ohio N. P. 279 [1900]; Duniway v. Portland, 47 Or. 103, 81 Pac. 945 [1905]; Kodderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903]; Schenley v. Commonwealth for the use of the City of Allegheny, 36 Pa. St. (12 Casey) 29, 78 Am. Dec. 359 [1859]; Woodhouse v. City of Burlington, 47 Vt. 300 [1875]; City of Spokane v. Security Savings Society, — Wash. —, 89 Pac. 466 [1907]; State of Washington on the Relation of the Barber Asphalt Paving Company v. City of Seattle, 42 Wash. 370, 85 Pac. 11 [1906]; City of Port Angeles v. Lauridsen, 26 Wash. 153, 66 Pac. 403 [1901]; McNamee v. City of Tacoma, 24 Wash. 591, 64 Pac. 791 [1901]; Ryan v. Sumner, 17 Wash. 228, 49 Pac. 487 [1897]; Frederick v. City of Seattle,

13 Wash. 428, 43 Pac. 364 [1896]; Pabst Brewing Co. v. City of Milwaukee, 126 Wis. 110, 105 N. W. 563 [1905]; Pier v. Fond du Lac County, 53 Wis. 421, 10 N. W. 686 [1881]; Dean v. Borchsenius, 30 Wis. 234 [1872]; Dean v. Charlton, 27 Wis. 522 [1871].

²Dean v. Charlton, 27 Wis. 522 [1871].

³Lord v. Mayor and Council of City of Bayonne, 65 N. J. L. (36 Vr.) 127, 46 Atl. 701 [1900]; (citing and following City of Elizabeth v. State, Meeker, Pros., 45 N. J. L. (16 Vr.) 157 [1833]; and holding that if State, App. Pros. v. Town of Stockton in County of Camden, 61 N. J. L. (32 Vr.) 520, 39 Atl. 921 [1898] is not in harmony with this view it is not to be followed).

⁴City of Chicago v. Sherman, 212 Ill. 498, 72 N. E. 396 [1904]; City of Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786 [1903]; Adcock v. City of Chicago, 172 Ill. 24, 49 N. E. 1008 [1898]; West Chicago Park Commissioners v. Farber, 171 Ill. 146, 49 N. E. 427 [1898]; Gill v. Patton, 118 Iowa, 88, 91 N. W. 904 [1902]; Manley v. Emlin, 46 Kan. 655, 27 Pac. 844 [1891]; State, Winkler, Pros. v. Inhabitants of West Hoboken, 37 N. J. L. (8 Vr.) 406 [1875]. •

re-assessment is itself unconstitutional,¹ as where it makes no provision for notice to the property owners,² or where it includes more than one subject in contravention of a constitutional provision forbidding a statute to include more than one subject,³ it is invalid and confers no authority to levy a re-assessment.⁴

§ 958. Power to re-assess dependent on statute.

The right of levying a re-assessment is, like the right of levying an original assessment,¹ not inherent in a public corporation, but depends solely upon statute, and exists only if the legislature has given authority to levy a re-assessment.² A grant of power to assess does not imply, in most jurisdictions, power to levy a re-assessment.³ The exercise of the power of levying an assessment for a given improvement exhausts the power of the public corporation to assess for such improvement,⁴ in the absence of statutory authority for levying a re-assessment. If the power of levying a re-assessment is granted, it can be exercised

¹In the Matter of Trustees of Union College, 129 N. Y. 308, 29 N. E. 460 [1891]; *Tingue v. The Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625 [1886].

²In the Matter of Trustees of Union College, 129 N. Y. 308, 29 N. E. 460 [1891].

³*Tingue v. The Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625 [1886].

⁴For a case where the re-assessment statute was held not to embrace more than one subject, see *Mills v. Charleton*, 29 Wis. 400, 9 Am. 578 [1872].

¹See § 222 *et seq.*, § 775.

²*Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287 [1895]; *Meuser v. Risdon*, 36 Cal. 239 [1868]; *Weld v. The People ex rel. Kern*, 149 Ill. 257, 36 N. E. 1006 [1894]; *City of Chicago v. Ward*, 36 Ill. 9 [1864]; *City of Emporia v. Bates*, 16 Kan. 495 [1876]; *Hubbard v. Garfield*, 102 Mass. 72 [1869]; *Breevort v. Detroit*, 24 Mich. 322 [1872]; *Tweed v. Metcalf*, 4 Mich. 590 [1854]; *Edwards v. Jersey City*, 40 N. J. L.

176; *State ex rel. Doyle v. Mayor and Common Council of the City of Newark*, 34 N. J. L. 236 [1870]; *Brown v. Mayor, Aldermen and Commonalty of the City of New York*, 63 N. Y. 239 [1875]; *In the Matter Van Antwerp*, 56 N. Y. 261 [1874]; *People ex rel. Williams v. Haines*, 49 N. Y. 587 [1872]; *Howell v. City of Buffalo*, 37 N. Y. 267 [1867]; *People ex rel. Cook v. Nearing*, 27 N. Y. 306 [1863]; *Dowell v. City of Portland*, 13 Or. 248, 10 Pac. 308 [1886]; *Schenley v. Commonwealth for the use of the City of Allegheny*, 36 Pa. St. (12 Casey) 29, 78 Am. Dec. 359 [1859]; *Rork v. Smith*, 55 Wis. 67, 12 N. W. 408 [1882]; *Whittaker v. City of Janesville*, 33 Wis. 76 [1872]; *Mills v. Charleton*, 29 Wis. 400, 9 Am. R. 578 [1872].

³*City of Spokane v. Security Savings Society*, — Wash. —, 59 Pac. 466 [1907].

⁴*People ex rel. Williams v. Haines*, 49 N. Y. 587 [1872]. But see *contra*: *Himmelman v. Cofran*, 36 Cal. 411 [1868].

only in the manner prescribed by statute.⁵ Thus, under a statute, prospective in its terms, which provides for re-assessments where prior assessments shall be set aside or held invalid, assessments set aside prior to the passage of such statute cannot be the basis for subsequent re-assessment.⁶ The liability of the property owner arising out of an improvement benefiting his property, which the legislature intends to make at the expense of the owners of property benefited, is held, however, to persist until suitable legislation for levying a re-assessment is enacted.⁷ If the power of levying a re-assessment is given, it is not exhausted by a single exercise of the power.⁸ It is a continuing power, and if the first re-assessment proves invalid, subsequent re-assessments may be levied until a valid one is obtained.⁹

§ 959. Retroactive effect of re-assessment statutes.

A somewhat more difficult case is presented where, at the time that the invalid or defective assessment was levied, there was no statutory authority for a re-assessment; and subsequently a statute has been passed, authorizing re-assessments in case of invalid, irregular or defective assessments. The view generally entertained by the courts in cases of this sort is, that when a public corporation attempts to construct a public improvement at the expense of the property owners who are benefited thereby, a liability is created which continues, even though it may not be enforceable in the form contemplated by the public corporation,¹ and that, accordingly, statutes which authorize re-assessments, merely provide a further and additional means of enforcing such liability, and are therefore valid.² In some jurisdictions, under

⁵ *City Street Improvement Company v. Emmons*, 138 Cal. 297, 71 Pac. 332 [1902]; *Ede v. Cuneo*, 126 Cal. 167, 58 Pac. 538 [1899]; *State, Sanford, Pros. v. Township of Kearny*, 48 N. J. L. (19 Vr.) 125, 4 Atl. 442 [1886].

⁶ *Tingue v. The Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625 [1886].

⁷ *Fountain v. Mayor and Common Council of the City of Newark*, 57 N. J. Eq. (12 Dick.) 76, 40 Atl. 212 [1898].

⁸ *Brevoort v. City of Detroit*, 24 Mich. 322 [1872].

⁹ *Brevoort v. City of Detroit*, 24 Mich. 322 [1872]; *State, Aldridge, Pros. v. Essex Public Road Board*, 46 N. J. L. (17 Vr.) 126 [1884].

¹ *Fountain v. Mayor and Common Council of City of Newark*, 57 N. J. Eq. (12 Dick.) 76, 40 Atl. 212 [1898].

² *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]; (affirming, *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]). (The original assessment in the foregoing case was held invalid in *Culver v. People ex rel.*

constitutional provisions which forbid retroactive or retrospective legislation, without any exception in favor of curative legislation, statutes which provide for re-assessment where assessments levied before the passage of such statute have been held to be invalid are unconstitutional.³ A statute which provides in general terms for re-assessments is ordinarily construed as applying both to assessments levied before the passage of such statute and to those levied after its passage.⁴ If it is possible to reach such result by a fair construction of the language used, a statute authorizing re-assessments will not be limited to assessments levied at the date of the enactment of such assessment.⁵

Kochersperger, 161 Ill. 89, 43 N. E. 812 [1896]]; Bellingham Bay & British Columbia Railroad v. New Whatcom, 172 U. S. 314, 19 S. 205, 43 L. 460 [1899]; (affirming, City of New Whatcom v. Bellingham Bay Improvement Co., 16 Wash. 131, 47 Pac. 236 [1896]); Spencer v. Merchant, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]); Newman v. City of Emporia, 41 Kan. 583, 21 Pac. 593 [1889]; City of Emporia v. Bates, 16 Kan. 495 [1876]; Hines v. City of Leavenworth, 3 Kan. 180 [1865]; Mayor and City Council of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43 [1894]; (affirmed without report in Ulman v. Mayor and City Council of Baltimore, 165 U. S. 719, 41 L. 1184, 17 S. 1001 [1897]; on authority of Spencer v. Merchant, 125 U. S. 345, 8 S. 921, 31 L. 763 [1888]; original assessment held invalid in Ulman v. Mayor and City Council of Baltimore, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709, 32 Am. & Eng. Corp. Cases 228 [1890]); Byram v. City of Detroit, 50 Mich. 56, 14 N. W. 698, 12 N. W. 912 [1883]; Brevoort v. City of Detroit, 24 Mich. 322 [1872]; Carpenter v. City of St. Paul, 23 Minn. 232 [1876]; Lord v. Mayor and Council of City of Bayonne, 65 N. J. L. (36 Vr.) 127, 46 Atl. 701 [1900]; Howard Savings In-

stitution v. City of Newark, 52 N. J. L. (23 Vr.) 1, 18 Atl. 672 [1889]; State, Copeland, Pros. v. Village of Passaic, 36 N. J. L. (7 Vr.) 382 [1873]; State ex rel. Davis v. Newark, reported in connection with State ex rel. Doyle v. Mayor and Common Council of City of Newark, 34 N. J. L. (5 Vr.) 236 [1870]; Fountain v. Mayor and Common Council of City of Newark, 57 N. J. Eq. (12 Dick.) 76, 40 Atl. 212 [1898]; Commissioners of Sinking Fund of New Jersey v. Inhabitants of Township of Linden, in County of Union, 40 N. J. Eq. (13 Stewart) 27 [1885]; Shiloh Street, Wilson's Appeal, 152 Pa. St. 136, 25 Atl. 530 [1893]; Haubner v. City of Milwaukee, 124 Wis. 153, 101 N. W. 930 [1904]; application for rehearing denied, 102 N. W. 578 [1905]; May v. Holdridge, 23 Wis. 93 [1868].

³ Evans v. City of Denver, 26 Colo. 193, 57 Pac. 696 [1899]; Holliday v. City of Atlanta, 96 Ga. 377, 23 S. E. 406 [1895].

⁴ Carpenter v. City of St. Paul, 23 Minn. 232 [1876]; S. D. Mercer Co. v. City of Omaha, — Neb. —, 107 N. W. 565 [1906]; Haubner v. City of Milwaukee, 124 Wis. 153, 101 N. W. 930 [1904]; application for rehearing denied, 102 N. W. 578 [1905].

⁵ Gill v. Patton, 118 Iowa, 88, 91 N. W. 904 [1902].

§ 960. Necessity of invalidity of original assessment.

Upon the question of the classes of cases in which the re-assessment may be levied, we find a marked conflict of judicial opinion, caused in part by a divergence in the views of the courts as to the constitutional power of the legislature to authorize re-assessments, in part by the different provisions of the statutes authorizing re-assessments, and in part by different constructions placed by the courts upon substantially similar statutory provisions. Under most statutory provisions authorizing re-assessments, such authority is given only if the original assessment is invalid.¹ Under such statutes, the power of levying a re-assessment cannot be exercised unless the original assessment is shown to be invalid;² since otherwise the public corporation would be levying two different assessments for the same improvement, each possibly up to the full limit of benefits. Under a statute authorizing a re-assessment, if the original assessment is invalid, a re-assessment cannot be made where the original assessment is valid, but cannot be enforced because the contractor, instead of compelling the city engineer to issue a valid certificate, voluntarily accepts a defective certificate.³ Under a statute authorizing a re-assessment in case of a defect or error in the return, the failure of the contractor to return the warrant within thirty days, whereby he loses his lien, is not ground for a re-assessment.⁴ If, however, the legislature provides specifically for a re-adjustment of assessments in arrears, whether valid or invalid, existing valid assessments may be adjusted under such provision.⁵ A statute authorizing a re-assessment in case of "non-compliance with any of the provisions of the city charter," does not authorize a re-assessment where an original assessment was levied in fraud of the property owners, and there was not a mere failure to comply with the provisions of the statute.⁶ Under a statute authorizing a re-assessment and providing that if the city had no power to make the original assessment through failure to adopt certain

¹ *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Nevins & Otter Creek Township Draining Co. v. Alkire*, 36 Ind. 189 [1871].

² *City of Spokane v. Security Savings Society*, — Wash. —, 89 Pac. 466 [1907].

³ *Ede v. Cuneo*, 126 Cal. 167, 58 Pac. 538 [1899].

⁴ *City Street Improvement Company v. Emmons*, 138 Cal. 297, 71 Pac. 332 [1902].

⁵ In the Matter of the Report of Commissioners of Elizabeth, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887].

⁶ *Dean v. Charlton*, 27 Wis. 522 [1871].

statutory provisions, which it had power to adopt, it might adopt such statutory provisions and proceed to levy a re-assessment, a city may levy a re-assessment without adopting such statutory provision, where it had authority originally to levy the assessment in question, but had proceeded in an improper manner.⁷

§ 961. Original assessment unconstitutional.

It has been said that the test of the power of the legislature to authorize a re-assessment is whether the informalities in the proceedings are such as the legislature could have dispensed with in advance.¹ As a result of this principle, it has been said that a re-assessment cannot be authorized if the statute under which the original assessment was levied was unconstitutional.² This view is, however, at variance with the general theory of re-assessments, since the intention of the public corporation to improve at the expense of the property owner, and resulting liability of the property owner to pay for such improvement, as long as a legal method of enforcing such liability is provided, exist under an unconstitutional statute as well as under one which is constitutional. Accordingly, it is held by the great weight of authority that the legislature may provide for a re-assessment, even if the original statute is unconstitutional,³ as where no provision

⁷ *Dahlman v. City of Milwaukee*, 131 Wis. 427, 110 N. W. 479 [1907].

¹ *Dean v. Borchsenius*, 30 Wis. 234 [1872].

² *Macfarland v. Byrnes*, 19 App. D. C. 531 [1902].

³ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Thompson v. Mitchell*, 133 Iowa, 527, 110 N. W. 901 [1907]; *Warren v. Street Commissioners of City of Boston*, 187 Mass. 290, 72 N. E. 1022 [1905]; *State, Righter, Pros. v. Mayor and Common Council of the City of New-ark*, 45 N. J. L. (16 Vr.) 104 [1883]; *Lang v. Kiendl*, 27 Hun, 66 [1882]; *City of Chester v. Pennell*, 169 Pa. St. 300, 32 Atl. 408 [1895]; *Donley v. City of Pittsburg*, 147 Pa. St. 348, 30 Am. St. Rep. 738, 23 Atl. 394 [1892]; (original statute held un-

constitutional in *Pittsburgh's Petition for Board of Viewers*, 138 Pa. St. 401, 21 Atl. 757 [1890]; *Wyoming Street*, 137 Pa. St. 494; *Whitney v. City of Pittsburg*, 147 Pa. St. 351, 30 Am. St. Rep. 740, 23 Atl. 395 [1892]; *Bingaman v. City of Pittsburgh*, 147 Pa. St. 353, 23 Atl. 395 [1892]; *Gray v. City of Pittsburgh*, 147 Pa. St. 354, 23 Atl. 395 [1892]; *Rubright v. City of Pittsburgh*, 147 Pa. St. 355, 23 Atl. 579 [1892]; *City of Chester v. Black*, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276 [1890]; *City of Reading v. Savage*, 124 Pa. St. 328, 16 Atl. 788 [1889]; (overruling, *City of Reading v. Savage*, 120 Pa. St. 198, 13 Atl. 919 [1888]); *State v. Board of Commissioners of Pacific County*, — Wash. —, 93 Pac. 326 [1908]; *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

is made for notice to the property owner,⁴ or where the original statute is invalid, as in violation of a constitutional provision forbidding special legislation.⁵ On the same principle, a re-assessment may be authorized, though the original statute was improper in form, and was enacted without complying with the constitutional requirements.⁶

§ 962. Original assessment is violation of statutory provisions.

It has been assumed that a re-assessment cannot be made if the original improvement was made without any authority of the law for levying an assessment therefor.¹ However, a re-assessment has been held valid where the original assessment failed because the city had not properly adopted a statutory provision authorizing the levy and collection of such assessment.² A re-assessment has been held to be valid, even if the original assessment was entirely void and the public corporation had no jurisdiction to levy the assessment.³ The Supreme Court of the United States has held that a re-assessment may be levied for an improvement for which, when it was made, there was no statutory authority to levy an assessment, and for which the public corporation making the improvement had determined to pay by general taxation.* It has been held that a re-assessment may be levied where the original assessment was invalid, because no ordinance was passed,⁵ or the ordinance was defective,⁶ or because the improve-

¹ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]; original assessment held invalid in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. R. 289 [1878]); *Lang v. Kiendl*, 27 Hun, 66 [1882].

² *City of Chester v. Black*, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276 [1890]; (original statute held invalid in *Appeal of Ayars*, 122 Pa. St. 266, 2 L. R. A. 577, 16 Atl. 356 [1888]).

³ *State, Bergen County Savings Bank, Pros. v. Inhabitants of the Township of Union in County of Bergen*, 44 N. J. L. (15 Vr.) 599 [1882].

⁴ *Schintgen v. City of La Crosse*, 117 Wis. 158, 94 N. W. 84 [1903]; *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205 [1869].

⁵ *Schintgen v. City of La Crosse*, 117 Wis. 158, 94 N. W. 84 [1903].

⁶ *Laffin v. City of Chicago*, 48 Ill. 449 [1868]; *State, ex rel. St. Anthony Park North Trust Co. v. District Court of Ramsey County*, 95 Minn. 183, 103 N. W. 881 [1905]; *Cline v. City of Seattle*, 13 Wash. 444, 43 Pac. 367 [1896]; *Frederick v. City of Seattle*, 13 Wash. 428, 43 Pac. 364 [1896]. See also *City of San Luis Obispo v. Pettit*, 87 Cal. 499, 25 Pac. 694 [1891].

⁷ *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904].

⁸ *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76 [1898]; *City of Alton v. Foster*, 74 Ill. App. 511 [1897].

⁹ *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541 [1903].

ment was authorized by resolution instead of by ordinance.⁷ It has been held that a re-assessment may be made if the original assessment is insufficient, but is not a nullity;⁸ and it has been said, on the other hand, that a re-assessment cannot be made if the original ordinance is valid.⁹ If the resolution passed by the council is irregular,¹⁰ as where it does not find that the amount assessed upon the property owners is a just proportion of the amount awarded by the jury,¹¹ a re-assessment may be based thereon. A re-assessment has been upheld where the contract was invalid,¹² as where the material to be used was not determined in advance,¹³ or the contract was not let to the lowest bidder.¹⁴ If the original assessment is invalid because authority was improperly delegated by the public officers upon whom it was conferred, a re-assessment may be made.¹⁵ Re-assessments have been upheld where the consent of the property owners required by statute was lacking,¹⁶ or where a sufficient petition for the improvement was not filed,¹⁷ or a remonstrance was ignored.¹⁸ Where no estimate has been made,¹⁹ or the estimate made is irregular and defective,²⁰ or the estimate is made by the wrong person,²¹ a re-assessment may be levied. If the original assessment is defective because the assessment district is not de-

⁷ *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. 593 [1889].

⁸ But the Supreme Court seems to have held that this ordinance was not a nullity. *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76 [1898].

⁹ *Martin v. City of Oskaloosa*, 126 Ia. 680, 102 N. W. 529 [1905]; (original opinion in 99 N. W. 557, withdrawn on rehearing.).

¹⁰ *Smith v. City of Detroit*, 120 Mich. 572, 79 N. W. 808 [1899].

¹¹ *Smith v. City of Detroit*, 120 Mich. 572, 79 N. W. 808 [1899].

¹² *Tuttle v. Polk*, 84 Ia. 12, 50 N. W. 38 [1891]; (original assessment held invalid in *Coggeshall v. City of Des Moines*, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889]); *City of St. Paul v. Mullen*, 27 Minn. 78, 6 N. W. 424 [1880]; *Cawker v. City of Milwaukee*, — Wis. —, 113 N. W. 419 [1907].

¹³ *Tuttle v. Polk*, 84 Ia. 12, 50 N.

W. 38 [1891]; (original assessment held invalid in *Coggeshall v. City of Des Moines*, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889]).

¹⁴ *Dean v. Borchsenius*, 30 Wis. 234 [1872].

¹⁵ *People ex rel. Talbot Paving Co. v. City of Pontiac*, 186 Ill. 437, 56 N. E. 1114 [1900].

¹⁶ *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280 [1899].

¹⁷ *Kansas City v. Silver*, 74 Kan. 851, 85 Pac. 805 [1906]; *Frederick v. City of Seattle*, 13 Wash. 428, 43 Pac. 364 [1896].

¹⁸ *Manley v. Emlin*, 46 Kan. 655, 27 Pac. 844 [1891].

¹⁹ *City of Emporia v. Bates*, 16 Kan. 495 [1876].

²⁰ *Manley v. Emlin*, 46 Kan. 655, 27 Pac. 844 [1891].

²¹ *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512 [1901].

fined,²² or because property which should have been assessed is omitted from the assessment,²³ or because the property which is assessed is improperly described,²⁴ or because two or more distinct tracts are included under one assessment,²⁵ a re-assessment may be levied. Thus, if the original ordinance is invalid because it does not describe the improvement with sufficient accuracy, such defect may be obviated by a re-assessment.²⁶ If legal and illegal items are grouped in an assessment in such a way that they cannot be separated, it has been questioned, but not decided, whether a re-assessment can be made.²⁷ If the original assessment is invalid because notice was not given to the owners of property upon which an assessment was levied,²⁸ or because the assessment was levied before the improvement was made, when the benefits were merely speculative and the statute contemplated an assessment after the improvement was completed,²⁹ or because the assessment has been apportioned upon an improper

²² *State ex rel. Barber Asphalt Paving Company v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904].

²³ *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904]; *Upington v. Oviatt*, 24 O. S. 232 [1873].

²⁴ *Gurnee v. City of Chicago*, 40 Ill. 165 [1866].

²⁵ *Gill v. Patton*, 118 Iowa, 88, 91 N. W. 904 [1902].

²⁶ *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396 [1904]; *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903].

²⁷ *Gallagher v. Garland*, 126 Ia. 206, 101 N. W. 867 [1904].

²⁸ *Spencer v. Merchant*, 125 U. S. 345, 8 S. 921 [1888]; (affirming *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *District of Columbia v. Wormley*, 15 App. D. C. 58 [1899]; *Mayor and City Council of Baltimore v. Ulman*, 79 Md. 469, 30 Atl. 43 [1894]; (affirmed without report in *Ulman v. Mayor and City Council of Baltimore*, 165 U. S. 719, 41 L. 1184, 17 S. 1001 [1897]; original assessment held invalid in *Ulman v. Mayor and City Council of Baltimore*, 72 Md. 587, 11 L. R. A.

224, 20 Atl. 141, 32 Am. and Eng. Corp. Cases 228, 21 Atl. 709 [1890]); *Townsend v. City of Manistee*, 88 Mich. 408, 50 N. W. 321 [1891]; *Woodhouse v. City of Burlington*, 47 Vt. 300 [1875]; *State of Washington on the Relation of the Barber Asphalt Paving Company v. City of Seattle*, 42 Wash. 370, 85 Pac. 11 [1906]. *Contra*: where there has been neither notice nor proper performance of the contract for constructing the improvement. *Rork v. Smith*, 55 Wis. 67, 12 N. W. 408 [1882].

²⁹ *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; (affirming *Matter of Drainage of Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.) 553 [1880]; which was affirmed without opinion in *Hoagland v. State, Simonton, Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]. The original assessment was held invalid in *Matter of Commissioners to Drain Great Meadows*, 39 N. J. L. (10 Vr.) 433 [1877]; affirmed as *Hoagland v. Wurts*, 41 N. J. L. (12 Vr.) 175 [1879]).

basis,³⁰ or because the assessment exceeds the limit imposed by statute,³¹ or because it has been levied in a manner not authorized by law,³² as where the report is defective,³³ or the name of the property owner is not given,³⁴ or the tax bill is made out to the wrong person,³⁵ or the assessment ordinance is invalid because it provides for the payment of the assessment in installments when there is no statutory authority therefor,³⁶ a re-assessment may be levied.

§ 963. Change of statute pending re-assessment.

If the legislature so provides, in changing the statutes applicable to re-assessment, re-assessments made after the passage of such statute must be controlled by such new provisions although the original assessment was made prior to the provisions of such statute.¹ If the statute which provides what property may be assessed has been changed after the original assessment was levied, and before the re-assessment, the re-assessment should be levied according to the law in force at the time that it is levied.² A re-assessment statute which is changed after the contract is entered into and which attempts to compel the contractor, in case of re-assessment, to be bound by an arbitrary reduction of the original estimate and by a re-survey and re-valuation, is unconstitutional.³ Under a statute which changes the method of levy-

³⁰ *Bellingham Bay and British Columbia Railroad v. New Whatcom*, 172 U. S. 314, 43 L. 460, 19 S. 203 [1899]; (affirming, *City of New Whatcom v. Bellingham Bay Improvement Co.*, 16 Wash. 131, 47 Pac. 236 [1896]); *Brevoort v. City of Detroit*, 24 Mich. 322 [1872]; *State Becker, Pros. v. Gardner*, 34 N. J. L. (5 Vr.) 327 [1870]; *Walsh v. Barron*, 61 O. S. 15, 76 Am. St. Rep. 354, 55 N. E. 164 [1899]; *Raymond v. Cleveland*, 42 O. S. 522 [1885]; (original assessment held invalid, *Chamberlain v. Cleveland*, 34 O. S. 551 [1878]).

³¹ *Corliss v. Village of Highland Park*, 132 Mich. 152, 10 Detroit Leg. N. 236, 93 N. W. 254, 93 N. W. 610; (affirmed on rehearing 95 N. W. 416 [1903]).

³² *The Freeport Street Railroad Company v. City of Freeport*, 151 Ill. 451, 38 N. E. 137 [1894].

³³ *Shiloh Street*, 152 Pa. St. 136, 25 Atl. 530 [1893].

³⁴ *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891].

³⁵ *City of Fayette ex rel. Crews v. Rich*, 122 Mo. App. 145, 99 S. W. 8 [1907].

³⁶ *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]; (affirmed as *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]); *West Chicago Park Commissioners v. Farber*, 171 Ill. 146 49 N. E. 427 [1898].

¹ *Brevoort v. City of Detroit*, 24 Mich. 322 [1872].

² *Cline v. City of Seattle*, 13 Wash. 444, 43 Pac. 367 [1896].

³ *People ex rel. Whiteley v. Common Council of the City of Lansing*, 27 Mich. 131 [1873].

ing a re-assessment, but provides that laws subsisting shall apply to proceedings pending in a court, subsequent re-assessments are governed by the law existing at the time of the passage of such new statute where such proceedings were pending;⁴ as where an appeal was pending in the Supreme Court, on which appeal a judgment of confirmation was subsequently reversed.⁵ A statute limiting the right to correct improper assessments or irregularities during the preceding five years, does not apply to irregularities which a city had a right to correct at the time of the passage of such statute, where such new statute provides that it "shall not in any manner affect any right, lien, or liability existing under previous charters."⁶ If an objection to the confirmation is based on the ground that proceedings on the original assessment were not pending in court when the new statute took effect, the objector is estopped from claiming subsequently that such proceedings were then pending.⁷ If the new statute is by its terms not to apply to any existing "suit, prosecution, or proceeding," the prior action of the city council and city boards in attempting to levy an assessment is a "proceeding" and the old statute controls.⁸

§ 964. By what body re-assessment may be levied.

As in the case of original assessments, the provisions of the statute determine who may levy re-assessments. The legislature may levy re-assessments itself,¹ or it may authorize a city council,² or the executive officers of a public corporation,³ to levy

⁴Cratty v. City of Chicago, 217 Ill. 453, 75 N. E. 343 [1905]; Markley v. City of Chicago, 190 Ill. 276, 60 N. E. 512 [1901]; People ex rel. Talbot Paving Co. v. City of Pontiac, 185 Ill. 437, 56 N. E. 1114 [1900]; Palmer v. City of Danville, 166 Ill. 42, 46 N. E. 629 [1897].

⁵Markley v. City of Chicago, 190 Ill. 276, 60 N. E. 512 [1901].

⁶Board of Councilmen of Frankfort v. Mason & Foard Co., 100 Ky. 48, 37 S. W. 290 [1896].

⁷Cratty v. City of Chicago, 217 Ill. 453, 75 N. E. 343 [1905].

⁸Raymond v. Cleveland, 42 O. S. 522 [1885].

¹Spencer v. Merchant, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (af-

firming, Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]); Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682 [1885]; (original assessment held invalid in Stuart v. Palmer, 74 N. Y. 183, 30 Am. R. 289 [1878]); In the Matter of Van Antwerp, 56 N. Y. 261 [1874].

²Bailey v. City of Zanesville, 20 Ohio C. C. 236 [1900]; Mocker v. Cincinnati, 7 Ohio N. P. 279 [1900]; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898].

³Mattinely v. District of Columbia, 97 U. S. 687 [1878]; Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327 [1886]; Sherard v. McNeil, 38 Cal. 73 [1869]; Himmelmann v. Cofran, 36 Cal. 411 [1868].

a re-assessment. The legislature may confer the power of levying a re-assessment upon a court of competent jurisdiction.⁴ Thus, such power may be conferred upon the court by which such pre-existing assessment is set aside; also it may be authorized to make a proper assessment if the original assessment is erroneous or void, provided that at the time of the adjudication of invalidity such assessment could be lawfully made.⁵ The court may be authorized to appoint commissioners to make a re-assessment and to act upon the report made by them.⁶ Where the right of levying a re-assessment exists, the public corporation having such power must nevertheless actually levy such assessment, or the property owner cannot be compelled to pay for the improvement.⁷

§ 965. Necessity and effect of judgment of invalidity.

A re-assessment may be made when a final judgment holding the original assessment invalid has been rendered,¹ even if the time for taking an appeal has not elapsed.² Upon the rendition of a judgment declaring the assessment to be invalid, the contractor who has agreed to look to the fund raised by assessment for his compensation, may ask for a re-assessment immediately, without waiting for the expiration of the time fixed for appeal, since this amounts to an abandonment by him of his right to appeal from a judgment adverse to himself.³ If the Supreme

⁴Manor v. Board of Commissioners of Jay Co., 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; Lammers v. Balfe, 41 Ind. 218 [1872]; Batchelor v. Borough of Avon-by-the-Sea, — N. J. L. —, 68 Atl. 124 [1907]; Brewer, Pros. v. City of Elizabeth, 66 N. J. L. 547, 49 Atl. 480 [1901]; Brown v. Town of Union, 65 N. J. L. 601, 48 Atl. 562 [1900]; State, Sanford, Pros. v. Township of Kearny, 48 N. J. L. (19 Vr.) 125, 4 Atl. 442 [1886]; City of Elizabeth v. State, Meeker, Pros., 45 N. J. L. (16 Vr.) 157 [1883]; Kerston v. City of Milwaukee, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900]. See also Palmer v. City of Danville, 166 Ill. 42, 46 N. E. 629 [1897].

⁵Brewer, Pros. v. City of Elizabeth, 66 N. J. L. 547, 49 Atl. 480

[1901]; Brown v. Town of Union, 65 N. J. L. (36 Vr.) 601, 48 Atl. 562 [1900]; City of Elizabeth v. State, Meeker, Pros., 45 N. J. L. (16 Vr.) 157 [1883].

⁶In the Matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

⁷Dean v. Borchsenius, 30 Wis. 234 [1872].

¹Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303 [1899]; State v. District Court of Blue Earth County, 102 Minn. 482, 113 N. W. 697, 114 N. W. 654 [1907]; City of St. Paul v. Mullen, 27 Minn. 78, 6 N. W. 424 [1880].

²Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303 [1899].

³Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303 [1899].

Court reverses a judgment of confirmation rendered by the trial court, the public corporation must make a re-assessment, whether the cause is remanded or not.⁴ Delay in filing a mandate which reverses a confirmation judgment, does not prevent re-assessment.⁵ If, in an action to set aside an assessment, the court files a decision holding part of the assessment to be void, but no judgment is ever entered, it has been held that a re-assessment may be made under a statute authorizing a re-assessment whenever an assessment has been declared void by any court.⁶ A judgment in a prior action holding an assessment invalid, is conclusive as to its invalidity in a proceeding for a re-assessment.⁷ Under a statute providing for a re-assessment, if the original assessment has been declared invalid, it has been held that it is not necessary that a judgment be obtained in a direct proceeding involving the invalidity of the specific assessment upon the specific tract of land, but that it is sufficient if the assessment has been declared illegal in litigation involving other tracts of land,⁸ or if the court in another case involving the validity of an assessment levied in the same manner, has held it invalid,⁹ or if the court has laid down a principle which must result in the invalidity of the assessment in question.¹⁰ A party at whose instance a judgment of invalidity has been rendered, cannot complain of a re-assessment on the ground that the court acted without jurisdiction in setting aside the original assessment.¹¹ A party who pleads the invalidity of the original assessment in a suit thereon, has been held to be estopped to deny its invalidity in a proceeding upon a re-assessment.¹² Under a statute which provides that the right of making a re-assessment exists only when a judgment shows that the prior assessment was defeated by some defect in the assessment, it has been held that an erroneous judgment de-

⁴ *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541 [1903].

⁵ *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896]; (following *Philadelphia and Reading Coal and Iron Co.*, 158 Ill. 9, 41 N. E. 1102 [1895]).

⁶ *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903].

⁷ *New Whatcom v. Bellingham Bay Improvement Co.*, 16 Wash. 131, 47 Pac. 236 [1896].

⁸ *City of Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403 [1901].

⁹ *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353 [1897].

¹⁰ *State of Washington on the Relation of Heman ex rel. v. City of Ballard*, 16 Wash. 418, 47 Pac. 970 [1897].

¹¹ *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512 [1901].

¹² *Dyer v. Scalmanini*, 69 Cal. 637, 11 Pac. 327 [1886].

nying recovery on the ground that the certificate of the city engineer was not attached to the assessment, does not authorize a re-assessment.¹³ If the original assessment is valid, but the party seeking to enforce it becomes convinced by the ruling of the court at the trial that such assessment is invalid, and that he can not recover thereon, and, accordingly, abandons his attempt to enforce it, the right to levy a re-assessment is held not to exist.¹⁴ A re-assessment ordinance is not adopted prematurely, although after its passage and before it is confirmed the parties to the proceeding on the original assessment which had been stricken from the docket of the county court, have caused it to be re-instated for the purpose of filing therein the remanding orders of the Supreme Court.¹⁵ If the owners of property which is assessed acquiesce in the conduct of the city in regarding the assessment as invalid, a formal judgment of the invalidity of the assessment is not necessary.¹⁶ A judgment denying an application for the sale of the property assessed is conclusive, and defective only as to the irregularities which are found to exist.¹⁷ Thus, if the judgment of sale is refused on the ground that the assessment roll is not certified in a proper manner, a judgment of sale may be applied for and obtained when such defeat is corrected.¹⁸ So, if judgment of sale is denied because no ordinance has been passed regulating the conduct of the city collector, such application is no bar to a second application.¹⁹ A judgment holding the original assessment to be invalid, is not a bar to a re-assessment, since it does not hold that the right to levy an assessment does not exist, but merely that the assessment as levied is irregular and defective.²⁰ After an adjudication that the original assess-

¹³ *Gray v. Lucas*, 115 Cal. 430, 47 Pac. 354 [1896].

¹⁴ *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891].

¹⁵ *Farrel v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E. 325 [1899].

¹⁶ *State of Minnesota ex rel. Putnam v. Egan*, 64 Minn. 331, 67 N. W. 77 [1896].

¹⁷ *Brackett v. People of Weinnett*, 115 Ill. 29, 3 N. E. 723 [1886].

¹⁸ *Brackett v. People of Weinnett*, 115 Ill. 29, 3 N. E. 723 [1886].

¹⁹ *Schertz v. The People ex rel. Taylor*, 105 Ill. 27 [1882].

²⁰ *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766 [1888]; *Goodrich v. City of Chicago*, 218 Ill. 18, 75 N. E. 805 [1905]; *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396 [1904]; *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903]; *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541 [1903]; *People ex rel. Talbot Paving Co. v. City of Pontiac*, 185 Ill. 437, 56 N. E. 1114 [1900]; *Murray v. City of Chicago*, 175 Ill. 340, 51 N. E. 654 [1898]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *Farr*

ment is invalid, the legislature cannot, however, ratify and make valid the original assessment, thus setting aside the judgment of the court.²¹ Accordingly, if an assessment has been judicially declared to be invalid, and a curative act has then been passed, purporting to cure the assessment, the city should then be given an opportunity to levy a re-assessment before it is held liable at the suit of a contractor who has agreed to look to the assessment for his compensation.²² Property owners who claim that the original ordinance and assessment were invalid and who offer in evidence a judgment and opinion of the Supreme Court to that effect, have themselves proved the fact of its invalidity.²³

§ 966. Effect of judgment in original proceeding.

If, in the original proceedings, it has been found that certain property has been benefited by such improvement, such question can not be litigated again in an action on a re-assessment.¹ A judgment of confirmation which has been not set aside bars a re-assessment;² even if the city has subsequently repealed the assessment ordinance, and the trial court has attempted to set

v. West Chicago Park Commissioners, 167 Ill. 355, 46 N. E. 893 [1897]; City of Chicago v. Ward, 36 Ill. 9 [1864]; Village of Hyde Park v. Waite, 2 Ill. App. 443 [1878]; Martin v. City of Oskaloosa, 126 Ia. 680, 102 N. W. 529; (opinion rendered at former hearing, 99 N. W. 557, withdrawn on rehearing [1905]); City of Emporia v. Bates, 16 Kan. 495 [1876]; City of Emporia v. Norton, 13 Kan. 569 [1874]; Pollock v. Sowers, 137 Mich. 368, 100 N. W. 596 [1904]; Smith v. City of Detroit, 120 Mich. 572, 79 N. W. 808 [1899]; State v. District Court of Blue Earth County, 102 Minn. 482, 113 N. W. 697 [1907]; Howard Savings Institution v. Mayor and Common Council of the City of Newark, 52 N. J. L. (23 Vr.) 1, 18 Atl. 672 [1889]; Thomas v. Portland, 40 Or. 50, 66 Pac. 439 [1901]; Lester v. City of Seattle, 42 Wash. 539, 85 Pac. 14 [1906]; Ryan v. Sumner, 17 Wash. 228, 49 Pac. 487 [1897]; Frederick v. City of Seattle, 13 Wash. 428, 43 Pac. 364 [1896]; Mills v.

Charleton, 29 Wis. 400, 9 Am. Rep. 578 [1872]. *Contra*, holding a statute authorizing a re-assessment after a judgment of invalidity to be unconstitutional. Evans v. City of Denver, 26 Colo. 193, 57 Pac. 696 [1899]; Holliday v. City of Atlanta, 96 Ga. 377, 23 S. E. 406 [1895].

¹ Searcy v. Patriot and Barkworks Turnpike Company, 79 Ind. 274 [1881]; McManus v. Hornaday, 124 Ia. 267, 104 Am. St. Rep. 316, 100 N. W. 33 [1904]; Mayor and Common Council of Baltimore v. Horn, 26 Md. 194 [1866].

² Citizens' Bank of Des Moines, Iowa v. City of Spencer, 126 Ia. 101, 101 N. W. 643 [1904].

²³ City of Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39 [1903].

¹ Ireland v. City of Rochester, 51 Barb. 414 [1868].

² Chicago and Western Indiana R. Co. v. City of Chicago, 230 Ill. 9, 82 N. E. 399 [1907]; McChesney v. City of Chicago, 161 Ill. 110, 43 N. E. 702 [1890].

aside the original judgment at a subsequent term, pending an appeal to the supreme court, on which the judgment of confirmation was finally affirmed.³ A dismissal of assessment proceedings after confirmation, at the instance of one property owner, does not affect the judgment of confirmation as to the remaining property owners.⁴ A fraudulent vacation of a judgment of confirmation at the instance of the city, in order to enable the city to levy a new assessment, and to attempt to secure a larger assessment in such proceedings, is ineffective, the original judgment of confirmation is still in effect, and a re-assessment can not be levied.⁵ A different result has been reached under other statutes in other jurisdictions.⁶ If the original ordinance is void, the judgment of confirmation is also void, and it is not a bar to a different determination under a new assessment.⁷

§ 967. Effect of payment of original invalid assessment.

Questions of some difficulty are presented where one or more of the property owners have paid an irregular or invalid assessment, and the attempt is subsequently made to set aside the entire assessment and levy a re-assessment. Upon this question there is some divergence of judicial opinion, based chiefly upon different deductions as to the intention of the legislature in enacting re-assessment statutes. It is evident that unless some method is provided expressly, or by fair implication, for exempting the owners of property who have voluntarily paid the original assessment, or for crediting such payments upon the re-assessment, a re-assessment will result in the double taxation of the property owners who have been most prompt in paying their assessments, and least anxious to take advantage of technicalities; while, on the other hand, if some means is provided for exempting such property owners, or for crediting their payments upon the amount of the subsequent assessment, no reason appears why payment by some owners should prevent a re-assessment as against the owners who have not paid. In some juris-

³ *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. Rep. 702 [1896].

⁴ *LeMoyne v. City of Chicago*, 175 Ill. 356, 51 N. E. Rep. 718 [1898].

⁵ *McChesney v. City of Chicago*, 183 Ill. 423, 58 N. E. 982 [1900].

⁶ *Kansas City v. Mulkey*, 176 Mo. 229, 75 S. W. 973 [1903].

⁷ *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898].

dictions, under the statutes there in force, it is held that voluntary payment by some owners does not prevent the right of levying a re-assessment as against property owners who have not paid.¹ Where this is done, the public corporation may exempt from re-assessment the property of those who have voluntarily paid the re-assessment,² even if the second assessment is higher in amount.³ It is proper to assess only those who have not paid the original assessment,⁴ even where all except the owner of a single lot have voluntarily paid the original assessment.⁵ If the public corporation attempts to levy a re-assessment upon certain property, it will be assumed, in the absence of a showing to the contrary, that the original assessment was not paid.⁶ If, in levying a re-assessment, the amount of the original assessment is arbitrarily reduced, without any reference to the benefits conferred, it has been held that property owners who have paid the original assessment may object to the re-assessment proceedings.⁷ In other cases, it has been held that if some of the property owners have voluntarily paid the original assessment, a re-assessment cannot be levied upon the owners of property who have not paid, in the absence of some statute specifically providing for a re-assessment under such circumstances,⁸ even if the origi-

¹ Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766 [1888]; Bacon v. Mayor and Aldermen of Savannah, 105 Ga. 62, 31 S. E. 127 [1898]; Davis v. City of Litchfield, 158 Ill. 384, 40 N. E. 354 [1895]; The Freeport Street Railroad Co. v. City of Freeport, 151 Ill. 451, 38 N. E. 137 [1894].

² Bacon v. Mayor and Aldermen of Savannah, 105 Ga. 62, 31 S. E. 127 [1898]; Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. 354 [1895].

³ Bacon v. Mayor and Aldermen of Savannah, 105 Ga. 62, 31 S. E. 127 [1898]; Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. 354 [1895].

⁴ Mayor and City Council of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43 [1894]; (affirmed without report Ulman v. Mayor and City Council of Baltimore, 165 U. S. 719, 41 L. 1184, 17 S. 1001 [1897]); State. Sanford, Pros. v. The Board of Township Com-

mittee of Kearney Township, 51 N. J. L. (22 Vr.) 473, 18 Atl. 349 [1889].

⁵ State ex rel. Golzian v. District Court of Ramsey County, 77 Minn. 248, 79 N. W. 971 [1899].

⁶ Warren v. Street Commissioners of City of Boston, 187 Mass. 290, 72 N. E. 1022 [1905].

⁷ State ex rel. Eaton v. District Court of Ramsey County, 95 Minn. 503, 104 N. W. 553 [1905].

⁸ Danenhower v. District of Columbia, 7 Mackey (D. C.) 99 [1889]; State, Norris, Pros. v. City of Elizabeth, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889]; Campion v. City of Elizabeth, 41 N. J. L. (12 Vroom) 355 [1879]; State, Van Horne, Pros. v. Town of Bergen, 30 N. J. L. (1 Vr.) 307 [1863]; Pittsburg v. Logan, 165 Pa. St. 516, 30 Atl. 1017 [1895].

nal assessment was levied under an unconstitutional statute.⁹ Where this theory obtains, it has been held that in the absence of a statute specifically authorizing it, the city has no power voluntarily to repay the amount of an assessment paid in by property owners, and accordingly the fact that the city voluntarily makes such repayment, does not entitle it to levy a re-assessment if it could not have levied a re-assessment in the absence of such repayment.¹⁰ An offer on the part of the city to return what it has received under an invalid assessment, which has been confirmed erroneously, does not justify the trial court in setting aside its judgment after the expiration of the term at which it was rendered.¹¹ However, a voluntary payment made by the city and received by the property owner, with the understanding that the assessment was void, has been held to be effectual, and to empower the city to levy a re-assessment.¹² In other cases, the city has levied a re-assessment upon all the property benefited, and has then credited upon such re-assessments payments made upon the original invalid assessments. This method of protecting the property owner has been held to be sufficient.¹³ If land has been sold to pay a void assessment, it has been held that in levying a re-assessment the city need not credit the property owner with money which it has received from the purchaser at such sale, since the city is liable over to the purchaser.¹⁴ It has, however, been held that the city is not liable to the purchaser, that it must credit the amount paid by him as a payment on the assessment, and that it cannot levy a re-assessment for the purpose of reimbursing the purchaser.¹⁵ Another method provided by statute for doing justice where a re-assessment is levied after some property owners have voluntarily paid the assessment, is to require the city to repay the assessments, and then to levy a re-assessment. Under such statutes

⁹ *State, Norris, Pros. v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889]; *Pittsburg v. Loosan*, 165 Pa. St. 516, 30 Atl. 1017 [1895].

¹⁰ *State, Norris, Pros. v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889].

¹¹ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903].

¹² *State ex rel. Putnam v. Fran*, 64 Minn. 331, 67 N. W. 77 [1896].

¹³ *Philadelphia and Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Kerscen v. City of Milwaukee*, 106 Wis. 230, 48 L. R. A. 851, 81 N. W. 1103 [1900]. The same view seems to be taken in *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766 [1888].

¹⁴ *Wells v. City of Chicago*, 66 Ill. 280 [1872].

¹⁵ *Caston v. City of Portland*, 48 Or. 82, 84 Pac. 1040 [1906].

the city cannot levy a re-assessment until the original assessment has been repaid.¹⁶ If the re-assessment is less than the original assessment, it has been held that the city may treat the second assessment as paid, and that it will then be liable to the property owner for the difference between the second assessment and the first.¹⁷

§ 968. Adjustment of arrears.

Under some statutes authority is given to commissioners of unpaid taxes to make an adjustment of taxes and assessments which are in arrears.¹ These statutes are remedial and should be construed liberally.² Under such statute the city is deprived of the right to collect such assessments.³ Such statutory provision applies both to defective assessments,⁴ and to valid assessments which are in arrears. The assessments must, however, be in fact in arrears to give to the commissioners power to act under such statute.⁵ If paid, no authority to act under the

¹⁶ Mayor and Council of the City of Bayonne v. Morris, 61 N. J. L. (32 Vr.) 127, 38 Atl. 819 [1897]; Mayor and Aldermen of Jersey City v. O'Callaghan, 41 N. J. L. (12 Vr.) 349 [1879]; City of Elizabeth v. Hill, 39 N. J. L. (10 Vr.) 555 [1877].

¹⁷ Mayor, etc., of Jersey City v. Green, 42 N. J. L. (13 Vr.) 627 [1880].

¹ Essex Public Road Board v. Skinkle, 140 U. S. 334, 35 L. 446, 11 S. 790 [1891]; (affirming Essex Public Road Board v. Skinkle, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379 [1887]; which affirmed Essex Public Road Board v. Skinkle, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1888]); Hayday, Pros. v. Borough of Ocean City, 69 N. J. L. (40 Vr.) 22, 54 Atl. 813 [1903]; Hayday, Pros. v. Ocean City, 67 N. J. L. (38 Vr.) 155, 30 Atl. 584 [1901]; State, Protestant Foster Home of City of Newark, Pros. v. Mayor, Aldermen and Common Council of City of Newark, 52 N. J. L. (23 Vr.) 138, 18 Atl. 572 [1889]; *In re* Report of Commissioners of Elizabeth, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; State, Society

for Establishing Useful Manufactures, Pros. v. City of Paterson, 40 N. J. L. (11 Vr.) 250 [1878]; Fountain v. Mayor and Common Council of the City of Newark, 57 N. J. Eq. (12 Dick.) 76, 40 Atl. 212 [1898]; Baldwin v. City of Elizabeth, 42 N. J. Eq. (15 Stew.) 11, 6 Atl. 275 [1886]; Field v. Inhabitants of the Township of West Orange, 39 N. J. Eq. (12 Stew.) 60 [1884]; Bowns v. May, 120 N. Y. 357, 24 N. E. 947 [1890].

² State Society for Establishing Useful Manufactures, Pros. v. Mayor and Aldermen of Paterson, 40 N. J. L. (11 Vr.) 250 [1878].

³ State, Miller v. Love, 37 N. J. L. (8 Vr.) 261 [1874].

⁴ Hayday v. Borough of Ocean City, 69 N. J. L. (40 Vr.) 22, 54 Atl. 813 [1903]; State, Protestant Foster Home of City of Newark, Pros. v. Mayor and Common Council of the City of Newark, 52 N. J. L. (23 Vr.) 138, 18 Atl. 572 [1889]; Baldwin v. City of Elizabeth, 42 N. J. Eq. (15 Stew.) 11, 6 Atl. 275 [1886].

⁵ Bowns v. May, 120 N. Y. 357, 24 N. E. 947 [1890].

statute exists,⁶ even if such payment has, without authority of law, been repaid to the property owner.⁷ Under similar statutes, authority is given to levy a second assessment where the original assessment for any cause is delinquent.⁸ Under such statutes a re-assessment may be levied where the original assessment was void,⁹ as well as where the original assessment was valid, but the property owner for some reason has failed to pay it. If there is no delinquency there can be no re-assessment.¹⁰ Accordingly, a deficiency due to the fact that the city did not collect the amount assessed upon certain property, cannot be assessed upon the remaining property.¹¹

§ 969. Method of levying re-assessment.

The method of levying a re-assessment, like the method of levying an original assessment,¹ depends upon the provisions of the statute authorizing such assessment.² If the original assessment is invalid on account of the ordinance under which it is made, a valid re-assessment cannot be made unless a new and valid ordinance is enacted.³ If the new ordinance is enacted after the improvement is completed, it need not describe the improvement in detail.⁴ If the report in the original assessment is defective, a new and valid report must be made, and the re-assessment cannot be based on the amount shown in the original invalid report.⁵ If the original ordinance is not void, it may be taken as a basis for re-assessment.⁶ If the proceedings in the original assessment are valid, through and including the report, the amount estimated as the cost of the improvement in such

⁶ *State, Norris, Pros. v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889].

⁷ *State, Norris v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889].

⁸ *Harrison v. City of Chicago*, 61 Ill. 459 [1871]; *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870]; *City of Chicago v. Ward*, 36 Ill. 9 [1864]; *Lafin v. City of Chicago*, 48 Ill. 449 [1868].

⁹ *City of Chicago v. Ward*, 36 Ill. 9 [1864]; *Lafin v. City of Chicago*, 48 Ill. 449 [1868].

¹⁰ *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870].

¹¹ *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870].

¹ See § 234, 777.

² *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287 [1895].

³ *City of Chicago v. Wright*, 80 Ill. 579 [1875].

⁴ *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903].

⁵ *Workmen v. City of Chicago*, 61 Ill. 463 [1871]. See also *City of Chicago v. Wright*, 80 Ill. 579 [1875].

⁶ *City of Chicago v. Clark*, 233 Ill. 404, 84 N. E. 363 [1908].

report may be used as a basis for the re-assessment, and the actual cost of the improvement need not be given.⁷ If the re-assessment is levied after the improvement has been constructed it is not necessary that an estimate of probable cost be made.⁸ If the statute provides that, in re-assessments, the apportionment must be on a basis of what the improvements are really worth, a re-assessment cannot be levied upon the basis of a contract price furnished by the engineer, as distinct from the actual value of the improvements.⁹ The contract is, however, some evidence of the value of the improvement.¹⁰ If the alteration in the new assessment makes a new and corrected diagram and warrant necessary, the re-assessment is not valid unless such new and corrected diagram and warrant are furnished.¹¹ In case of re-assessment, the original assessment is not necessarily taken as a basis of apportionment, and accordingly a notice is necessary to the owner of property to be affected by such re-assessment.¹² Separate notice of two meetings, at one of which the assessment district is to be determined and at the other of which the assessment is to be adjusted, is sufficient.¹³ If notice is so given that the property owner has a reasonable opportunity to be heard upon the questions upon which he has a constitutional right to a hearing, such notice is sufficient.¹⁴ It is not necessary that a notice be given of facts which the legislature may determine, and which it has determined. Thus, if the legislature has de-

⁷ *Adcock v. City of Chicago*, 172 Ill. 24, 49 N. E. 1008 [1898].

⁸ *City of Chicago v. Gage*, 232 Ill. 169, 83 N. E. 663 [1908].

⁹ *Shiloh Street, Wilson's Appeal*, 152 Pa. St. 136, 25 Atl. 530 [1893]; *Omega Street, Traver's Appeal*, 152 Pa. St. 129, 25 Atl. 528 [1893].

¹⁰ *Bingaman v. City of Pittsburg*, 147 Pa. St. 353, 23 Atl. 395 [1892].

¹¹ *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262 [1901].

¹² *Guckien v. Rothrock*, 137 Ind. 355, 37 N. E. 17 [1893]; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531 [1891]. See also *State, Copeland, Pros. v. Village of Passaic*, 36 N. J. L. (7 Vr.) 382 [1873].

¹³ *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905].

¹⁴ *Bellingham Bay & British Columbia Railroad v. New Whatcom*, 172 U. S. 314, 43 L. 460, 19 S. 205 [1899]; (affirming *City of New Whatcom v. Bellingham Bay Improvement Company*, 16 Wash. 131, 47 Pac. 236 [1896]); *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]); *Newman v. City of Emporia*, 41 Kan. 583, 21 Pac. 593 [1889]; *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905]; *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280 [1899]; *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353 [1897].

terminated what land is benefited, and has determined that it is benefited to the full amount of the cost of the improvement, notice of such determination and an opportunity to be heard upon such question, need not be given to the property owner.¹⁵ Under the statutes which authorize the appointment of commissioners to levy an assessment, it is generally held that if their report is set aside on error by a reviewing court, their powers are exhausted, and they have no right to make another report unless they are appointed again.¹⁶ If an assessment is referred under authority of law to the original assessors to recast it, they need not be sworn again.¹⁷ A re-assessment may be apportioned according to benefits if the re-assessment statute so provides, even if the original assessment was apportioned according to frontage.¹⁸ Under a statute which requires an apportionment according to benefits it cannot be apportioned on an arbitrary basis, such as frontage,¹⁹ and it cannot exceed the amount of benefits.²⁰

§ 970. Re-assessment not limited to property originally assessed.

In levying a re-assessment a public corporation may levy an assessment upon any land benefited by the improvement within the limits fixed by statute, even if such land was not assessed originally.¹ Thus, if the original assessment was levied upon contiguous property, the re-assessment may nevertheless be levied upon any property benefited.² Thus, where a street was con-

¹⁵ *Spencer v. Merchant*, 125 U. S. 345, 31 L. 763, 8 S. 921 [1888]; (affirming, *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682 [1885]).

¹⁶ *People ex rel. Reynolds v. City of Brooklyn*, 49 Barb. (N. Y.) 136 [1867]; *In re Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905]. That new commissioners should be appointed, see also *State, Copeland, Pros. v. Village of Passaic*, 36 N. J. L. (7 Vr.) 382 [1873].

¹⁷ *Schemick v. City of Chicago*, 151 Ill. 336, 37 N. E. 888 [1894].

¹⁸ *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

¹⁹ *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905].

²⁰ *State v. Board of Commissioners of Pacific County*, — Wash. —, 93 Pac. 326 [1908].

¹ *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *State ex rel. Eaton v. District Court of Ramsey County*, 95 Minn. 503, 104 N. W. 553 [1905]; *Raymond v. City of Cleveland*, 42 O. S. 522 [1885]; *In re Westlake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905]. See also *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905].

² *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898].

structed along the city limits, so that the property on one side of such street was within the city limits, while that on the other side of such street was not, the original assessment properly included only such property as was within the city limits. This assessment was invalid and was set aside; and before a re-assessment was levied the property on the other side of the street was taken into the city. It was held that on re-assessment, property on both sides of the street might be assessed.³ Where land has been sub-divided into lots after the original assessment has been levied and before the re-assessment, and the original property owner remains personally liable for the whole of the amount of the assessment, he cannot raise the question whether that part of the tract which, as now laid out, does not abut upon the street improvement, can be included in the re-assessment.⁴

§ 971. Effect of conveyance to bona fide grantee.

The fact that property has been sold after the original assessment was levied, and before the re-assessment is made, to one who has paid value and has not actual notice of the proceedings for re-assessment, does not prevent the re-assessment from being a lien upon such property; since, if the proceedings are properly conducted, there is a constructive notice to all purchasers of the fact of the public improvement, and of the resulting liability to pay for the benefits received.¹ Under a statute making it the duty of the comptroller to give a certificate as to the liability of land for unpaid taxes or assessment, and providing that such certificate in the hands of a bona fide purchaser should discharge such land from any tax or assessment, except such as was stated therein to be unpaid, the issuing of such certificate prevents the city from levying a re-assessment after the original assessment is set aside, where such original assessment was not shown as an unpaid liability on the face of such certificate.²

³ In the Matter of Hollister, 180 N. Y. 518, 72 N. E. 1143 [1904]; (affirming, 89 N. Y. S. 518, 96 App. Div. 501 [1904]).

⁴ Evans v. Sharp, 29 Wis. 564 [1872].

¹ City of Seattle v. Kelleher, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904];

Thomas v. Portland, 40 Or. 50, 66 Pac. 439 [1901]; Tallman v. City of Janesville, 17 Wis. 71 [1863]. See also Barnes v. City of Beloit, 19 Wis. 93 [1865].

² City of Elizabeth v. Shirley, 35 N. J. Eq. (8 Stewart) 515 [1882].

§ 972. Time at which re-assessment may be levied.

In the absence of a specific statute applicable thereto, there is no arbitrary period of limitations within which a re-assessment must be levied.¹ It has been said to be sufficient if the re-assessment is levied within a reasonable time.² A long delay, owing to protracted litigation over the validity of the original assessment, does not prevent a re-assessment, or the issuing of new tax bills.³ Even if no statutory period of limitations exists, a delay of eleven years in levying a re-assessment after the original assessment is held invalid is excessive and a re-assessment cannot then be levied.⁴

Under some statutes a specific time is fixed within which re-assessments must be levied, if levied at all. Full effect is given to such statutes.⁵ A statutory period of limitation begins to run from the entry of the final judgment which declares the original assessment invalid.⁶ Under a statute providing for a re-assessment, if the original assessment is set aside by the court, and providing for a re-assessment within five years after the confirmation of the original assessment, where, from any cause, the city failed to collect the original assessment, but it is not set aside by order of the court, it has been held that where several terms elapsed between the confirmation of the assessment and an order denying the sale of property to satisfy such assessment so that the court has no jurisdiction to set aside the judgment of confirmation, the order denying the sale is not a setting aside of the judgment of confirmation, and accordingly the re-assessment, if not made within five years from the date of the confirmation of the original assessment, is barred by limitation.⁷ This section does not apply where the assessment ordi-

¹ State ex rel. Minnesota Transfer Ry. Co. v. District Court of Ramsey County, 68 Minn. 242, 71 N. W. 27 [1896].

² Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766 [1888].

³ Dollar Savings Bank v. Ridge, 183 Mo. 506, 82 S. W. 56 [1904].

⁴ City of Olympia v. Knox, — Wash. —, 95 Pac. 1090 [1908]; (In this case the work was done in 1891, the assessment confirmed in 1893; the assessment held invalid in 1893 (for a case applying the doc-

trine of estoppel to the same assessment see Phillips v. City of Olympia, 21 Wash. 153, 57 Pac. 347 [1899]). A statute authorizing reassessments was passed in 1893 and the reassessment in question was levied in 1904.)

⁵ Westall v. Altschul, 126 Cal. 164, 58 Pac. 458 [1899]; Doremus v. City of Chicago, 212 Ill. 513, 72 N. E. 403 [1904].

⁶ Westall v. Altschul, 126 Cal. 164, 58 Pac. 458 [1899].

⁷ Doremus v. City of Chicago, 212 Ill. 513, 72 N. E. 403 [1904].

nance has been held to be void by the Supreme Court, as in such case there is no confirmation of the original assessment.⁸ If the petition for a special assessment is dismissed as to a part of the proceedings, and is still pending as to the rest, when a new assessment is ordered, there has been no confirmation as to the proceedings which are not abandoned, and the statute of limitations does not apply.⁹ Under a statute limiting an action to enforce an assessment to ten years, mandamus to compel a re-assessment brought in 1904, by a relator who had actual knowledge of the facts, is barred where the original assessment was ordered in 1890 and was adjudged invalid in 1893.¹⁰

§ 973. Whether assessment is entire or severable.

Under some statutes an assessment which has been declared to be illegal at the instance of some of the owners of property assessed, may be set aside as an entirety, and a re-assessment levied upon all the property benefited by the improvement, including the property of owners who did not object to the original assessment.¹ This rule has been applied under a statute authorizing a re-assessment whenever the city discovers that assessments are liable to be set aside by judicial authority because of informality or illegality.² Unless the statute specifically provides that the assessment must be set aside as an entirety, it has been held proper for the court to set the assessment aside, either as an entirety or only as to the land of the parties complaining of the assessment.³ Where this view of the law is taken, the assessment will be regarded as set aside as an entirety where the language of the record shows, in a plain and unambiguous manner, that the court made such order.⁴ Under a stat-

⁸ *Murray v. City of Chicago*, 175 Ill. 340, 51 N. E. 654 [1898].

⁹ *Pardridge v. Village of Hyde Park*, 131 Ill. 537, 23 N. E. 345 [1890].

¹⁰ *Frye v. Town of Mt. Vernon*, 42 Wash. 268, 84 Pac. 864 [1906].

¹ *Long Branch Police, Sanitary and Improvement Commission v. Dobbins*, 61 N. J. L. 659, 40 Atl. 599 [1898]; *State, Vreeland, Pros. v. Mayor, etc., of Town of Bergen*, 34 N. J. L. (5 Vr.) 438 [1871]; *State, Brown, Pros. v. Village of South Orange*, 49 N. J. L. (20 Vr.) 104, 6 Atl. 312 [1886].

² *State, Watson, Pros. v. City of*

Elizabeth, 42 N. J. L. (13 Vr.) 508 [1880].

³ *Town of Bergen in County of Hudson v. State*, 32 N. J. L. (3 Vr.) 490 [1865].

⁴ The language of the record was "and it appearing to the court that the assessment and proceedings removed by the said certiorari are illegal, erroneous, and void, it is, therefore, ordered, considered and adjudged by the court here that the assessment and proceedings be set aside, reversed and for nothing holden." *Town of Bergen in County of Hudson v. State*, 32 N. J. L. (3 Vr.) 490, 494 [1865].

ute authorizing a re-assessment, when the original assessment is set aside, it is held that the word "assessment" implies the assessment as an entirety, and that a re-assessment cannot be made until the original assessment has been set aside.⁵ If the court sets aside the original assessment only as to the property of those who complain of the assessment, a re-assessment may be made as to such property only,⁶ especially if the remaining property owners have paid their assessment.⁷ Under other statutes it is held to be proper to levy a re-assessment only as to the property of those who have had the original assessment set aside, leaving the original assessment in force as to the property owners who do not complain of it.⁸

§ 974. For whose benefit re-assessment may be had.

The fact that the contractors are to look to the fund raised by the assessment for their compensation, and that the proceeds of the re-assessment are to go to the contractors and not into the city treasury, does not prevent the exercise of power of re-assessment.¹ If the contractor has not performed his contract, a re-assessment need not and should not be levied for his benefit.² If the city has neglected to provide a fund by assessment, to pay the contractors, and has thus become personally liable to them, property owners who have not paid the original assessment, or the re-assessment, cannot question the city's right to be subrogated to the rights of the contractors in the fund raised by the assessment.³ A contractor who is to be compensated out of assessments, can compel a city to levy a re-assessment where the original assessment has been held to be invalid.⁴ The fact that the proceeds of a re-assessment are to go

⁵ *State, Winkler, Pros. v. Inhabitants of West Hoboken*, 37 N. J. L. (8 Vr.) 406 [1875].

⁶ *Pardee Works v. City of Perth Amboy*, 59 N. J. L. 335, 36 Atl. 660 [1896].

⁷ *State ex rel. Golzian v. District Court*, 77 Minn. 248, 79 N. W. 971 [1899].

⁸ *In re Westake Avenue, Seattle*, 40 Wash. 144, 82 Pac. 279 [1905].

¹ *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303 [1899]; *Duniway v. Portland*, 47 Or. 103, 81 Pac. 945 [1905].

² *Crawford v. Mason*, 123 Ia. 301, 98 N. W. 795 [1904]; (original assessment held invalid in *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899]).

³ *City of Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403 [1901].

⁴ *City of Greencastle v. Allen*, 43 Ind. 347 [1873]; *Reock v. Mayor and Common Council of Newark*, 33 N. J. L. (4 Vr.) 129 [1868]; *People ex rel. Ready v. Mayor and Common Council of Syracuse*, 144 N. Y. 63, 38 N. E. 1006 [1894]; (affirming,

to bond holders,⁵ the improvement having already been paid for by the proceeds of the sale of such bonds, does not prevent the exercise of the power of re-assessment. It has been held that the city is under no obligation to compensate purchasers at a void sale, and that accordingly a re-assessment cannot be levied in order to compensate them.⁶

§ 975. Items for which re-assessment may be levied.

In levying a re-assessment, the cost of the original invalid assessment cannot be included.¹ If provision is made for a reduction of the assessment by the court to the amount which is properly chargeable upon the property, and for enforcing the collection for such amount, even if the assessment is irregular or invalid, it has been held that in determining such amount interest may be allowed from the time fixed for the payment of the assessment.² Interest upon the amount with which the land owner should be charged at the date of the first assessment may be allowed from such date in making a re-assessment.³ Interest accruing on deferred installments of the assessments may be included in the re-assessment.⁴ It has been held in other cases that if the first assessment is void, interest thereon cannot be included in the re-assessment until after the date of the re-assessment.⁵ It has been held that interest will run from the date of the curative act, but no penalty can be allowed until a valid warrant issues and notice is given.⁶ Interest cannot be included in the absence of a statute authorizing such item.⁷ The cost of a suit brought to enforce the prior invalid assessment

People ex rel. Ready v. Mayor and Common Council of Syracuse, 65 Hun (N. Y.) 321 [1892]; *Phillips v. City of Olympia*, 21 Wash. 153, 57 Pac. 347 [1899]; *Fletcher v. City of Oshkosh*, 18 Wis. 228 [1864].

⁵ *Schintgen v. City of La Crosse*, 117 Wis. 158, 94 N. W. 84 [1903].

⁶ *Budge v. City of Grand Forks*, 1 N. D. 309, 10 L. R. A. 165, 47 N. W. 390 [1890]; *Gaston v. City of Portland*, 48 Or. 82, 84 Pac. 1040 [1906].

⁷ *Farr v. West Chicago Park Commissioners*, 167 Ill. 355, 46 N. E. 893 [1897]; *Laffin v. City of Chicago*, 48 Ill. 449 [1868].

² *Gest v. City of Cincinnati*, 26 O. S. 275 [1875]; *Fricke v. City of Cincinnati*, 1 Ohio N. P. 98 [1894].

³ *State, Johnston, Pros. v. Inhabitants of the City of Trenton*, 43 N. J. L. (14 Vr.) 166 [1881].

⁴ *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Philadelphia Mortgage & Trust Company v. City of New Whatcom*, 19 Wash. 225, 52 Pac. 1063 [1898].

⁵ *Tuttle v. Polk & Hubble*, 84 Ia. 12, 50 N. W. 38 [1891].

⁶ *Blount v. City of Janesville*, 31 Wis. 548 [1872].

⁷ *Laffin v. City of Chicago*, 48 Ill. 449 [1868].

cannot be included in the re-assessment.⁸ Under a statute authorizing a re-assessment for all expenses which have been incurred, it is held that the legislature did not intend to authorize a re-assessment for unauthorized or illegal expenditure.⁹

§ 976. Effect of re-assessment.

On making a re-assessment the original assessment merges in the new assessment, and there is then but one assessment and but one lien.¹ If a public corporation has by ordinance declared prior assessments to be invalid, and provided for a re-assessment, such corporation cannot subsequently assert the validity of the original assessments in a proceeding in mandamus to compel them to levy the assessment.² A re-assessment operates as a lien upon the property assessed in accordance with the provisions of the local statute upon that subject.³

§ 977. Power of court to fix amount of assessment.

Under other statutes, it is provided that in case of defects or irregularities, the court before which the proceedings to enforce or to set aside the assessment is had, may determine what amount of the assessment is properly to be charged upon the property in question, and may enforce such assessment, in spite of such irregularities, up to the amount thus determined.¹

⁸ *Tuttle v. Polk & Hubble*, 84 Ia. 12, 50 N. W. 38 [1891].

⁹ In the *Matter of the Metropolitan Gas Light Company*, 23 Hun, 327 [1880].

¹ *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280 [1899].

² *Phillips v. City of Olympia*, 21 Wash. 153, 57 Pac. 347 [1899].

³ *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898].

¹ *Chicago, Rock Island & Pacific Railway Co. v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; *Ottumwa Brick & Construction Company v. Ainley*, 109 Ia. 386, 80 N. W. 510 [1899]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *City of Louis-*

ville v. American Standard Asphalt Co., — Ky. —, 31 Ky. L. R. 133, 102 S. W. 806 [1907]; *Langan v. Bitzer*, — Ky. —, 26 Ky. Law Rep. 579, 82 S. W. 280 [1904]; *Loeser v. Redd & Bro.*, 77 Ky. (14 Bush.) 18 [1878]; *Zahn v. Borough of Rutherford*, 72 N. J. L. (43 Vr.) 446, 60 Atl. 1123 [1905]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vroom) 119, 27 Atl. 801 [1893]; In the *Matter of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172 [1890]; In the *Matter of Anderson*, 109 N. Y. 559 [1887]; In the *Matter of Auchmuty*, 18 Hun, 324 [1879]; In the *Matter of McCormack*, 60 Barb. 128 [1870]; *Well v. City of Cincinnati*, 45 Ohio St. 407, 15 N. E. 196 [1887]; *Railroad Company v. Wagner*, 43 O. S. 75, 1 N. E. 91 [1885]; *Hastings v. Columbus*, 42 O. S. 585 [1885];

Such statutes have, however, been held to be invalid as validating proceedings which may be void for want of jurisdiction and as imposing administrative duties on the courts.² It has been held that where a statute authorizing a re-assessment exists, a court of equity may require the amount properly chargeable upon the property to be paid in as a condition to granting equitable relief to the property owner, even though no statute specifically authorizes the court to determine what amount of the assessment is properly to be charged upon the property.³ Statutes of this sort are regarded as highly remedial, since they give the property owner an ample opportunity to be heard; and are construed liberally.⁴ Some of these statutes have been held to be prospective and not to apply to prior assessments.⁵ Other statutes have been held to apply to proceedings pending when the statute was enacted.⁶ Some statutes of this class are so broad that they apply even to jurisdictional defects.⁷ They are not regarded as applying, where the public corporation which attempts to levy the assessment has no authority to assess,⁸ or where no notice whatever is given,⁹ or where a bond, which is required as a jurisdictional fact, is not filed.¹⁰ Such statutes are applicable, if notice has been given sufficient to advise the property owner of the fact of the assessment, but such notice does not comply strictly with the statutory requirements,¹¹ or does not describe the improvement accurately.¹² Such statutes have been held to apply to a failure to publish the preliminary resolution required by statute;¹³ though under curative statutes

Jaeger v. Burr, 36 O. S. 164 [1880]; *Springer v. Avondale*, 35 O. S. 620 [1880]; *Kelly v. The City of Cleveland*, 34 O. S. 468 [1878]; *Gest v. City of Cincinnati*, 26 O. S. 275 [1875]; *Fricke v. City of Cincinnati*, 1 Ohio N. P. 98 [1894].

² *Houseman v. Kent*, 58 Mich. 364, 25 N. W. 369 [1885].

³ *Blount v. City of Janesville*, 31 Wis. 648 [1872].

⁴ *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vr.) 119, 27 Atl. 801 [1893].

⁵ *In the Matter of Eager*, 58 Barb. 557 [1871].

⁶ *Miller v. Graham*, 17 O. S. 1 [1866].

⁷ *Miller v. Graham*, 17 O. S. 1 [1866].

⁸ *Stephan v. Daniels*, 27 O. S. 527 [1875].

⁹ *Railroad Company v. Wagner*, 43 O. S. 75, 1 N. E. 91 [1885]; *Sessions v. Crunkilton*, 20 O. S. 349 [1870]; *Schmidt v. Village of Elmwood Place*, 15 Ohio C. C. 351 [1897].

¹⁰ *Sessions v. Crunkilton*, 20 O. S. 349 [1870].

¹¹ *Hastings v. Columbus*, 42 O. S. 585 [1885].

¹² *Miller v. Graham*, 17 O. S. 1 [1866].

¹³ *Upington v. Oviatt*, 24 O. S. 232 [1873].

somewhat different in their phraseology, it has been held that this power does not exist in the absence of a jurisdictional fact,¹⁴ such as the publication of the preliminary resolution.¹⁵ Such statutes are applicable where defects in the estimate exist,¹⁶ or where no plans have been made,¹⁷ or the advertisement for bids has not been in compliance with the statute,¹⁸ or where bids have not been advertised for, at all, though required by statute,¹⁹ or where the preliminary resolutions are passed irregularly,²⁰ as where resolutions for improving several streets are passed together;²¹ or where the assessment district has been laid off in an improper manner,²² as where the council has failed to fix the depth to which land in bulk may be assessed.²³ Such statutes are held to apply where an improper apportionment has been made.²⁴ They do not apply where council has failed to fix the amount to be assessed upon non-abutting property, under a statute which authorizes an assessment upon non-abutting property only if the council fixes the amount so to be assessed.²⁵ The amount which is properly chargeable against the land assessed, is not the amount of the benefits conferred by the improvement, but the proportion of the entire assessment which would have been chargeable to the property owner if the assessment had been legally made,²⁶ at least if the errors and irregularities do not improperly increase the proportion to be paid by the property owner.²⁷ Interest on the assessment may be allowed from the time fixed for the payment of the assessment;²⁸ at least if a re-assessment is not necessary.²⁹ These

¹⁴ *Welker v. Potter*, 18 O. S. 85 [1868].

¹⁵ *Welker v. Potter*, 18 O. S. 85 [1868].

¹⁶ *Wewell v. City of Cincinnati*, 45 Ohio St. 407, 15 N. E. 196 [1887].

¹⁷ *Becher v. City of Columbus, Ohio*, 4 Ohio C. C. 305 [1890].

¹⁸ *Wilder v. City of Cincinnati*, 26 O. S. 284 [1875]; *Upington v. Oviatt*, 24 O. S. 232 [1873]; *Becher v. City of Columbus, Ohio*, 4 Ohio C. C. 305 [1890].

¹⁹ *In the Matter of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172 [1890].

²⁰ *Bode v. City of Cincinnati*, 9 Ohio C. C. 382 [1895].

²¹ *Bode v. City of Cincinnati*, 9 Ohio C. C. 382 [1895].

²² *City of Louisville v. American*

Standard Asphalt Co., — Ky. —, 31 Ky. L. Rep. 133, 102 S. W. 806 [1907]; *Loeser v. Redd & Bro.*, 77 Ky. (14 Bush.) 18 [1878].

²³ *Springer v. Avondale*, 35 O. S. 620 [1880].

²⁴ *Jaeger v. Burr*, 36 O. S. 164 [1880].

²⁵ *Kelly v. The City of Cleveland*, 34 O. S. 468 [1878].

²⁶ *City of Cincinnati for use of Ashman v. Bickett*, 26 O. S. 49 [1875].

²⁷ *City of Cincinnati, for use of Ashman v. Bickett*, 26 O. S. 49 [1875].

²⁸ *Gest v. City of Cincinnati*, 26 O. S. 275 [1875]; *Fricke v. City of Cincinnati*, 1 Ohio N. P. 98 [1894].

²⁹ See §§ 475, 1105.

statutes have been held to be applicable, even where no assessment has as yet been made,³⁰ as where the proceedings are removed to the court by certiorari before the assessment has been levied.³¹ Similar results have been reached under statutes authorizing a recovery for work and labor if the assessment is irregular.³²

§ 978. Correction and reformation of defective proceedings.

Where a public corporation attempts to levy a local assessment, has once obtained jurisdiction, and subsequent irregularities have intervened, the public corporation frequently attempts to cure such irregularities by going back to the first defective step in the proceedings, beginning at that point, and taking the subsequent steps in compliance with the requirements of the law. This procedure is resorted to in some cases in statutes specifically authorizing it, and in other cases, under statutes which do not provide specifically for such procedure. It is generally held that if the property owner is given full opportunity to be heard, and he has not by this method of procedure been deprived of any of his constitutional or statutory rights, such method of procedure may be resorted to.¹ Under a special statute authorizing proceedings to be begun anew, at the last stage at which they were correct, it is held that such procedure may be resorted to, even if the expense of the mistake is imposed upon the owner of the property benefited.² By such procedure, unlawful items, the amount of which appears upon the face of the proceedings, and which can therefore be determined

³⁰ *Zahn v. Borough of Rutherford*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 1123 [1905].

³¹ *Zahn v. Borough of Rutherford*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 1123 [1905].

³² *Burns v. Patterson*, 2 Handy (Ohio) 270 [1855]. See § 18.

¹ *Bacon v. Mayor and Aldermen of Savannah*, 105 Ga. 62, 31 S. E. 127 [1898]; *Otis v. Sullivan*, 219 Ill. 365, 76 N. E. 487 [1906]; *McChesnev v. City of Chicago*, 205 Ill. 328, 69 N. E. 38 [1903]; *Fwart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478 [1899]; *Burton v. City of Chicago*, 62 Ill. 179 [1871]; *Pitts-*

burgh, C., C. & St. L. Ry. Co. v. Taber, 168 Ind. 419, 77 N. E. 741 [1906]; *Ager v. State ex rel. Houston*, 162 Ind. 538, 70 N. E. 808 [1903]; *Luzadder v. State for Use of Rhine*, 131 Ind. 598, 31 N. E. Rep. 453 [1891]; *State ex rel. Ely v. Smith*, 124 Ind. 302, 24 N. E. Rep. 331 [1890]; *Anketell v. Hayward*, 119 Mich. 525, 78 N. W. 557 [1899]; *Shimmons v. City of Sardinaw*, 104 Mich. 511, 62 N. W. 725 [1895]; *State ex rel. Barber Asphalt Paving Co. v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904].

² *Anketell v. Hayward*, 119 Mich. 525, 78 N. W. 557 [1899].

without resorting to extrinsic evidence, may be eliminated.³ This procedure may be resorted to where the wrong body of officers have acted in taking some necessary step,⁴ where a commissioner to levy assessments is an interested party,⁵ where the land to be assessed is not described with sufficient accuracy,⁶ where two lots are assessed separately, but the assessment is confirmed against the two of them together,⁷ where the ordinance defines the assessment district, although the council has no power so to do,⁸ and where notice of confirmation is omitted.⁹ If a judgment of confirmation is reversed, and the improvement has been completed and accepted by the city, it is not necessary that the new ordinance repeat the specifications of the improvement contained in the first ordinance,¹⁰ or that it should correct defects in the description of the improvement contained in the first ordinance.¹¹ If assessment proceedings have been dismissed by the city after a petition for an assessment has been filed, the city cannot pass a new ordinance without taking the preliminary steps required by statute with reference to the estimate of the cost and a public hearing.¹² If the opinion of a board of public works as to the justice of the proposed improvement is necessary, such an opinion as to the justice of a prior void assessment will not sustain a new ordinance.¹³ After a judgment confirming an assessment has been reversed, the city may repeal the ordinance, vacate proceedings thereunder, and pass a new ordinance for a different kind of improvement.¹⁴

³ *McChesney v. City of Chicago*, 205 Ill. 528, 69 N. E. 38 [1903].

⁴ *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895].

⁵ *Ewart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478 [1899].

⁶ *Pittsburg, C., C. & St. L. Ry. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906]; *Ager v. State ex rel. Heaston*, 162 Ind. 538, 70 N. E. 808 [1903]; *Lusadder v. State for Use of Rhine*, 131 Ind. 598, 31 N. E. Rep. 453 [1891]; *State ex rel. Ely v. Smith*, 124 Ind. 302, 24 N. E. Rep. 331 [1890].

⁷ *Ottis v. Sullivan*, 219 Ill. 365, 76 N. E. 487 [1906].

⁸ *State ex rel. Barber Asphalt Paving Co. v. City of St. Louis*, 183 Mo. 230, 81 S. W. 1104 [1904].

⁹ *Burton v. City of Chicago*, 62 Ill. 179 [1871].

¹⁰ *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396 [1904]; *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512 [1901].

¹¹ *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903].

¹² *Bass v. City of Chicago*, 195 Ill. 109, 62 N. E. 913 [1902].

¹³ *Workman v. City of Chicago*, 61 Ill. 463 [1871].

¹⁴ *Gage v. City of Chicago*, 193 Ill. 108, 61 N. E. 850 [1901].

CHAPTER XVIII.

CURATIVE STATUTES.

§ 979. Power of legislature to prescribe effect of irregularities.

Since the power of levying local assessments is not inherent in public corporations, but exists only when given by the legislature,¹ it follows that the legislature may attach such formalities to levying local assessments as it sees fit, and may require a compliance with all such formalities in order to make the assessment valid.² The converse of this proposition holds good. While the legislature cannot dispense with any of the rights secured to the property owners by the constitution,³ it may provide specifically what shall be the effect of failure to comply with any legislative requirement imposed in addition to the constitutional requirements; and provisions are frequently found which provide that failure to comply with certain requirements, or certain classes of requirements, shall not invalidate the assessment proceedings.⁴ Thus, statutes are found which provide that no irregularity or variance from the statutory requirements shall invalidate the assessment, unless it affects the substantial justice of the assessment,⁵ or unless the variance is wilful and

¹ See § 222 *et seq.*; § 775.

² See § 234; § 777. *Pittelkow v. City of Milwaukee*, 94 Wis. 651, 69 N. E. 803 [1897].

³ See Chapter V.

⁴ *City of Chicago v. Gage*, 232 Ill. 169, 83 N. E. 663 [1908]; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; *Gardiner v. Street Commissioners of the City of Boston*, 188 Mass. 223, 74 N. E. 341 [1905]; *Smith v. Tobener*, 32 Mo. App. 601 [1888]; *DeWitt v. City of Elizabeth*, 56 N. J. L. (27 Vr.) 119, 27 Atl. 801 [1893]; *State, Pudney, Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.)

65 [1874]; *Mayor and Common Council of Newark v. State, Batten, Pros.*, 32 N. J. L. (3 Vr.) 453 [1865]; *Elwood v. City of Rochester*, 43 Hun, 102 [1887]; *In the Matter of O'Hara*, 5 Hun, 287 [1875]; *Hasan v. City of Rochester*, 6 Lansing, 185 [1871]; *McMillan v. Fond du Lac County*, — Wis. —, 114 N. W. 1119 [1908].

⁵ *Chicago, Rock Island & Pacific R. Co. v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882]; *City of*

material.⁶ Provisions are also found in some states to the effect that after the work is done the assessment cannot be avoided for defects or irregularities in the proceedings.⁷ The same result is sometimes reached by statutes which provide that objections must be made within a certain period of time, or that they shall be regarded as waived.⁸ Full effect is given to such curative provisions as long as the legislature is dispensing with compliance with statutory provisions which the legislature need not have imposed in the first instance.⁹ Under guise of curative provisions, the legislature cannot, however, dispense with the constitutional rights of the property owners, nor can it provide that a violation of such constitutional rights shall not invalidate the assessment.¹⁰ The legislature may restrict the methods in which the property owners may after confirmation attack the assessment.¹¹

§ 980. Curative act must be constitutional.

In order to be effective, the curative act must not itself be unconstitutional.¹ Thus, under a constitutional provision forbidding a statute to embrace more than one subject, and requiring that subject to be expressed in the title, a curative act

Burlington v. Quick, 47 Ia. 222 [1877]; *Weller v. City of St. Paul*, 5 Minn. 95 [1861].

⁶*Otis v. Sullivan*, 219 Ill. 365, 76 N. E. 487 [1906]; *Ziegler v. City of Chicago*, 213 Ill. 61, 72 N. E. 719 [1904].

⁷*City of Louisville v. American Standard Asphalt Co.*, — Ky. —, 31 Ky. L. Rep. 133, 102 S. W. 806 [1907]; *Langan v. Bitzer*, — Ky. —, 82 S. W. 280, 26 Ky. L. Rep. 579 [1904]; *Broadway Baptist Church v. McAtee*, 8 Bush. (Ky.) 598, 8 Am. Rep. 480 [1871].

⁸*Matter of Bridgford*, 65 Hun, 227, 20 N. Y. Sup. 281 [1892]. See § 141.

⁹*Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *Ottumwa Brick and Construction Company v. Ainlev*, 109 Ia. 386, 80 N. W. 510 [1899]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W.

775 [1882]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; and see cases cited in preceding notes to this section.

¹⁰*Union Building Association v. City of Chicago*, 61 Ill. 439 [1871]; *Hershberger v. City of Pittsburgh*, 115 Pa. St. 78, 8 Atl. 381 [1886]; *Hayes v. Douglas Co.*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

¹¹In the *Matter of Munn*, 165 N. Y. 149, 58 N. E. 881 [1900]; (reversing, *In re Munn*, 49 App. Div. 232).

¹*Schumacker v. Toberman*, 56 Cal. 508 [1880]; *Brady v. King*, 53 Cal. 44 [1878]; *People of the State of California v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677 [1875]; *Gilmore v. Norton*, 10 Kan. 491 [1872]; *City of Watertown v. Fairbanks*, 65 N. Y. 588 [1875]; *Boyd v. City of Milwaukee*, 92 Wis. 456, 66 N. W. 603 [1896].

in violation of this provision is of no effect.² A statute which provides for the recovery of all invalid assessments theretofore levied in a given city, and modifies the method of laying out streets and of collecting taxes, has been held to have but one object; namely, to make an amendment or addition to the city charter, whereby certain defects found to exist therein, might be corrected.³ Under constitutional provisions forbidding local or special legislation, a curative act in violation of such provision, is itself invalid.⁴ In the absence of a provision in the constitution forbidding local or special legislation, a specific assessment may be cured by a statute applicable to such assessment alone.⁵

§ 981. Construction and application of curative statutes.

In some jurisdictions, such curative provisions are not favored in construction.¹ A statute which transfers the power of levying assessments from one department of the public corporation to another, does not make valid assessments, which, but for such statute, would be invalid for failure to comply with the pre-existing requirements of the law.² Statutes which provide that an assessment shall not be void because of irregularities, and the like, are not applicable where there is no power to levy the assessment,³ as where the same tract of land has been assessed twice, to different persons, and in different amounts,⁴

² *City of Watertown v. Fairbanks*, 65 N. Y. 588 [1875].

³ *State ex rel. Doyle v. Mayor, Aldermen and Common Council of City of Newark*, 34 N. J. L. (5 Vr.) 236 [1876]; *State, Walter, Pros. v. Town of Union in County of Hudson*, 33 N. J. L. (4 Vr.) 350 [1869]. The validity of a similar statute was questioned in *Hopkins v. Mason*, 61 Barb. 469 [1871].

⁴ *Schumacker v. Toberman*, 56 Cal. 508 [1880]; *Independent School District of Burlington v. City of Burlington*, 60 Ia. 500, 15 N. W. 295 [1883]; *Gilmore v. Norton*, 10 Kan. 491 [1872]; *Boyd v. City of Milwaukee*, 92 Wis. 456, 66 N. W. 603 [1896].

⁵ *Tift v. City of Buffalo*, 82 N. Y. 204 [1880].

¹ *Broadway Baptist Church v. MeAtee*, 8 Bush. (Ky.) 508, 8 Am. Rep. 480 [1871]; *Caldwell v. Rupert*, 73 Ky. (10 Bush.) 179 [1873].

² In the *Matter of Livingston to Vacate an Assessment*, 121 N. Y. 94, 24 N. E. 290 [1890].

³ *Town of Bellevue v. Peacock*, 89 Ky. 495, 25 Am. St. Rep. 552, 12 S. W. 1042 [1890]; *State, App. Pros. v. Town of Stockton, in County of Camden*, 61 N. J. L. (32 Vr.) 520, 39 Atl. 921 [1898]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

⁴ *Fitchison Ditching Association v. Hillis*, 40 Ind. 408 [1872].

or where jurisdictional defects exist.⁵ On the other hand, such statutes are applicable where the omissions and irregularities are non-jurisdictional, and do not work substantial injustice.⁶ A departure from statutory provisions causing a substantial injustice, invalidates the assessment under such curative statutes.⁷ Accordingly, we find that curative statutes of the type under discussion do not apply where the ordinance is void,⁸ but do apply where the ordinance was enacted irregularly, as where it was not voted on on two different days.⁹ If a preliminary resolution is made jurisdictional, failure to enact such resolution is not cured by a statute providing that an assessment shall not be defeated entirely by reason of omissions, formalities or irregularities.¹⁰ Such statutes are not applicable where the resolution for the improvement has been repealed.¹¹ Such statutes are held to apply where power has been improperly delegated by the corporate officers in whom it was reposed, if they have subsequently adopted the acts of the official to whom such power was unlawfully delegated.¹² Notice is ordinarily jurisdictional, and it is furthermore a constitutional right. Omission to give notice is therefore not cured by such statutes.¹³ Thus, curative

⁵ *Comstock v. Eagle Grove City*, 133 Ia. 589, 111 N. W. 51 [1907]; *Sewall v. St. Paul*, 20 Minn. 459 [1874]; *Prindle v. Campbell*, 9 Minn. 212, 86 Am. Dec. 93 [1864]; *People ex rel. Hayes v. City of Brooklyn*, 71 N. Y. 495 [1877]; *Elwood v. City of Rochester*, 43 Hun, 102 [1887]; *In the Matter of Ford*, 6 Lansing (N. Y.) 92 [1871]; *City of Williamsport v. Beck*, 128 Pa. St. 147, 18 Atl. 329 [1889].

⁶ *Barber Asphalt Paving Company, v. Edgerton*, 125 Ind. 455, 25 N. E. Rep. 436 [1890]; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *City of Burlington v. Quick*, 47 Ia. 222 [1877]; *Broadway Baptist Church v. McAtee*, 8 Bush. (Ky.) 508, 8 Am. Rep. 480 [1871]; *Gardiner v. Street Commissioners of the City of Boston*, 188 Mass. 223, 74 N. E. 341 [1905]; *In the Matter of O'Hara*, 5 Hun, 287

[1875]; *Hassan v. City of Rochester*, 6 Lansing, 185 [1871].

⁷ *Liebermann v. City of Milwaukee*, 89 Wis. 336, 61 N. W. 1112 [1895].

⁸ *Richardson v. Mehler*, 111 Ky. 408, 23 Ky. Law Rep. 917, 63 S. W. 957 [1901].

⁹ *Broadway Baptist Church v. McAtee*, 8 Bush. (Ky.) 508, 8 Am. Rep. 480 [1871].

¹⁰ *Zalesky v. City of Cedar Rapids*, 118 Ia. 714, 92 N. W. 657 [1902].

¹¹ *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

¹² *Noland v. Mildenberger*, — Ky. —, 97 S. W. 24 [1906].

¹³ *Sewall v. City of St. Paul*, 20 Minn. 511 [1874]; *City of Lowell v. Wentworth*, 60 Mass. (6 Cush.) 221 [1850]; *State, Ogden, Pros. v. Mayor and Common Council of the City of Hudson*, 29 N. J. L. (5 Dutch.) 475 [1861]; *State, Brunley, Pros. v. Inhabitants of the City of Perth Amboy*, 29 N. J. L. (5 Dutch.) 259 [1861]; *Brewster v. Mayor and Common*

statutes are not applicable where no notice was given to the property owner to do the work himself.¹⁴ They are, however, applicable if notice was given which fairly advises the property owner of the necessary facts, although it was given in the wrong name,¹⁵ or irregularly, as by failure to give a hearing for the length of time prescribed in the notice.¹⁶ If an estimate is a jurisdictional fact, these curative statutes do not apply where no estimate has been made,¹⁷ although they are applicable where such estimate is not jurisdictional,¹⁸ or where an estimate has been irregularly made, as long as no injustice has resulted,¹⁹ or where an estimate has been made and incorporated in the resolutions, but has not been signed.²⁰ Such curative statutes do not apply where the certificate showing the amount to be raised fails to give the facts which are required by statute for the protection of the taxpayer.²¹ Such curative statutes are applicable where an irregular bond has been taken,²² or where a contract has been entered into irregularly, as long as such irregularity is not prejudicial to the property owner.²³ They are not applicable where a contract has been let without any advertisement for bids.²⁴ Such curative statutes are applicable where a street has been laid out irregularly.²⁵ They are applicable where a defective petition has been filed for an improvement,²⁶ but they are

Council of the City of Newark, 11 N. J. Eq. (3 Stock.) 114 [1856]; In the Matter of Ford, 6 Lans. (N. Y.) 92 [1871]; Cowan v. Village of West Troy, 43 Barb. (N. Y.) 48 [1864]; Hershberger v. City of Pittsburgh, 115 Pa. St. 78, 8 Atl. 381 [1886]; Myrick v. City of La Crosse, 17 Wis. 442 [1863].

¹⁴ Johnson v. City of Oshkosh, 21 Wis. 184 [1866].

¹⁵ Chicago, Rock Island & Pacific R. R. Co. v. City of Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900].

¹⁶ People, etc., ex rel. Butts v. Common Council of the City of Rochester, 5 Lansing, 142 [1871].

¹⁷ Erie to use v. Brady, 150 Pa. St. 462, 24 Atl. 641 [1892]; City of Erie for use v. Brady, 127 Pa. St. 169, 17 Atl. Rep. 885 [1889].

¹⁸ M'Kusick v. Stillwater, 44 Minn. 372, 46 N. W. 769 [1890].

¹⁹ State, Pudney, Pros. v. Village of Passaic, 37 N. J. L. (8 Vr.) 65 [1874].

²⁰ Ziegler v. City of Chicago, 213 Ill. 61, 72 N. E. 719 [1904].

²¹ People ex rel. v. Glenn, 207 Ill. 50, 69 N. E. 568 [1903].

²² Conde v. City of Schenectady, 164 N. Y. 258, 58 N. E. 130 [1900].

²³ Ottumwa Brick & Construction Co. v. Ainley, 109 Ia. 386, 80 N. W. 510 [1899].

²⁴ Allen v. City of Davenport, 132 Fed. 209, 65 C. C. A. 641 [1904]; Comstock v. Eagle Grove City, 133 Ia. 589, 111 N. W. 51 [1907].

²⁵ Mayor and Common Council of Newark v. State, Batten, Pros., 32 N. J. L. (3 Vr.) 453 [1865].

²⁶ Smith v. Tobener, 32 Mo. App. 601 [1888].

not applicable where no petition has been filed,²⁷ nor where a remonstrance which has been properly made has been ignored entirely.²⁸ Such statutes are applicable where an error has been made in the Christian name of the owner,²⁹ but not where the assessment is made against one who is not the owner of the property assessed.³⁰ A statute which transfers pending improvements to another department of the city government does not cure existing defects.³¹ A decree of court ordering that "any and every irregularity or informality . . . or any omission or defective act . . . be and the same are hereby corrected, supplied and made to conform to law as by statute in such cases made and provided," does not cure defects in the absence of specific statutory authority.³²

§ 982. Curative statutes not applicable in case of fraud.

By the terms of some curative statutes, they are not applicable in cases of fraud.¹ It has been held that a curative statute providing for an assessment to pay a contractor, whose contract has been held to be a nullity, is unconstitutional.² Under some statutes, an assessment cannot be declared to be invalid on account of any irregularity or technicality, except in cases of fraud or repaving.³ Under such statutes, failure to levy the assessment within the time fixed by law is regarded as a mere irregularity;⁴ and so is failure to publish notice of the final passage of the resolution authorizing the improvement,⁵ or irregularity in appointing a commissioner.⁶ A false certificate of the

²⁷ *People ex rel. Hayes v. City of Brooklyn*, 71 N. Y. 495 [1877].

²⁸ *Portland v. Oregon Real Estate Co.*, 43 Or. 423, 72 Pac. 322 [1903]; *Oregon Real Estate Company v. Portland*, 40 Or. 56, 66 Pac. 442 [1901].

²⁹ *Langan v. Bitzer*, — Ky. —, 26 Ky. Law Rep. 579, 82 S. W. 280 [1904].

³⁰ *State, Ackerson, Pros. v. Inhabitants, etc., of North Bergen in County of Hudson*, 39 N. J. L. (10 Vr.) 694 [1877].

³¹ *In the Matter of Livingston*, 121 N. Y. 94, 24 N. E. 290 [1890].

³² *Holland v. The People ex rel. Miller*, 189 Ill. 348, 59 N. E. 753 [1901].

¹ *Dederer v. Voorhies*, 81 N. Y. 154 [1880].

² *Granger v. City of Buffalo*, 6 Abb. N. C. 238 [1879]. But see §§ 410, 424.

³ *In the Matter of Burmeister*, 76 N. Y. 174 [1879]; (reversing *In the Matter of Burmeister*, 9 Hun, 613 [1877]); *In the Matter of Deering*, 14 Daly (N. Y.) 89 [1886]; *In the Matter of Belmont*, 12 Hun, 558 [1878].

⁴ *In the Matter of Deering*, 14 Daly (N. Y.) 89 [1886].

⁵ *In the Matter of Agnew*, 4 Hun, 435 [1875].

⁶ *Astor v. The Mayor, Aldermen and Commonalty of the City of New York*, 62 N. Y. 580 [1875].

rate at which the work is to be done,⁷ or collusion and fraud in awarding the contract,⁸ will invalidate the assessment.⁹ The mere fact that the contract was not let to the lowest bidder does not invalidate the assessment under such a statute, unless fraud is shown.¹⁰ The opening or enlarging of a street is "a local improvement," and a "public work" within the meaning of this statute.¹¹ Such statute does not, by its terms, apply to repaving, where the property owner has already paid assessments for the original paving.¹² Within the meaning of this statute, the term "street" includes the sidewalk and gutters, and "paving" includes the laying of sidewalks.¹³ Accordingly, the work of setting curb and gutter stone and paving a sidewalk which has been done before, is repaving within the meaning of such statute, and is not within the curative provisions thereof.¹⁴ Provisions have also been made requiring some specified officer to investigate the proceedings, and to give a certificate that the proceedings are free from fraud, if he finds such to be the fact. Such certificate is regarded as conclusive.¹⁵ It may be provided that if fraud or extravagance are found to exist, the assessment shall be reduced in a proportionate amount instead of being vacated entirely.¹⁶

§ 983. Retroactive effect of curative statutes.

If the curative statute clearly shows that the legislature intended it to apply to prior assessments, it is not, on that account, invalid;¹ even "though thereby a right of action which had

⁷ In the Matter of Beekman, 18 Howard, 460 [1859].

⁸ In the Matter of Eightieth Street, as to Certain Property Assessed, 31 Howard, 99 [1865].

⁹ See § 484 *et seq.*

¹⁰ Bennett's Case, 12 Abb. Pr. 127 [1861].

¹¹ Astor v. Mayor, Aldermen and Commonalty of the City of New York, 62 N. Y. 580 [1875].

¹² In the Matter of Astor, 53 N. Y. 617 [1873].

¹³ In the Matter of Burmeister, 76 N. Y. 174 [1879]; (reversing In the Matter of Burmeister, 9 Hun, 613 [1877]).

¹⁴ In the Matter of Burmeister, 76 N. Y. 174 [1879]; (reversing In the

Matter of Burmeister, 9 Hun, 613 [1877]); In the Matter of Burke, 62 N. Y. 224 [1875]; In the Matter of Phillips, 60 N. Y. 16 [1875]. The opposite view was persisted in by the lower courts after the earlier decisions of the court of appeals. In the Matter of Fay, 12 Hun, 490 [1878].

¹⁵ Matter of the Petition of Kerdall, 85 N. Y. 302 [1881]; In the Matter of Peugnet, 67 N. Y. 441 [1876]; Brown v. Mayor, 63 N. Y. 239 [1875].

¹⁶ In the Matter of Meade, 13 Hun, 349 [1878]; In the Matter of McCormack, 60 Barb. 128 [1870].

¹ Mattingly v. District of Columbia, 97 U. S. 687, 24 L. 1098 [1878]; City and County of San Francisco v.

been vested in an individual should be divested.”² It is generally held that the legislature may, by a subsequent curative statute, obviate the effects of any irregularity or defect in steps in the assessment proceedings with which it could have dispensed in advance.³ Retroactive curative statutes are held to apply to prior assessments, even if suit to recover the assessment is pending when the curative statute is passed,⁴ or if the property owner has brought proceedings in certiorari to test the validity of the assessment.⁵ A statute making valid a defectively incorporated municipality, and affirming its acts, avoids the effect of failure to file a statement of the election of the town board of

Certain Real Estate, 42 Cal. 513 [1872]; *Daly v. Gubbins*, — Ind. —, 82 N. E. 659 [1907]; *In the Matter of Peugnet*, 67 N. Y. 441 [1876]; *In the Matter of Delaware & Hudson Canal Company*, 60 Hun, 204, 14 N. Y. Supp. 585 [1891]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

² *City of Chester v. Black*, 132 Pa. St. 568, 6 L. R. A. 802, 19 Atl. 276 [1890].

³ *Daly v. Gubbins*, — Ind. —, 82 N. E. 659 [1907]; *City of Clinton v. Walliker*, 98 Ia. 655, 68 N. W. 431 [1896]; *Richman v. Supervisors of Muscatine County*, 77 Ia. 513, 4 L. R. A. 445, 42 N. W. 422 [1889]; *Mason v. Spencer*, 35 Kan. 512, 11 Pac. 402 [1886]; *City of Emporia v. Norton*, 13 Kan. 569 [1874]; *Gillespie v. Police Jury of Concordia*, 5 La. Ann. 403 [1850]; *Constantine v. City of Albion*, 148 Mich. 403, 111 N. W. 1068 [1907]; *State, Bogart, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 57 [1875]; *State, Delaware, Lackawanna & Western Railroad Company v. City of Passaic*, 37 N. J. L. (8 Vr.) 137 [1874]; *State, Pudney, Pros. v. Village of Passaic*, 37 N. J. L. (8 Vr.) 65 [1874]; *State, ex rel. Doyle v. Mayor and Common Council of City of Newark*, 34 N. J. L. (5 Vr.) 236 [1876]; *State, Board of Chosen Freeholders of County of Hudson, Pros. v. Road Commissioners*, 41 N. J. L. (12 Vr.)

83 [1879]; *State, Walter, Pros. v. Town of Union, in County of Hudson*, 33 N. J. L. (4 Vr.) 350 [1869]; *State, New Jersey Railroad & Transfer Company v. Mayor and Common Council of City of Newark*, 27 N. J. L. (3 Dutcher) 185 [1858]; *Smith v. City of Buffalo*, 159 N. Y. 427, 54 N. E. 62 [1899]; *In the Matter of Hearn*, 96 N. Y. 378 [1884]; *Tift v. City of Buffalo*, 82 N. Y. 204 [1880]; *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877]; *Hatzung v. City of Syracuse*, 92 Hun, 203, 36 N. Y. St. 521 [1895]; *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874]; *Miller v. Graham*, 17 O. S. 1 [1866]; *Reed v. City of Cincinnati*, 8 Ohio C. C. 393 [1894]; *Whitney v. City of Pittsburgh*, 147 Pa. St. 351, 30 Am. St. Rep. 740, 23 Atl. 395 [1892]; *Erie City v. Reed*, 113 Pa. St. 468, 6 Atl. 679, *Hewitt's Appeal*, 88 Pa. St. 55, *Kelly v. Pittsburgh*, 85 Pa. St. 170; *Commonwealth v. Marshall*, 69 Pa. St. 328; *Magee v. Commonwealth*, 46 Pa. St. 358; *Schenley v. Commonwealth for the use of the City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859].

⁴ *City of Clinton v. Walliker*, 98 Ia. 655, 68 N. W. 431 [1896].

⁵ *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877].

trustees.⁶ In other cases, however, such statutes are held to be effectual, if at all, only from the date of their enactment,⁷ and hence not applicable to suits pending to enforce the assessment,⁸ nor effective to defeat a pending appeal.⁹ Such curative statutes are held not to be applicable where a judgment has been rendered declaring the assessment to be invalid.¹⁰ A curative statute which is passed while assessment proceedings are pending, may be applicable to such proceedings, and may prevent the effect of irregularities which would otherwise render the assessment invalid.¹¹ Even if the original statute is unconstitutional by reason of failure to protect the rights of the property owner, as where no provision for notice is given,¹² a curative statute which provides for notice, and which becomes effective when the proceedings have reached the stage at which notice should be given, has been held to render such proceedings valid, if notice was in fact given under the new statute.¹³ If the original statute providing for assessment is defective, as where it fails to provide a method for collecting such assessments,¹⁴ such defect may be cured by a subsequent statute. Curative statutes are not regarded as retroactive in the absence of words showing the intention of the legislature to make them apply to prior assessments.¹⁵ If the statute purports to cure all defects in the assessment, including the failure to observe the constitutional rights of the property owner, as well as to comply with the requirements which are merely statutory, it is held that such statute is valid as to such requirements which are merely statutory, although it is invalid as to the constitutional requirements.¹⁶ Retroactive curative statutes, providing that an assessment shall

⁶ *Daly v. Gubbins*, — Ind. —, 82 N. E. 659 [1907].

⁷ *People of the City of San Francisco v. Kinsman*, 51 Cal. 92 [1875]; *Reis v. Graff*, 51 Cal. 86 [1875].

⁸ *People of the City and County of San Francisco v. O'Neil*, 51 Cal. 91 [1875].

⁹ *Lammers v. Balfe*, 41 Ind. 218 [1872].

¹⁰ *People on the Petition of Butler v. Board of Supervisors of Saginaw County*, 26 Mich. 22 [1872].

¹¹ *Blake v. The People for use of Caldwell*, 109 Ill. 504 [1884].

¹² *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

¹³ *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Ia. 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

¹⁴ *Todd v. McFarland*, 20 App. D. C. 176 [1902].

¹⁵ *Starr v. City of Burlington*, 45 Ia. 87 [1876]; *In the Matter of Eager*, 58 Barb. 557 [1871].

¹⁶ *City of Emporia v. Norton*, 13 Kan. 369 [1874].

not be set aside on account of irregularities or defects in procedure, are held to apply to non-jurisdictional defects,¹⁷ such as defects in the form of the oath,¹⁸ or in the method of letting the contract,¹⁹ or in failure to make formal presentation to the mayor,²⁰ or in case of the failure of the majority of the property owners to petition for the improvement,²¹ or failure to secure the consent of the majority of the property owners.²² Such statutes are applicable where the report is defective,²³ as not describing the property assessed for benefits,²⁴ or where a notice has not been given to the property owner to do the work himself,²⁵ or where notice of the presentation of an amended report has not been given,²⁶ or where the resolution and ordinance have been passed irregularly,²⁷ or where the ordinance has not been recorded as provided by statute.²⁸ Such statutes are applicable where a town illegally incorporated has been re-incorporated.²⁹ In some jurisdictions it has been said that a retroactive curative statute which attempts to legalize a void assessment, is invalid.³⁰

¹⁷ *Smith v. City of Buffalo*, 159 N. Y. 427, 54 N. E. 62 [1899].

¹⁸ *State, Board of Chosen Freeholders of County of Hudson, Pros. v. Road Commissioners*, 41 N. J. L. (12 Vr.) 83 [1879]; *State, Walter, Pros. v. Town of Union in County of Hudson*, 33 N. J. L. (4 Vr.) 350 [1869].

¹⁹ *State, Board of Chosen Freeholders of County of Hudson, Pros. v. Road Commissioners*, 41 N. J. L. (12 Vr.) 83 [1879].

²⁰ *State, New Jersey Railroad & Transfer Co., Pros. v. Mayor and Common Council of City of Newark*, 27 N. J. L. (3 Dutcher) 185 [1858].

²¹ *Richman v. Supervisors of Muscatine County*, 77 Ia. 513, 4 L. R. A. 445, 14 Am. St. Rep. 308, 42 N. W. 422 [1889]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

²² *Whitney v. City of Pittsburg*, 147 Pa. St. 351, 30 Am. St. Rep. 740, 23 Atl. 395 [1892].

²³ *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877].

²⁴ *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877].

²⁵ *In re Amberson Avenue, Appeal*

of Childs, 179 Pa. St. 634, 36 Atl. 354 [1897].

²⁶ *Astor v. Mayor, Aldermen and Commonalty of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874].

²⁷ *Reed v. City of Cincinnati*, 8 Ohio C. C. 393 [1894].

²⁸ *Commonwealth to use of Allegheny City v. Marshall*, 69 Pa. St. (19 P. F. Smith) 328 [1871].

²⁹ *Abernethy v. Town of Medical Lake*, 9 Wash. 112, 37 Pac. 306 [1894].

³⁰ *Fanning v. Schammell*, 68 Cal. 428, 9 Pac. 427 [1886]; *People v. McCune*, 57 Cal. 153 [1880]; *Schumacker v. Toberman*, 56 Cal. 508 [1880]; *Brady v. King*, 53 Cal. 44 [1878]; *People of the State of California v. Lynch*, 51 Cal. 15, 21 Am. 677 [1875]; *People of the State of California v. Hastings*, 34 Cal. 571 [1868]; *Windsor v. District of Columbia*, 7 Mackey (D. C.) 96 [1889]; *Hopkins v. Mason*, 42 Howard, 115 [1871]; *City of Portland v. Oregon Real Estate Co.*, 43 Or. 423, 72 Pac. 322 [1903]; *Oregon Real Estate Co. v. Portland*, 40 Or. 56, 66 Pac. 442 [1901].

In these jurisdictions, however, retroactive statutes of other types,³¹ such as statutes legalizing an unauthorized reclamation district,³² or rendering valid an unauthorized order of a board of supervisors establishing the location, width and grade of streets,³³ have been held to be valid. Assessments, invalid because the statute providing for their levy and collection has been repealed, may be revived by a subsequent statute.³⁴ Such statute may authorize their collection only as far as debts have been incurred by the public corporation in reliance on such assessments.³⁵ It has been held that a retroactive curative statute cannot apply to make valid a sale of property for an assessment which was invalid when the sale was made, and which could be attacked collaterally by proceedings to set aside the sale, or to retain possession of the land which was sold.³⁶ In some jurisdictions it has been held that a curative act cannot apply to suits pending when the curative act was passed;³⁷ and that no action of the city, taken after such suits are brought, can make such assessment valid.³⁸ In other jurisdictions it has been held that curative acts can apply even to suits pending when the act was passed.³⁹ A curative statute, passed after the rendition of a judgment holding an assessment invalid, cannot set aside such judgment and make such assessment valid.⁴⁰ A statute which does not purport to be a curative statute, but merely to authorize a re-assessment, is not subject to objection on that

³¹ Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892]; *Himmelman v. Hoadley*, 44 Cal. 213 [1872]; *City and County of San Francisco v. Certain Real Estate*, 42 Cal. 513 [1872].

³² Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892].

³³ *Himmelman v. Hoadley*, 44 Cal. 213 [1872].

³⁴ *Marion & Monroe Gravel Road Co. v. McClure*, 66 Ind. 468 [1879].

³⁵ *Marion & Monroe Gravel Road Co. v. McClure*, 66 Ind. 468 [1879].

³⁶ *Lennon v. Mayor, Aldermen and Commonalty of City of New York*, 55 N. Y. 361 [1874]; *Lennon v. Mayor, etc., of New York*, 5 Dalv. 347 [1874]; *Hopkins v. Mason*, 42 Howard, 115 [1871]; *Hopkins v. Mason*,

61 Barb. 469 [1871]; *Zeigler v. Flack*, 54 N. Y. Sup. Ct. Rep. 69 [1886].

³⁷ *People of the City and County of San Francisco v. Kinsman*, 51 Cal. 92 [1875]; *Reis v. Graff*, 51 Cal. 86 [1875]; *People of the City and County of San Francisco v. O'Neil*, 51 Cal. 91 [1875].

³⁸ *Pennsylvania Company v. Cole*, 132 Fed. 668 [1904].

³⁹ *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877].

⁴⁰ *Searcy v. Patriot and Barkworks Turnpike Company*, 79 Ind. 274 [1881]; *McManus v. Hornaday*, 124 Ia. 267, 104 Am. St. Rep. 316, 100 N. W. 33 [1904]; *Mayor and Common Council of Baltimore v. Horn*, 26 Md. 194 [1866].

account; and may authorize a re-assessment, even if a judgment holding the original assessment invalid has been rendered.⁴¹ The act of the court in making a correct assessment is said not to be a ratification of a precept issued on a former void assessment.⁴² A curative act providing that if the assessment is invalid, the city may, nevertheless, recover the proportion of the cost of the improvement properly chargeable on the property benefited, does not ratify an irregular assessment, but gives a new remedy to the city upon the adjudication of the invalidity of the original assessment, and, accordingly, gives the property owner his day in court, and complies with the constitutional requirement of due process of law.⁴³ Under such statutes a suit cannot be maintained on the original assessment.⁴⁴ Such curative statutes have been held not to apply where the original assessment statute was unconstitutional,⁴⁵ or where the assessment was invalid for want of some jurisdictional fact,⁴⁶ such as notice and hearing to the property owner.⁴⁷ A curative statute which forbids the setting aside of an assessment by reason of a defect in the notice does not prevent such defect from making the assessment invalid, if objection is made to such defect at once.⁴⁸ If a public corporation has begun an improvement to be paid for by local assessments, but the legislature could at the time have made the cost of such improvement a charge upon the city, to be paid by general taxation, the legislature may, after such improvement is begun, take away from the city the right to levy local assessments and require the city to pay the cost of the improvement out of its funds raised by general taxation.⁴⁹

⁴¹ *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578 [1872].

⁴² *Lammers v. Balfe*, 41 Ind. 218 [1872].

⁴³ *Oregon Real Estate Co. v. Gambell*, 41 Or. 61, 66 Pac. 441 [1901]; *Thomas v. Portland*, 40 Or. 50, 66 Pac. 439 [1901]; *Nottage v. City of Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.

⁴⁴ *Thomas v. Portland*, 40 Or. 50, 66 Pac. 349 [1901]; *Nottage v. City of Portland*, 35 Or. 539, 76 Am. St. Rep. 513, 58 Pac. 883.

⁴⁵ *State, Peckham, Pros. v. Mayor and Common Council of City of New-ark*, 43 N. J. L. (14 Vr.) 576 [1881].

⁴⁶ *Harris v. City of Ansonia*, 73 Conn. 359, 47 Atl. 672 [1900]; *Great Falls Ice Co. v. District of Columbia*, 19 D. C. 327 [1890].

⁴⁷ *State ex rel. Boice, Pros. v. Inhabitants of City of Plainfield*, 38 N. J. L. (9 Vr.) 95 [1875]; *Hille v. Neale*, 32 Ind. App. 341, 69 N. E. 713 [1904]; *State, Copeland, Pros. v. Village of Passaic*, 36 N. J. L. (7 Vr.) 382 [1873].

⁴⁸ *State, Leuly, Pros. v. Town of West Hoboken*, 53 N. J. L. (24 Vr.) 64, 20 Atl. 737 [1890].

⁴⁹ *O'Neill v. City of Hoboken*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 50 [1905].

§ 984. Curative ordinances and resolutions.

If an assessment is invalid through failure to comply with specific statutory requirements, the public corporation by which such proceedings have been instituted and conducted, cannot cure such defects and render the proceedings valid by passing a subsequent curative ordinance.¹ The assessment in such cases is defective through failure to comply with the requirements of the statute, and these requirements being imposed upon the public corporation by the superior power of the legislature cannot be dispensed with in advance by the public corporation, and accordingly cannot be cured by the subsequent acts of such public corporation. If power to ratify a void or defective assessment exists anywhere, it exists in the legislature and not in the public corporation.² The fact that power to levy a re-assessment in case of a defective assessment is given to the public corporation, does not empower such corporation to enact an ordinance by which a prior void or defective assessment is made valid without levying a re-assessment.³ Under specific statutory provisions, giving such authority to a city, such city may have power to make valid irregular or defective proceedings by a subsequent ordinance.⁴ Thus, under a statute providing that sewers should be of such dimensions as were prescribed by ordinance, and might be changed, enlarged or extended by ordinance, it was held that if the work was begun under a defective ordinance, but during its progress, another ordinance was passed curing the defect, the second ordinance would by virtue of these statutory provisions, render the assessment valid.⁵ A defective ordinance cannot, however, be cured by a resolution.⁶ It can be cured only by a subsequent ordinance.⁷

¹ *Pennsylvania Company v. Cole*, 132 Fed. 668 [1904]; *Meuser v. Risdon*, 36 Cal. 239 [1868]; *Zalesky v. City of Cedar Rapids*, 118 Ia. 714, 92 N. W. 657 [1902]; *Newman v. City of Emporia*, 32 Kan. 456, 4 Pac. 815 [1884]; *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853]; *Dickey v. Holmes*, 109 Mo. App. 721, 83 S. W. 982 [1904]; *In the Matter of Turfler*, 44 Barb. 46 [1865]; *Buckley v. City of Tacoma*, 9 Wash. 253, 37 Pac. 441 [1894]. But see as expressly views apparently contrary

Lucas Turner & Co. v. San Francisco, 7 Cal. 463 [1857].

² *Meuser v. Risdon*, 36 Cal. 239 [1868].

³ *McManus v. Hornaday*, 124 Ia. 267, 104 Am. St. Rep. 316, 100 N. W. 33 [1904].

⁴ *Kiley v. Craner*, 51 Mo. 541 [1873].

⁵ *Kiley v. Craner*, 51 Mo. 541 [1873].

⁶ *City of St. Joseph ex rel. Danaher v. Wilshire*, 47 Mo. App. 125 [1891].

⁷ *City of St. Joseph to use of Danaher v. Wilshire*, 47 Mo. App. 125 [1891].

CHAPTER XIX.

ESTOPPEL.

A.—ESTOPPEL BY DEED.

§ 985. Estoppel by deed in assessment proceedings.

It is sometimes sought to prevent a property owner from setting up defects and irregularities in an assessment which would ordinarily render it invalid by applying the doctrine that the parties to a deed or those claiming under them, are estopped from denying the truth of the recitals therein. The difficulty in applying this doctrine in assessment proceedings is that the city is not a party to the conveyance, and that its claim is rather adverse to both parties than under either of them. Nevertheless, the doctrine of estoppel by deed has been applied to a very considerable extent. A grantee who takes land, and is charged with actual knowledge of the assessments thereon, has not been allowed to complain of the injustice of the assessment.¹ If a grantee acquires property under a deed by which it is provided that such property shall be "subject" to assessments, it is generally held that the term "assessments" in this connection means valid assessments, and that the property thus acquired is not subject to the assessments if invalid; and that, accordingly, the grantee is not estopped by his conveyance from attacking such assessment.² A covenant that a grantee is to pay "all street assessments and sewer assessments," is construed as referring to valid assessments only, and such covenant does not estop the grantee from testing the validity of certain assessments.³ A conveyance "subject to all incumbrances of record," includes

¹ *Farwell v. Des Moines Brick Mfg. Co.*, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896].

² *Batty v. City of Hastings*, 63 Neb. 26, 88 N. W. 139 [1901]; *Matter of Pennie*, 108 N. Y. 364, 15 N. E. 611 [1888]; In the *Matter of*

Pennie, 45 Hun, 391 [1887]; In the *Matter of Pennie*, 19 Abb. N. C. 117; *Waldschmidt v. Bowland*, 27 Ohio Cir. Ct. R. 782 [1905].

³ *Walsh v. Sims*, 65 O. S. 211, 62 N. E. 120 [1901].

valid incumbrances only, and does not prevent the grantee or those claiming under him from attacking prior invalid assessments.⁴ If the grantee takes by a deed whereby he assumes and agrees to pay certain specified assessments, he is held to be estopped from denying their validity in some jurisdictions;⁵ apparently upon the theory that such promise is for the benefit of the city, and that, accordingly, the city, though not a party to the contract, may sue thereon, and since it may enforce its liability by suit upon the promise, circuitry of action may be prevented by denying to the grantee the right to attack the validity of the assessment. In other jurisdictions it is held that the grantee is not estopped by such a covenant,⁶ on the theory that the city is not a party to such deed, and cannot take advantage thereof. The difference of the authorities on this point may be referred in part to their difference on the question of a right of a person not a party to a contract to sue on a covenant entered into between the parties to the contract for his benefit. A covenant by which the grantee is to pay assessments and protect the grantor, has been held not to estop the grantee from attacking the validity of the assessment.⁷ A property owner who conveys land by deeds recognizing an existing plat, has been held to be estopped to deny the existence and validity of such plat.⁸ The mere fact that the owner of land has submitted an acknowledged

⁴ *Carter v. Cemansky*, 126 Ia. 506, 102 N. W. 438 [1905].

⁵ *Jebb v. Sexton*, 84 Ill. App. 45 [1899]; *Eddy v. City of Omaha*, 72 Neb. 550, 101 N. W. 25 [1904]; (modified on rehearing 102 N. W. 70 [1905] and 103 N. W. 692 [1905]); In the Matter of the Petition of Conley to Vacate an Assessment, 22 Hun (N. Y.) 603 [1880]; *Caldwell v. Columbus*, 56 O. S. 759 [1897]. (In this case the language used was: "All moneys, taxes, and assessments whatsoever, created by or existing in consequence of any improvements of streets and avenues touching said lots, or either of them, whether under what is known as the Taylor law or otherwise, that are now due or may hereafter become due, said grantee assumes and agrees to pay as a part of the purchase price of

said lots.") *Waldschmidt v. Bowland*, 27 Ohio C. C. 782 [1905].

⁶ *State, Evans, Pros. v. Mayor and Common Council of Jersey City*, 35 N. J. L. (6 Vr.) 381 [1872]; In the Matter of Pennie, 46 Hun, 391 [1887]; In the Matter of Pennie, 19 Abb. N. C. 117.

⁷ *Walsh v. Sims*, 65 O. S. 211, 62 N. E. 120 [1901]. (In this case the language used was: "The taxes and penalties now due, and taxes for 1892, are to be paid by the said administrator for all street assessments, and sewer assessments are to be paid by the said purchaser and grantee.")

⁸ *Harts v. People ex rel. Kochersberger*, 171 Ill. 373, 49 N. E. 539 [1898]; *Grimm v. Shickle*, 4 Mo. App. 585 [1877]; *Reynolds v. Newton*, 14 Ohio C. C. 433 [1893].

and certified plat to the council for approval, does not estop him from denying its binding effect after it has been approved, and before it has been recorded, or land has been sold with reference thereto.⁹

B.—ESTOPPEL OF RECORD.

§ 986. Adjudication of court as estoppel.

If a court of competent jurisdiction has passed upon the question of the validity of an assessment, its adjudication upon such question is final and binding as between the parties to such proceeding, and cannot be attacked collaterally. If appeal or proceedings in error are not taken, such judgment is absolutely conclusive of the rights of the parties.¹ This general principle applies in whatever form the question of the effect of an adjudication may arise. A common method of presenting this question is found where, under the procedure in force in some states, an assessment is taken before a court of competent jurisdiction for confirmation as a part of the ordinary procedure of levying the same. If the court before which such confirmation proceedings are brought, has jurisdiction to hear and determine the questions arising upon confirmation, the parties to such confirmation proceedings are estopped from denying the validity of the assessment in subsequent proceedings, other than appeal or error to the judgment of confirmation. A property owner who does not resort to appeal or error proceedings is precluded from attacking the validity of the judgment of confirmation rendered under these circumstances.² The conclusive effect of a judgment of confirmation is by no means limited to its operation against prop-

⁹ *People ex rel. Kochersperger v. Clifford*, 166 Ill. 165, 46 N. E. 770 [1897].

¹ *Bucknall v. Story*, 46 Cal. 489, 13 Am. Rep. 220 [1873]; *Elston v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361 [1866]; *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12 [1896]; *Depuy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016 [1892]; *Jamison v. City of New Orleans*, 12 La. Ann. 346 [1857]; *Hering v. Chambers*, 103 Pa. St. 172 [1883]. This principal seems to be ignored in *Mitchell v. Lane*, 62 Hun, 253, 16 N. Y. Supp. 707 [1891].

² *Hale v. Moore*, 82 Ark. 75, 100

S. W. 742 [1907]; *People ex rel. Thompson v. Judson*, 233 Ill. 280, 84 N. E. 233 [1908]; *Chicago & W. I. R. Co. v. City of Chicago*, 230 Ill. 9, 82 N. E. 399 [1907]; *City of Chicago v. Galt*, 225 Ill. 368, 80 N. E. 285 [1907]; *People ex rel. Hanberg v. Second Ward Savings Bank*, 224 Ill. 191, 79 N. E. 628 [1906]; *Noonan v. People ex rel. Hanberg*, 221 Ill. 567, 77 N. E. 930 [1906]; *Board of Education of City of Chicago v. People ex rel. Commissioners of Lincoln Park*, 219 Ill. 83, 76 N. E. 75 [1905]; *Phillips v. People ex rel. Goedtner*, 218 Ill. 450, 75 N. E. 1016 [1905]; *People ex rel. Russel v.*

erty owners; but the city is concluded by such judgment of

Brown, 218 Ill. 375, 75 N. E. 989 [1905]; Wagg v. People ex rel. Hanberg, 218 Ill. 337, 75 N. E. 977 [1905]; Harman v. People ex rel. Munsterman, 214 Ill. 454, 73 N. E. 760 [1905]; Gage v. People ex rel. Hanberg, 213 Ill. 468, 72 N. E. 1108 [1905]; People ex rel. Merriam v. Illinois Central Railroad Company, 213 Ill. 367, 72 N. E. 1069 [1904]; Lyman v. City of Chicago, 211 Ill. 209, 71 N. E. 832 [1904]; Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904]; Gage v. People ex rel. Hanberg, 207 Ill. 61, 69 N. E. 635 [1904]; Perry v. People ex rel. Hanberg, 206 Ill. 334, 69 N. E. 63 [1903]; People ex rel. Raymond v. Fuller, 204 Ill. 290, 68 N. E. 371 [1903]; Bass v. People ex rel. Raymond, 203 Ill. 206, 67 N. E. 806 [1903]; Chew v. People ex rel. Raymond, 202 Ill. 380, 66 N. E. 1069 [1903]; Walker v. People ex rel. Raymond, 202 Ill. 34, 66 N. E. 827 [1903]; Shepard v. People ex rel. Raymond, 200 Ill. 508, 65 N. E. 1068 [1903]; People ex rel. Raymond v. Talmadge, 194 Ill. 67, 61 N. E. 1049 [1901]; Gross v. People ex rel. Raymond, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901]; Fischback v. People ex rel. Tetherington, 191 Ill. 171, 60 N. E. 887 [1901]; Conlin v. People ex rel. Lassig, 190 Ill. 400, 60 N. E. 55 [1901]; Illinois Central Railway Co. v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901]; Johnson v. People ex rel. Raymond, 189 Ill. 83, 59 N. E. 515 [1901]; Glover v. People ex rel. Raymond, 188 Ill. 576, 59 N. E. 429 [1901]; Blount v. People ex rel. Raymond, 188 Ill. 538, 59 N. E. 241 [1901]; Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306 [1900]; Perisho v. People ex rel. Gannaway, 185 Ill. 334, 56 N. E. 1134 [1900]; Piper v. People ex rel. Gannaway, 183 Ill. 436, 56 N. E. 84 [1900]; McManus v. People ex rel. Raymond, 183 Ill. 391, 55 N. E. 886 [1899];

Larson v. City of Chicago, 172 Ill. 298, 50 N. E. 179 [1898]; Young v. People ex rel. Kochersperger, 171 Ill. 299, 49 N. E. 503 [1898]; Larson v. People ex rel. Kochersperger, 170 Ill. 93, 48 N. E. 443 [1897]; Hammond v. People for use, etc., 169 Ill. 545, 48 N. E. 573 [1897]; Walker v. People ex rel. Kochersperger, 169 Ill. 473, 48 N. E. 694 [1897]; People ex rel. Kochersperger v. Markley, 166 Ill. 48, 46 N. E. 742 [1897]; Cass v. People ex rel. Kochersperger, 166 Ill. 126, 46 N. E. 729 [1897]; People ex rel. Kochersperger v. Calvin, 165 Ill. 67, 46 N. E. 14 [1897]; People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. 10 [1897]; People ex rel. Kochersperger v. Eggers, 164 Ill. 515, 45 N. E. 1074 [1897]; Steenberg v. People ex rel. Kochersperger, 164 Ill. 478, 45 N. E. 970 [1897]; Gage v. People ex rel. Kochersperger, 163 Ill. 39, 44 N. E. 819 [1896]; Doremus v. People ex rel. Kochersperger, 161 Ill. 26, 43 N. E. 701 [1896]; Keeler v. People ex rel. Kern, 160 Ill. 179, 43 N. E. Rep. 342 [1896]; Kirchman v. People ex rel. Kochersperger, 159 Ill. 321, 42 N. E. 883 [1896]; Hertig v. People ex rel. 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879 [1896]; People ex rel. Mannen v. Green, 158 Ill. 594, 42 N. E. 163 [1895]; Fisher v. People ex rel. Kern, 157 Ill. 85, 41 N. E. 615 [1895]; People ex rel. Kern v. Ryan, 156 Ill. 620, 41 N. E. 180 [1895]; William Riebling v. The People for the use of the Columbian Levee and Drainage District, 147 Ill. 120, 35 N. E. 467 [1894]; Clark v. The People ex rel. 146 Ill. 348, 35 N. E. 60 [1893]; Chicago & Northwestern Railway Co. v. People, 120 Ill. 104, 11 N. E. 418 [1887]; LeMoyne v. West Chicago Park Commissioners, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48 [1886]; Kedzie v. Park Commissioners, 114 Ill. 280, 2 N. E. 182 [1886]; (distinguished in Derby v. West Chicago Park Commission-

confirmation,³ and, accordingly, cannot levy a subsequent assessment for the same improvement on the ground that the confirmation of the original assessment was defective or irregular,⁴ even if the city of its own motion but without the consent of the property owners, repeals the improvement ordinance and obtains an order vacating such judgment before enacting a new ordinance and attempting to levy a new assessment.⁵ Parties to a proceeding in which is rendered a judgment concerning the validity of an assessment are estopped as to all questions which are adjudicated.⁶ The fact that the property owner does not appear and

ers, 154 Ill. 213, 40 N. E. 438 [1894], where the attack was direct as being on appeal); *Schertz v. The People ex rel. Taylor*, 105 Ill. 27 [1882]; *Andrews v. People ex rel. Rumsey*, 83 Ill. 529 [1876]; *The Chicago & Northwestern Railroad Company v. The People ex rel. Miller*, 83 Ill. 467 [1876]; *Lehmer v. The People ex rel. Miller*, 80 Ill. 601 [1875]; *The People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875]; *Jebb v. Sexton*, 84 Ill. App. 45 [1899]; *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12 [1896]; *Tolin v. Jones*, 33 Ind. App. 423, 71 N. E. 678 [1904]; *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. Rep. 829 [1899]; *Hayday, Pros. v. Ocean City*, 67 N. J. L. (38 Vr.) 155, 50 Atl. 584 [1901]; *Poillon, Pros. v. Brunner*, 66 N. J. L. 116, 48 Atl. 541 [1901]; *Stockton v. Mayor and Common Council of the City of Newark*, 58 N. J. L. (28 Vr.) 116, 32 Atl. Rep. 67 [1895]; *Tingue v. Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625 [1886]; *Mayer v. Mayor, Aldermen and Commonalty of New York*, 101 N. Y. 284, 4 N. E. 336 [1886]; *Dolan v. The Mayor, Aldermen and Commonalty of New York*, 62 N. Y. 472 [1875]; *Meserole v. Mayor and Common Council of Brooklyn*, 8 Paige's Chan. 193 [1840]; *Murray v. Graham*, 6 Paige's Chan. Rep. (N. Y.) 622 [1837]; *Morning Park Side Case*, 10 Abb. Pr. (N. S.) 338 [1870]; *contra*, *Astor v. Mayor, Aldermen and Commonalty*

of City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874]. That confirmation is not a finality, see *Nalle v. City of Austin*, — Tex. Civ. App. —, 103 S. W. 825 [1907].

³ *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306 [1900].

⁴ *Rich v. City of Chicago*, 187 Ill. 396, 58 N. E. 306 [1900]; *McChesney v. City of Chicago*, 188 Ill. 423, 58 N. E. 982 [1900]; *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. Rep. 702 [1896].

⁵ *McChesney v. City of Chicago*, 161 Ill. 110, 43 N. E. Rep. 702 [1896]; *contra*, *Kansas City v. Mulkey*, 176 Mo. 229, 75 S. W. 973 [1903].

⁶ *Wood v. Jordan*, 125 Cal. 261, 57 Pac. 997 [1899]; *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *Marshall v. People ex rel. Smith*, 219 Ill. 99, 76 N. E. 70 [1905]; *Gage v. People ex rel. Hanberg*, 213 Ill. 410, 72 N. E. 1084 [1904]; *Downey v. People ex rel. Raymond*, 205 Ill. 230, 68 N. E. 807 [1903]; *Markley v. People ex rel. Lochersperger*, 171 Ill. 260, 63 Am. St. Rep. 234, 49 N. E. 502 [1898]; *People v. Weber*, 164 Ill. 412, 45 N. E. 723 [1897]; *Village of Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238 [1889]; *Gage v. Parker*, 103 Ill. 528 [1882]; *McEnery v. Town of Sullivan*, 125 Ind. 407, 25 N. F. 540 [1890]; *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *White v. Fleming*, 114

contest the validity of the assessment, and that a default judgment is taken against him, does not prevent such default judgment from being conclusive as between the parties.⁷ Upon the same principle, if it has been determined, in a suit to enjoin an assessment, that certain officials have jurisdiction to order the improvement in question, the same objection cannot be interposed in a subsequent injunction proceeding.⁸ Where an assessment has been held in one action not to be a lien, such judgment is conclusive in subsequent litigation as between the same parties, and all who claim under them.⁹ Thus, where a charge for water was held to be a debt but not a lien in a suit to which the city was a party,¹⁰ such decree was held binding in a subsequent action in mandamus in which the city was the defendant, and a subsequent grantee of such property the real plaintiff.¹¹ It is the judgment of the court, and not the verdict of a jury which concludes the parties, under most systems of procedure.¹² Accordingly, if a city has power to dismiss a proceeding to open a

Ind. 560, 16 N. E. 487 [1877]; *Davis v. Lake Shore & Michigan Southern Ry. Co.*, 114 Ind. 364, 16 N. E. 639 [1887]; *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481 [1887]; *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886]; *Indianapolis & Cumberland Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316 [1885]; *McKinney v. State for use of Nixon*, 101 Ind. 355 [1884]; *Cox v. Bird*, 88 Ind. 142 [1882]; *Willard v. Hodapp*, 98 Minn. 269, 107 N. W. 954 [1906]; *London and Northwest American Mortgage Company v. Gibson*, 77 Minn. 394, 80 N. W. 777, 205 [1899]; *State of Minnesota v. Norton*, 63 Minn. 497, 65 N. W. 935 [1893]; *Hayday. Pros. v. Ocean City*, 67 N. J. L. (38 Vr.) 155, 50 Atl. 584 [1901]; *Davis v. Mayor and Common Council of City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; *State. Evans. Pros. v. Mayor and Common Council of Jersey City*, 35 N. J. L. (6 Vr.) 391 [1872]; *Martin v. Roney*, 41 O. S. 141 [1884]; *Hering v. Chambers*, 103 Pa. St. 172 [1883].

⁷ *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254 [1898]; *Fiske v. People ex rel. Raymond*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985 [1900]; *Johnson v. People ex rel. Kochersperger*, 177 Ill. 64, 52 N. E. 308 [1898]; *Cass v. People ex rel. Kochersperger*, 166 Ill. 126, 46 N. E. 729 [1897]; *People ex rel. Kochersperger v. Markley*, 166 Ill. 48, 46 N. E. Rep. 742 [1897]. See also, *Bordages v. Higgins*, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 726, 184 [1892]; (reversed by *Higgins v. Bordages*, 88 Tex. 453, 53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895]).

⁸ *Martin v. Roney*, 41 O. S. 141 [1884].

⁹ *Hoboken Manufactures Co. v. Mayor, etc., of Hoboken*, — N. J. L. —, 68 Atl. 1097 [1908].

¹⁰ *Hudson Trust and Savings Institution v. Carr-Curran Paper Mills Co.*, 58 N. J. Eq. (13 Dick.) 59, 43 Atl. 418 [1899].

¹¹ *Hoboken Manufactures Company v. Mayor, etc., of City of Hoboken*, — N. J. L. —, 68 Atl. 1098 [1908].

¹² *City of Chicago v. Goodwillie*, 208 Ill. 252, 70 N. E. 228 [1904].

street, and assess benefits and damages therefor, it may, if acting in good faith, dismiss such proceedings after the verdict of the jury and before the judgment of the court.¹³

§ 987. Adjudication conclusive as to all facts which might have been submitted.

Such adjudication is binding upon the parties, not merely as to the questions which actually were submitted to the court, but as to all which might have been submitted to the court in that proceeding if the record does not show affirmatively that the court declined to pass upon such question.¹ Thus, a property owner who sues to enjoin an assessment on the ground that it was passed with six others at one roll call, cannot then sue to reduce the assessment for a street running along the side of his lot to an amount apportioned according to the front of such lot upon the other street.²

§ 988. Adjudication not conclusive as to facts upon which court refused to pass.

If the record shows that the court passed upon certain questions only, such adjudication cannot be conclusive as to other questions which, as shown by the record, were not determined by the court.¹ Thus, if the court dismisses

¹³ *City of Chicago v. Goodwillie*, 208 Ill. 252, 70 N. E. 228 [1904].

¹ *Marshall v. People ex rel. Smith*, 219 Ill. 99, 76 N. E. 70 [1905]; *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903]; *Johnson v. People ex rel. Reed*, 202 Ill. 306, 66 N. E. 1081 [1903]; *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903]; *Vandersyde v. People ex rel. Raymond*, 195 Ill. 200, 62 N. E. 806 [1902]; *Gross v. People ex rel. Raymond*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901]; *Thomson v. People ex rel. Foote*, 184 Ill. 17, 56 N. E. 383 [1900]; *Kunst v. People ex rel. Kochersperger*, 173 Ill. 79, 50 N. E. 168 [1898]; *People ex rel. Kochersperger v. Lingle*, 165 Ill. 65, 46 N. E. Rep. 10 [1897]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Kedzie v. West*

Chicago Park Commissioners, 114 Ill. 280, 2 N. E. 182 [1886]; *Blake v. The People for Use of Caldwell*, 109 Ill. 504 [1884]; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Machler*, 158 Ind. 159, 63 N. E. Rep. 210 [1901]; *In the Matter of Bernheimer*, 47 Hun. 567 [1888]; *City of Cincinnati v. Emerson*, 57 O. S. 132, 48 N. E. 667 [1897]; *City of Cincinnati v. Lingo*, 13 Ohio C. C. 334 [1897].

² *City of Cincinnati v. Emerson*, 57 O. S. 132, 48 N. E. 667 [1897].

¹ *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878 [1904]; *Bracket v. Weiennett*, 115 Ill. 29, 3 N. E. 723 [1886]; *Manns v. City of Cincinnati*, 10 Ohio C. C. 549 [1895]; *In re Greentree Avenue*, 21 Pa. Super Ct. 177 [1902].

a proceeding on the ground that it is brought prematurely,² or that it is brought under the wrong statute,³ or that no ordinance authorizing the collection of the assessment has ever been passed,⁴ such order of dismissal is not conclusive on the merits when the defects pointed out by the court have been cured by subsequent action. A judgment of reversal for errors is not necessarily conclusive of the fact that no rights exist at all.⁵

§ 989. Adjudication not conclusive as to facts upon which court could not pass.

The parties to a proceeding are not concluded by an adjudication as to facts concerning the validity of the assessment which could not have been passed upon by the court rendering the adjudication.¹ Thus, if the determination of benefits is conferred upon tribunals other than those empowered to determine damages, an adjudication as to the amount of damages is not final as to the question of benefits.² Thus, from the nature of things, a decree cannot be conclusive as to facts which arise after the rendition of the decree,³ such as a variance between the improve-

¹ *Bracket v. Wiennett*, 115 Ill. 29, 3 N. E. 723 [1886].

² *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878 [1904].

³ *Schertz v. The People ex rel. Taylor*, 105 Ill. 27 [1882].

⁴ *Milton v. Stell*, — N. J. —, 65 Atl. 1118 [1907]; (affirming, 73 N. J. L. (44 Vr.) 261, 62 Atl. 1133 [1906]); *McDowell v. City of Asheville*, 112 N. C. 747, 17 S. E. 537 [1893].

⁵ *People v. Carr*, 231 Ill. 502, 83 N. E. 269 [1907]; *Biggins' Est. v. People ex rel. Tetherington*, 193 Ill. 601, 61 N. E. 1124 [1901]; *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747 [1898]; *Harris v. City of Chicago*, 162 Ill. 288, 44 N. E. 437 [1896]; *Pells v. People ex rel. Holmerain*, 159 Ill. 580, 42 N. E. 784 [1896]; *Owners of Land v. The People ex rel. Stooker*, 113 Ill. 206 [1886]; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Porter*, 38 Ind. Ann. 296, 74 N. E. 260, 76 N. E. 179 [1905]; *In the Matter of Flushing Avenue*, 98 N. Y. 445

[1885]; *In the Matter of the Department of Public Parks*, 85 N. Y. 459 [1881]; *In the Matter of Lange*, 85 N. Y. 307 [1881]; *People v. Starkweather*, 42 N. Y. Sup. Ct. Rep. 325 [1877]; *Ireland v. City of Rochester*, 51 Barb. 414 [1868]; *McDowell v. City of Asheville*, 112 N. C. 747, 17 S. E. 537 [1893]. See also *Farrell v. City of St. Paul*, 62 Minn. 271, 54 Am. St. Rep. 641, 29 L. R. A. 778, 64 N. W. 809 [1895].

² *Ross v. Prante*, — N. D. —, 115 N. W. 833 [1908].

³ *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902]; *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747 [1898]; *Pells v. People ex rel. Holmerain*, 159 Ill. 580, 42 N. E. 784 [1896]; *Brackett v. Wiennett*, 115 Ill. 29, 3 N. E. 723 [1886]; *Town of Underhill v. Town of Essex*, 64 Vt. 28, 23 Atl. 617 [1891].

ment as ordered and the improvement as subsequently constructed.⁴ The theory that a judgment of confirmation is final and conclusive between the parties is based upon the theory that the action of the court, taken upon existing facts, is binding upon the parties to the proceedings if the court has jurisdiction, in order that the rights of the parties may be settled once for all as a finality. Accordingly, a judgment or decree is not conclusive as to facts arising after the rendition thereof.⁵ Thus, where the question is presented whether certain property is rural or urban, a finding made several years before with reference to the same property, determining that it was rural, is not conclusive or even admissible in evidence, since the facts may have changed after the rendition of the former judgment, and the question at issue is the character of the property at the time of the subsequent proceedings.⁶ A finding of a board having no authority to pass on the question of the power of the city to make the assessment,⁷ or the constitutionality of the statute under which the assessment is levied,⁸ is not final as to such questions. An order in a suit foreclosing an equity of redemption, to pay an assessment out of the proceeds of the sale, is not an adjudication of its validity if the court is bound to make such order as long as the assessment is not set aside.⁹ A finding that certain lands are not benefited by the original construction of a ditch is not conclusive that such lands are not liable for its maintenance.¹⁰ If the first opportunity given to a property owner to be heard on a given defence is on application for a judgment of sale, such defence may then be interposed.¹¹

⁴ Gage v. People ex rel. Raymond, 193 Ill. 316, 56 L. L. A. 916, 61 N. E. 1045 [1901]; People ex rel. Raymond v. Whidden, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]. (But see explanation of People ex rel. Raymond v. Whidden in Young v. People ex rel. Raymond, 196 Ill. 603, 63 N. E. 1075 [1902]); Pells v. People ex rel. Holmgren, 159 Ill. 580, 42 N. E. 784 [1896].

⁵ Keith v. City of Philadelphia, 126 Pa. St. 575, 17 Atl. 883 [1889].

⁶ Keith v. Philadelphia, 126 Pa. St. 575, 17 Atl. 883 [1889].

⁷ In the Matter of Lange, 85 N. Y. 307 [1881].

⁸ In the Matter of the Department of Public Parks, 85 N. Y. 459 [1881].

⁹ Brehm v. The Mayor, Aldermen and Commonalty of the City of New York, 104 N. Y. 186, 10 N. E. 158 [1887].

¹⁰ Roundenbush v. Mitchell, 154 Ind. 616, 57 N. E. 510 [1900].

¹¹ People v. Carr, 231 Ill. 502, 83 N. E. 269 [1907].

§ 990. Adjudication in original assessment as affecting re-assessment.

A judgment finding an assessment invalid, is not a bar to a subsequent proceeding to levy a re-assessment for the cost of the improvement, since the validity of the re-assessment could not have been passed upon in the proceeding concerning the original assessment.¹ A judgment upon a supplemental assessment is not conclusive as to a subsequent re-assessment after the original assessment is vacated.²

§ 991. Adjudication in original assessment as affecting supplemental assessment.

In a proceeding to levy a supplemental assessment, the original judgment of confirmation is not a bar to such proceeding if it shows that the original assessment was for less than the full amount of the benefits conferred upon the property by the improvement.¹ In such cases, the original judgment is conclusive as to the apportionment of the benefits upon the various tracts of property assessed.² If the original judgment of confirmation shows that the full amount of benefits was collected in the orig-

¹City of Davenport v. Allen, 120 Fed. Rep. 172 [1903]; Noyes v. City of Chicago, 218 Ill. 45, 75 N. E. 807 [1905]; City of Chicago v. Sherman, 212 Ill. 498, 72 N. E. 396 [1904]; City of Chicago v. Hulbert, 205 Ill. 346, 68 N. E. 786 [1903]; People ex rel. Talbot Paving Co. v. City of Pontiac, 185 Ill. 437, 56 N. E. 1114 [1900]; Murray v. City of Chicago, 175 Ill. 340, 51 N. E. 654 [1898]; West Chicago Park Commissioners v. Farber, 171 Ill. 146, 49 N. E. 427 [1898]; Farr v. West Chicago Park Commissioners, 167 Ill. 355, 46 N. E. 893 [1897]; City of Chicago v. Ward, 36 Ill. 9 [1864]; Village of Hyde Park v. Waite, 2 Bradwell (Ill.) 443 [1878]; City of Emporia v. Bates, 16 Kan. 495 [1876]; Pollock v. Sowers, 137 Mich. 368, 100 N. W. 596 [1904]; Smith v. City of Detroit, 120 Mich. 572, 79 N. W. 808 [1899]; State ex rel. Schmitt v. District Court of Blue Earth County, 102 Minn. 482, 113 N. W. 697 [1907]; Prendergast v.

Richards, 2 Mo. App. 187 [1876]; Milton v. Stell, — N. J. —, 65 Atl. 1118 [1907]; (affirming, Milton v. Stell, 73 N. J. Law (44 Vr.) 261, 62 Atl. 1133 [1906]); Howard Savings Institution v. Mayor and Common Council of City of Newark, 52 N. J. L. (23 Vr.) 1, 18 Atl. 672 [1889]; Upington v. Oviatt, 24 O. S. 232 [1873]; Lester v. City of Seattle, 42 Wash. 539, 85 Pac. 14 [1906]; Ryan v. Sumner, 17 Wash. 228, 49 Pac. 487 [1897]; Frederick v. City of Seattle, 13 Wash. 428, 43 Pac. 364 [1896].

²City of Chicago v. Clark, 233 Ill. 404, 84 N. E. 363 [1908].

¹Cody v. Town of Cicero, 203 Ill. 322, 67 N. E. 859 [1903]; Freeport Street Railroad Co. v. City of Freeport, 151 Ill. 451, 38 N. E. 137 [1894].

²Wickett v. Town of Cicero, 152 Ill. 575, 38 N. E. 909 [1894]; (following Greeley v. Town of Cicero, 148 Ill. 632, 36 N. E. 603 [1894]).

inal assessment, such judgment is a bar to a proceeding for a supplemental assessment.³

§ 992. Adjudication not conclusive if court has no jurisdiction.

In order to operate as an estoppel it is necessary that the court rendering the decree which it is claimed acts as an estoppel, should have jurisdiction both of the subject matter and of the parties. In the absence of jurisdiction, a decree is a nullity and cannot operate as an estoppel of either party thereto.¹ If notice of confirmation is not given, the property owner to whom notice is not given is not estopped by such judgment.² If the ordinance is absolutely void,³ as where no petition for the improvement has been filed,⁴ or the description of the improvement is so insufficient that the nature and character of the improvement cannot be determined,⁵ or the estimate of the cost of the improvement has

* *Sheriffs v. City of Chicago*, 213 Ill. 620, 73 N. E. 367 [1905]; *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904]; *Wickett v. Town of Cicero*, 152 Ill. 575, 38 N. E. 909 [1894]; *Greeley v. The Town of Cicero*, 148 Ill. 632, 36 N. E. Rep. 603 [1894]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

¹ *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774 [1903]; *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903]; *Willis v. City of Chicago*, 189 Ill. 103, 59 N. E. 543 [1901]; *Fiske v. People ex rel. Raymond*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985 [1900]; *Vennum v. People ex rel. Galloway*, 188 Ill. 158, 58 N. E. 979 [1900]; *Village of Hammond v. Leavitt*, 181 Ill. 416, 54 N. E. 982 [1899]; *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898]; *People ex rel. Kochersperger v. Warneke*, 173 Ill. 40, 50 N. E. 221 [1898]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *People ex rel. Kochersperger v. Hurford*, 167 Ill. 226, 47 N. E. 368 [1897]; *O'Neil v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897];

People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. Rep. 10 [1897]; *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 27 N. E. 725 [1890]; *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053 [1904]; *Riker v. Mayor, Aldermen and Commonalty of the City of New York*, 3 Daly (N. Y.) 174 [1869]; *Ferguson v. Quinn*, 123 Pa. St. 337, 16 Atl. 844 [1889].

² *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898]; *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 27 N. E. 725 [1890].

³ *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774 [1903]; *West Chicago Park Commissioners v. Farber*, 171 Ill. 146, 49 N. E. 427 [1898]; *O'Neil v. People ex rel. Kochersperger*, 166 Ill. 561, 46 N. E. 1096 [1897]; *Glos v. Cannata*, 121 Ill. App. 215 [1905].

⁴ *Village of Hammond v. Leavitt*, 181 Ill. 416, 54 N. E. 982 [1899]; *Hawkins v. Horton*, 91 Minn. 285, 97 N. W. 1053 [1904].

⁵ *Willis v. City of Chicago*, 189 Ill. 103, 59 N. E. 543 [1901]; *People ex rel. Kochersperger v. Warneke*, 173 Ill. 40, 50 N. E. 221 [1898]; *People ex rel. Kochersperger v. Hurford*, 167 Ill. 226, 47 N. E. 368 [1897].

not been made as required by statute,⁶ or the ordinance is void as attempting to impose upon the abutting property owners the cost of paving between the rails of a street railway company,⁷ or if the assessment is levied against certain land supposed to be divided into lots by the numbers of such supposed lots, when, in fact, at the time of confirmation such tract has not been subdivided into lots,⁸ and the effect of such defects is in each case to render the proceedings void, and to prevent the court from having jurisdiction to confirm the assessment, a judgment of confirmation is not binding upon the parties. If an assessment is to be levied upon the filing of a bill showing the cost of the improvement and signed and certified by both members of the improvement committee, the existence of such bill is a jurisdictional fact, and if the bill is signed by one member only, the court has no jurisdiction to render judgment, and an attempted judgment may be attacked collaterally on application for an order of sale.⁹

§ 993. Estoppel to deny jurisdiction.

If the court before which the assessment is confirmed is a court of general jurisdiction, having authority to determine the extent and limits of its jurisdiction, its judgment is to be regarded as valid, if the want of jurisdiction does not appear affirmatively upon the record. Such want of jurisdiction cannot be shown by extrinsic evidence.¹ Thus, if the record shows that notice was given,² or the court has found specifically that notice was given, and the record does not purport to show all the evi-

⁶ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903].

⁷ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903].

⁸ *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. 1074 [1897].

⁹ *Vennum v. People ex rel. Gallo-way*, 188 Ill. 158, 58 N. E. 979 [1900].

¹ *People ex rel. Hanberg v. Second Ward Savings Bank*, 224 Ill. 191, 79 N. E. 628 [1906]; *Stack v. People ex rel. Talbott*, 217 Ill. 220, 75 N. E. 347 [1905]; *People ex rel. Merriman v. Illinois Central Railroad Company*, 213 Ill. 367, 72 N. E. 1069 [1904];

Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904]; *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898]; *West Chicago Street Railway Company v. People ex rel. Kern*, 155 Ill. 299, 40 N. E. 599 [1895].

² *Larson v. People ex rel. Kochersperger*, 170 Ill. 93, 48 N. E. 443 [1897]; *Kirchman v. People ex rel. Kochersperger*, 159 Ill. 321, 42 N. E. 883 [1896].

dence on which such finding was made, although the formal proof of serving notice is inadequate,³ the jurisdiction of the court cannot be attacked collaterally. A specific finding which is contradicted by the record itself, is said not to be conclusive.⁴ If the court has not found specifically that notice is given to the property owners, and the record shows affirmatively that notice was not given, a decree of confirmation is not binding.⁵ A party who has procured a judgment of confirmation cannot attack the jurisdiction of the court by which such judgment was rendered.⁶

§ 994. Effect of reversal.

The theory of estoppel by judgment or decree of court, implies that such judgment or decree remains and continues in full force and effect and unreversed. If such judgment is reversed, the case stands substantially as if such judgment had never been rendered, and the parties to the proceedings are therefore not concluded by the rendition of the original judgment.¹ Thus, if a city has attempted to vacate a judgment and to enter a new judgment of confirmation, and such new judgment is reversed on the ground that the city had no power to vacate the original judgment, but that it remained in full force, the city may, upon notice, vacate its order setting the original judgment aside and may enter judgment of sale for non-payment of the original assessment.² If a tax is reduced on appeal, the court may on

³ *Glover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Larson v. People ex rel. Kochersperger*, 170 Ill. 93, 48 N. E. 443 [1897]; *Dickey v. People ex rel. Kochersperger*, 160 Ill. 633, 43 N. E. 606 [1896]; *Hertig v. People ex rel.*, 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879 [1896]; *West Chicago Street Railway Company v. People ex rel. Kern*, 156 Ill. 18, 40 N. E. 605 [1895]; *Chicago West Division Railway Co. v. People ex rel.*, 154 Ill. 256, 40 N. E. 342 [1894]; *Clark v. People ex rel.*, 146 Ill. 348, 35 N. E. 60 [1893].

⁴ *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588 [1898].

⁵ *Chandler v. People ex rel. Kochersperger*, 161 Ill. 41, 43 N. E. 590 [1896]; *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895]; *McChesney v. People ex rel. Fern*, 148 Ill. 221, 35 N. E. 739 [1894]; *McChesney v. People ex rel. Fern*, 145 Ill. 614, 34 N. E. 431 [1893].

⁶ *West Chicago Park Commissioners v. Novak*, 121 Ill. App. 287 [1905].

¹ *Wiemers v. People ex rel. Price*, 225 Ill. 82, 80 N. E. 68 [1907]; *Gage v. City of Chicago*, 193 Ill. 108, 61 N. E. 850 [1901].

² *McChesney v. People ex rel. Raymond*, 200 Ill. 146, 65 N. E. 626 [1902].

application for judgment render judgment for the amount thus reduced.³

§ 995. Parties as to whom adjudication is conclusive.

The nature of the doctrine of estoppel by former adjudication, and the theory upon which it rests, restrict its operation to those who are parties to the proceedings in which such judgment is rendered. A decree of confirmation, or other adjudication as to the validity of an assessment, is, accordingly, binding only upon the parties to the confirmation proceedings and to their successors in interest.¹ Thus, an adjudication upon the question of the validity of an assessment rendered in a proceeding between the city and certain property owners cannot be taken advantage of by other property owners, if the assessment is held to be invalid;² other property owners may sue to enjoin the assessment, and are not barred by the adjudication in the other suit.³ nor is it binding upon other property owners if the assessment is held to be valid.⁴ Upon the same theory, the fact that an assessment has been held to be invalid in proceedings brought by one property owner, does not prevent other property owners from suing to restrain the collection of the assessment.⁵ A decree recognizing certain land as subject to assessment is not binding upon other owners of property who are not parties to such proceedings.⁶ One property

³ *The People ex rel. Ijams v. Meyers*, 124 Ill. 95, 16 N. E. 89 [1889].

¹ *Burlington Bank v. City of Clinton, Iowa*, 106 Fed. 269 [1901]; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254 [1898]; *LeMoyné v. City of Chicago*, 175 Ill. 356, 51 N. E. Rep. 718 [1898]; *Maxwell v. Auditor General*, 125 Mich. 621, 84 N. W. 1112 [1901]; *Trimmer v. City of Rochester*, 130 N. Y. 401, 29 N. E. 746 [1892]; *In the Matter of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172 [1890]; *Moore v. City of Albany*, 98 N. Y. 396 [1885]; *Horn's Case*, 12 Abb. Prac. 124 [1861]; *Wilkes v. The Mayor, Aldermen and Commonalty of the City of New York*, 8 Daly (N. Y.) 407 [1878]; *Zink v. City of Buffalo*, 6 Hun, 611 [1876];

Reynolds v. Newton, 14 Ohio C. C. 433 [1893]; *Feith v. City of Philadelphia*, 126 Pa. St. 575, 17 Atl. 883 [1889]; *Krutz v. Gardner*, 18 Wash. 332, 51 Pac. 397 [1897]; *Rork v. Smith*, 55 Wis. 67, 12 N. W. 408 [1882].

² *Trimmer v. City of Rochester*, 130 N. Y. 401, 29 N. E. 746 [1892]; *Horn's Case*, 12 Abb. Prac. 124 [1861]; *Wilkes v. The Mayor, Aldermen and Commonalty of City of New York*, 8 Daly (N. Y.) 407 [1878].

³ *Zink v. City of Buffalo*, 6 Hun, 611 [1876].

⁴ *In the Matter of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172 [1890].

⁵ *Zink v. City of Buffalo*, 6 Hun, 611 [1876].

⁶ *Reynolds v. Newton*, 14 Ohio C. C. 433 [1893].

owner is not bound by a dismissal of condemnation proceedings at the instance of another property owner after a special assessment has been confirmed, fixing the benefits which accrue to the property benefited.⁷ One co-owner is not bound by a decree as to the validity of an assessment rendered in a proceeding to which the other co-owner was the only party representing the property as to which they are co-tenants.⁸ Property owners are not bound by a proceeding in mandamus whereby the public corporation has been required to levy a special assessment, but they may nevertheless deny the validity of such assessment.⁹ A public corporation is not bound by judgment decreeing the invalidity of assessment rendered in a proceeding to which the city is not a party.¹⁰ An adjudication that a contract was illegally let, made in a suit brought by a property owner against a public corporation, is not a bar to a subsequent suit brought against the city by the owner of bonds for such improvement which are to be paid out of such assessments.¹¹ A mortgagee who has not been made a party to the foreclosure of an assessment may redeem and possibly may contest the validity of such assessment.¹² A decree in confirmation in which the fees of certain officers are included in the expenses of the improvement, while binding as between the city and the property owners, does not establish conclusively the right of the officers to such fees as between the public corporation and such officers.¹³ If the property owners affected are not made parties to proceedings, and therefore are not estopped thereby, the public corporation by which such proceedings are instituted is, on the other hand, not estopped by such proceedings.¹⁴ However, a judgment rendered in a proceeding between the contractor and the property owners, to which the city was not a party, granting to the contractor less than the full amount of the assessment because it exceeds the statutory limit of twenty-five per cent. of the value of the prop-

⁷ *LeMoyne v. City of Chicago*, 175 Ill. 356, 51 N. E. Rep. 718 [1898].

⁸ *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254 [1898].

⁹ *Rork v. Smith*, 55 Wis. 67, 12 N. W. 408 [1882].

¹⁰ *Maxwell v. Auditor General*, 125 Mich. 621, 84 N. W. 1112 [1901].

¹¹ *Burlington Bank v. City of Clinton, Iowa*, 106 Fed. 269 [1901].

¹² *Krutz v. Gardner*, 18 Wash. 332, 51 Pac. 397 [1897].

¹³ *People of the State of New York v. Starkweather*, 43 N. Y. Sup. Ct. Rep. 325 [1877].

¹⁴ *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *Wilkes v. The Mayor, Aldermen and Commonalty of City of New York*, 8 Daly (N. Y.) 407 [1878].

erty, is binding upon the city, if the contractor has attempted in good faith to collect the assessment, and is conclusive in a proceeding by the contractor against the city to collect the rest of the contract price.¹⁵ So, if a city has collected assessments the parties entitled thereto may by mandamus compel the city to pay such fund over to them, and the city cannot set up defects in the assessments.¹⁶ A judgment of condemnation as to the amount and fact of benefits is held to be binding on one who is not a party thereto.¹⁷ Under some systems of assessment, a judgment for a local assessment is regarded as a proceeding *in rem*,¹⁸ and, therefore, is binding upon the world at large, whether the real owner is named in the proceeding or not.¹⁹ By statute, adjudication may be taken advantage of not merely by the parties to the proceedings, but by those on whose behalf they were instituted.²⁰

§ 996. Questions as to which adjudication is conclusive.

A judgment of confirmation, or any other judgment determining the validity of an assessment, is conclusive as between the parties upon such questions as the propriety of the improvement,¹ as where a street is so laid out and improved as to provide no sidewalk on one side of the street;² whether a public easement has been acquired in the property which it is sought to use for the public improvement for which the assessment is to be levied;³ whether the court before which appropriation proceedings were had to acquire the land on which the public improvement is constructed had jurisdiction to act, where such objection is made

¹⁵ *City of Cincinnati v. Dickmeier*, 31 O. S. 242 [1877].

¹⁶ *Higgins v. City of Chicago*, 18 Ill. 276 [1857].

¹⁷ *City of St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677, 10 S. W. 477 [1888].

¹⁸ *Farrell v. City of St. Paul*, 62 Minn. 271, 54 Am. St. Rep. 641, 29 L. R. A. 778, 64 N. W. 809 [1895].

¹⁹ *Delaney v. Gault*, 30 Pa. St. (6 Casey) 63 [1858].

²⁰ *Schultze v. the Mayor, Aldermen and Commonalty of the City of New York*, 103 N. Y. 307, 8 N. E. 528 [1886].

¹ *Fischback v. People ex rel. Tetherington*, 191 Ill. 171, 60 N. E. 887 [1901].

² *Fischback v. People ex rel. Tetherington*, 191 Ill. 171, 60 N. E. 887 [1901].

³ *People ex rel. Raymond v. Talmadge*, 194 Ill. 67, 61 N. E. 1049 [1901]; *Gage v. People ex rel. Kochersperger*, 163 Ill. 39, 44 N. E. 819 [1896]; *Indianapolis & Cumberland Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316 [1885]; *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. Rep. 829 [1899].

after confirmation,⁴ the effect of the insufficiency of a petition for the improvement;⁵ or the insufficiency of the estimate required by statute;⁶ whether the estimate was made at the proper stage of the proceedings;⁷ whether the contract is let within the time provided for by statute;⁸ whether the contract has been performed in a proper manner;⁹ whether the improvement has been constructed at an excessive cost;¹⁰ whether the resolution has been published, as required by statute;¹¹ whether an ordinance has been repealed or remains in force;¹² whether the improvement is described with sufficient certainty,¹³ at least as long as the ordinance is not absolutely void for want of a definite description,¹⁴ as where the terminus of the improvement is misnamed,¹⁵ or the width of the street is not given,¹⁶ or the grade of the street is not fixed.¹⁷ Questions of this sort, which have been determined in the original judgment of confirmation, cannot be relitigated between the parties to the original proceeding. In like manner,

⁴ *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903].

⁵ *Phillips v. People ex rel. Goedtnner*, 218 Ill. 450, 75 N. E. 1016 [1905]; *Conlin v. People ex rel. Lassig*, 190 Ill. 400, 60 N. E. 55 [1901]; *Perisho v. People ex rel. Gannaway*, 185 Ill. 334, 56 N. E. 1134 [1900]; *Piper v. People ex rel. Gannaway*, 183 Ill. 436, 56 N. E. 84 [1900]; *McManus v. People ex rel. Raymond*, 183 Ill. 391, 55 N. E. 886 [1899]; *Martin v. Roney*, 41 O. S. 141 [1884].

⁶ *Noonan v. People ex rel. Hanberg*, 221 Ill. 567, 77 N. E. 930 [1906]; *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904]; *Thompson v. People ex rel. Hanberg*, 207 Ill. 334, 69 N. E. 842 [1904]; *Gage v. People ex rel. Hanberg*, 207 Ill. 61, 69 N. E. 635 [1904]; *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886].

⁷ *People ex rel. Kochersperger v. Colvin*, 165 Ill. 67, 46 N. E. 14 [1897].

⁸ *Gage v. People ex rel. Hanberg*, 213 Ill. 468, 72 N. E. 1108 [1905].

⁹ *McManus v. People ex rel. Raymond*, 183 Ill. 391, 55 N. E. 886 [1899]; *Fisher v. People ex rel.*

Kern, 157 Ill. 85, 41 N. E. 615 [1895]; *McEneny v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540 [1890].

¹⁰ *Hammond v. People for Use, etc.*, 169 Ill. 545, 48 N. E. 573 [1897].

¹¹ *Dolan v. The Mayor, Aldermen and Commonalty of New York*, 62 N. Y. 472 [1875].

¹² *Village of Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238 [1889].

¹³ *Johnson v. People ex rel. Raymond*, 189 Ill. 83, 59 N. E. 515 [1901]; *Walker v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694 [1897].

¹⁴ *Walker v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694 [1897]; *People ex rel. Kochersperger v. Lingle*, 165 Ill. 65, 46 N. E. 10 [1897].

¹⁵ *Steenberg v. People ex rel. Kochersperger*, 164 Ill. 478, 45 N. E. 970 [1897].

¹⁶ *Perry v. People ex rel. Hanberg*, 206 Ill. 334, 69 N. E. 63 [1903].

¹⁷ *People v. Brown ex rel. Russel*, 218 Ill. 375, 75 N. E. 989 [1905]; *Walker v. People ex rel. Raymond*, 202 Ill. 34, 66 N. E. 827 [1903]; *Shepard v. People ex rel. Raymond*, 200 Ill. 508, 65 N. E. 1068 [1903].

questions as to the sufficiency of the description of the land assessed,¹⁸ as to the existence and amount of benefits,¹⁹ whether the aggregate amount of the assessments exceeds the cost of the improvement,²⁰ or exceeds the limit fixed by statute,²¹ whether certain property which is assessed is exempt from an assessment for opening a street through the operation of the doctrine of estoppel, the property owner having purchased land upon what appeared by the commissioners' map and plan of the city of New York to be a public street;²² questions as to the validity of the levy,²³ as to the effect of the failure of all the commissioners to sign the assessment roll,²⁴ or to view the premises,²⁵ or the failure of the proper officer to make a certified copy of the assessment;²⁶ whether sufficient notice of the assessment was given;²⁷ whether the division of an assessment into installments is authorized,²⁸ whether a property owner is credited for work already done upon his property;²⁹ whether certain evidence is properly admitted in the confirmation proceedings,³⁰ whether a judgment in confirmation can be rendered if the original assessment is still pending,³¹ or after a prior judgment of confirmation has been rendered upon the same assessment,³² are all questions which are determined conclusively by the judgment of confirmation, and cannot be re-litigated in a subsequent proceeding, such as an ap-

¹⁸ *People ex rel. Mannen v. Green*, 153 Ill. 594, 42 N. E. 163 [1895].

¹⁹ *People ex rel. Fern v. Ryan*, 156 Ill. 620, 41 N. E. 180 [1895]; *Chicago & Northwestern Railway Co. v. People*, 120 Ill. 104, 11 N. E. 418 [1887]; *Meserole v. Mayor and Common Council of Brooklyn*, 8 Paige's Chan. 198 [1840].

²⁰ *People of the State of Illinois v. Weber*, 164 Ill. 412, 45 N. E. 723 [1897].

²¹ *Andrews v. People ex rel. Miller*, 83 Ill. 529 [1876].

²² *Murray v. Graham*, 6 Paige's Chan. 77, 62 [1873].

²³ *The People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875].

²⁴ *Jensen v. City of Chicago*, 172 Ill. 298, 50 N. E. 179 [1898]; *Larsen v. People ex rel. Kochersperger*, 170 Ill. 93, 48 N. E. 443 [1897]; *People ex rel. Kochersperger v. Markley*, 166 Ill. 47, 46 N. E. 742 [1897].

²⁵ *Hale v. Moore*, 82 Ark. 75, 100 S. W. 742 [1907].

²⁶ *Davis v. Lake Shore & Michigan Southern Railway Company*, 114 Ind. 364, 16 N. E. 639 [1887].

²⁷ *Illinois Central Railway Co. v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609 [1901]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898].

²⁸ *Farman v. People ex rel. Munsterman*, 214 Ill. 454, 73 N. E. 760 [1905].

²⁹ *Tolin v. Jones*, 33 Ind. App. 423, 71 N. E. 678 [1904].

³⁰ *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891].

³¹ *Wagg v. People ex rel. Hanberg*, 218 Ill. 337, 75 N. E. 977 [1905].

³² *People ex rel. Raymond v. Fuller*, 204 Ill. 290, 68 N. E. 371 [1903].

plication for a judgment of sale. If a special agreement has been entered into between the city and the property owner, whereby the amount of the assessment is reduced, such agreement must be set up at confirmation, and it cannot be taken advantage of on a subsequent application for a judgment of sale.³³ If the court sets aside a report of commissioners, and orders a further consideration of the petition for the improvement, its action may be erroneous, but it is not void, and cannot be attacked collaterally.³⁴

§ 997. Judgment in eminent domain as estoppel.

The doctrine of estoppel is by no means limited to judgments of confirmation. A judgment rendered in eminent domain in which benefits and damages are determined, is conclusive as between the parties thereto on the question of benefits and damages.¹ The city cannot subsequently assess benefits *de novo*.² Accordingly, if the judgment is irregular because no benefits were assessed to the city, such irregularity is not a ground for collateral attack, and the property owner cannot set it up in a suit to enforce the payment of the benefits assessed.³ If the proceedings are irregular, but the city takes possession of the property appropriated and collects the assessments, it cannot set up such irregularities as against an action brought by the former owner of the property appropriated to recover compensation awarded for such property.⁴ Conversely, a property owner who has recovered from the city the value of the property appropriated, is estopped from attacking the title of the city to such property, even if the original proceedings in appropriation were void.⁵ Under some statutes it is said that a judgment in appropriation

³³ Bass v. People ex rel. Raymond, 203 Ill. 206, 67 N. E. 806 [1903].

³⁴ Chaney v. State ex rel. Ely, 118 Ind. 494, 21 N. E. Rep. 45 [1888].

¹ Gas Light & Coke Co. v. City of New Albany, 158 Ind. 268, 63 N. E. 458 [1901]; City of St. Louis v. Annex Realty Company, 175 Mo. 63, 74 S. W. 961 [1903]; Michael v. City of St. Louis, 112 Mo. 610, 20 S. W. 666 [1892]; City of St. Louis v. Excelsior Brewing Co., 96 Mo. 677, 10 S. W. 477 [1888]; State, Rottinger, Pros. v. City of Passaic, 45 N. J. L. (16 Vr.) 146 [1883]; Opening Sheri-

dan Street, Bellevue Bor., 138 Pa. St. 264, 22 Atl. 22 [1890]. In the Matter of Pike Street, Seattle, 42 Wash. 551; *sub nomine*, *In re* City of Seattle, 85 Pac. 45 [1906].

² State, Rottinger, Pros. v. City of Passaic, 45 N. J. L. (16 Vr.) 14 [1883].

³ City of St. Louis v. Annex Realty Company, 175 Mo. 63, 74 S. W. 961 [1903].

⁴ City of Chicago v. Wheeler, 25 Ill. 478, 79 Am. Dec. 342 [1861].

⁵ Hawver v. City of Omaha, 52 Neb. 734, 73 N. W. 217 [1897].

proceedings is final as to damages, but not as to benefits.⁶ A judgment in appropriation proceedings is not conclusive as to questions not passed on by the court.⁷ If the court which has rendered a decree in condemnation proceedings has jurisdiction, the existence of the public easement in the property appropriated cannot be attacked in a proceeding to collect an assessment.⁸ A judgment in the appropriation proceedings is final as to the question of a prior dedication.⁹ It has been held, however, that the action of a city in instituting a suit to appropriate property is not conclusive as to the question of a former dedication.¹⁰ While a mortgagee who was not a party to appropriation proceedings is not bound conclusively thereby, he cannot attack the proceedings if enough land is left to satisfy his mortgage.¹¹ It has been held that a question of the validity of a recognized boundary of the city cannot be attacked collaterally in proceedings to collect an assessment.¹²

§ 998. Conclusive effect of judgment in proceedings to enforce assessment.

The doctrine of estoppel by adjudication is also applicable to a judgment rendered in an action to enforce an assessment. If the court rendering such judgment has jurisdiction of the subject matter, and of the parties, such judgment while unreversed is conclusive between the parties, even if it is irregular or erroneous.¹ A defect which was not interposed in a defense in a suit

⁶ *City of St. Louis v. Brineckwirth*, 204 Mo. 280, 102 S. W. 1091 [1907].

⁷ *Davis v. City of Newark*, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891].

⁸ *Prescott v. City of Chicago*, 60 Ill. 121 [1871]; *Carpenter v. City of St. Paul*, 23 Minn. 232 [1876]; *Martin v. Carron*, 26 N. J. L. (2 Dutcher) 228 [1857].

⁹ *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053 [1894].

¹⁰ *German Bank v. Brose*, 32 Ind. App. 77, 69 N. E. 300 [1903].

¹¹ *Smith v. City of Detroit*, 120 Mich. 572, 79 N. W. 808 [1899].

¹² *The Bloomington Cemetery Association v. The People of the State of Illinois*, 139 Ill. 16, 28 N. E. 1076 [1893].

¹ *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595 [1867]; *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984 [1902]; *Owners of Land v. The People ex rel. Stookey*, 113 Ill. 296 [1886]; *Hewes v. Village of Winnetka*, 60 Ill. App. 654 [1895]; *Gray v. Bowles*, 74 Mo. 419 [1881]; *Barber Asphalt Paving Co. v. Kienne*, 99 Mo. App. 528, 74 S. W. 872 [1903]; *Buell v. Trustees of Lockport*, 11 Barb. 602 [1852]. See also *London and Northwest American Mortgage Co. v. Gibson*, 77 Minn. 394, 80 N. W. 777, 205 [1899]. But see *Bordages v. Higgins*, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 726, 184 [1892]; as reversed by *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895].

upon a tax bill cannot be taken advantage of collaterally in a proceeding to quash an execution levied on a judgment rendered upon such tax bill.² Thus, where a judgment is rendered for an assessment against two lots *in solido*, when it should have been rendered against each lot separately;³ or if the apportionment is irregular,⁴ such judgment is nevertheless binding. By some special statutes, a judgment rendered on one installment may be conclusive as to the validity of installments to become due in the future, except as to questions which could not have been involved in the proceeding to obtain judgment on the original installment.⁵ Conversely, if the application for judgment as to an earlier installment is denied upon a ground which necessarily affects all the remaining installments, such judgment is conclusive as to the

² Barber Asphalt Paving Co. v. Kienne, 99 Mo. App. 528, 74 S. W. 872 [1903].

³ Gray v. Bowles, 74 Mo. 419 [1881].

⁴ Barber Asphalt Pav. Co. v. Kienne, 99 Mo. App. 528, 74 S. W. 872 [1903].

⁵ Treet v. City of Chicago, 125 Fed. 644 [1903]; (affirmed, 130 Fed. 443, 64 C. C. A. 645 [1903]); Gage v. People ex rel. Hanberg, 213 Ill. 410, 72 N. E. 1084 [1904]; Downey v. People ex rel. Raymond, 205 Ill. 230, 68 N. E. 807 [1903]; Gross v. People ex rel. Raymond, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901]; (objections had been filed to applications for judgment on previous installments, and had been taken to the Supreme Court in Walker v. People, 170 Ill. 410, 48 N. E. 1010; Gross v. People, 172 Ill. 571, 50 N. E. 334 [1898]; Walker v. People, 169 Ill. 473, 48 N. E. 694 [1897]; Gross v. People, 169 Ill. 635, 48 N. E. 1108; and error had been prosecuted to reverse the judgment of confirmation in Gross v. Village of Grossdale, 176 Ill. 572, 52 N. E. 370 [1898]; in all of which cases the assessments had been held valid.) "Upon the application for judgment of sale upon such assessment or matured installments thereof or the interest thereon or the interest accrued on installments not

yet matured, no defense or objection shall be made or heard which might have been interposed in the proceeding for the making of such assessment or the application for the confirmation thereof, and no errors in the proceeding to confirm not affecting the power of the court to entertain and consider the petition therefor shall be deemed a defense to the application herein provided for. When such application is made for judgment of sale on an installment only, of an assessment payable in installments, all questions affecting the jurisdiction of the court to enter the judgment of confirmation shall be raised and determined on the first of such applications. On application for judgment of sale on any subsequent installment, no defense except as to the legality of the pending proceeding, the amount to be paid or actual payment, shall be made or heard and the voluntary payment by the owner or his agent of any installment of any assessment, levied on any lot, block, tract, or parcel of land, shall be deemed and held in law to be an assent to the confirmation of the assessment roll, and be held to release and waive any and all right of such owner to enter objections to the applications for judgment of sale and order of sale." Act 1897, § 66, Hurd's Stats. 1899, p. 376.

invalidity of the remaining installments.⁶ If the controlling facts are not the same in the application for judgment upon a second installment as in the application for judgment upon the first installment, the fact that the court refused judgment upon the first installment will not operate as a bar to the application upon the second installment.⁷ A judgment in an action to enforce an assessment is binding not only upon the property owner,⁸ but also upon the city;⁹ as where the court finds that the assessment is invalid,¹⁰ or reduces the amount of the assessment to the limit fixed by statute.¹¹ A judgment rendered in a proceeding to which a minor is a party, as a result of which the property of the minor is sold, may by statute be void as to such minor, though valid as to the other property owners.¹² A judgment entered on an irregular assessment is a bar to a subsequent proceeding to obtain another judgment on the same assessment.¹³ If a city, in a proceeding foreclosing an equity of redemption, is made a party and sets up a street assessment but omits to set up assessments for improving an alley, the city is barred from subsequently collecting them.¹⁴ If a contractor sues for an amount less than that which is due to him and recovers judgment therefor, he cannot subsequently recover judgment for the residue of his claim.¹⁵ If, however, the second judgment cannot, under the law, be obtained until it is ascertained that the proceedings on the first judgment will not pay the assessment, the rendition of the first judgment is not a bar to the second judgment.¹⁶ Thus, if the lien of the assessments rests primarily upon the property fronting on the improvement, and it can be enforced as to prop-

⁶ *Markley v. People ex rel. Fochersperger*, 171 Ill. 260, 63 Am. St. Rep. 234, 49 N. E. 502 [1898].

⁷ *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 503 [1898].

⁸ *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984 [1902]; *Gray v. Bowles*, 74 Mo. 419 [1881].

⁹ *Kearney v. City of Covington*, 58 Ky. (1 Metcalf) 339 [1858]; *City of Cincinnati v. Diekmeier*, 31 O. S. 242 [1877].

¹⁰ *Kearney v. City of Covington*, 58 Ky. (1 Metcalf) 339 [1858].

¹¹ *City of Cincinnati v. Diekmeier*, 31 O. S. 242 [1877].

¹² *Scullier v. Fern*, 69 Pa. St. (19 P. F. Smith) 16 [1871].

¹³ *Otis v. Weide*, 98 Minn. 227, 107 N. W. 540 [1906]; *Eymann v. Scoulay*, 16 Mo. App. 498 [1885].

¹⁴ *City of Cincinnati v. Ling*, 13 Ohio C. C. 334 [1897]; (action by purchaser of land.)

¹⁵ *Ewing v. McNairy*, 20 O. S. 315 [1871].

¹⁶ *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Porter*, 38 Ind. App. 228, 74 N. E. 260, 76 N. E. 179 [1905]; (affirmed in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter*, 210 U. S. 177 [1908]).

erty lying back from the improvement only if the property fronting on the improvement is not sufficient to pay such lien, a decree foreclosing the lien on the property fronting on the improvement does not bar a subsequent suit to enforce the lien upon property lying back from the improvement.¹⁷ A recovery of a special assessment by a judgment against the land assessed is a bar to a proceeding to enforce payment of an appeal bond given to secure payment of such assessment.¹⁸ Since an assessment is several as to each tract, the foreclosure of the lien as to one tract is not a bar to a suit to foreclose the lien upon another tract owned by the same person.¹⁹ A judgment rendered by the trial court in favor of defendant on his general demurrer to the complaint in an action to enforce an assessment was reversed by the Supreme Court. This was held to be conclusive as to the propriety of bringing the action in the name of the plaintiff.²⁰

§ 999. Election of remedies.

If an improvement has been constructed to be paid for by assessments, and the construction has been so conducted that the property owner has been injured thereby, it has been held that he has a choice between resisting the assessment for want of benefit to his property, or of suing the city for such damages; and that if he elects to pursue either remedy, this operates as a waiver of the other.¹

§ 1000. Distinction between direct and collateral attack.

The doctrine forbidding collateral attack upon an adjudication has from its scope and nature no application to direct attack. Proceedings in the nature of appeal and error are everywhere regarded as direct attacks upon the judgment.¹ It has been held that a suit to quiet title as against assessments and liens is a direct attack thereon.² In the absence of specific stat-

¹⁷ *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Porter*, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179 [1905]; (affirmed in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter*, 210 U. S. 177 [1908]).

¹⁸ *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

¹⁹ *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351 [1890].

²⁰ *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884].

¹ *Smith v. City of Milwaukee*, 18 Wis. 63 [1864].

² *Derby v. West Chicago Park Commissioners*, 154 Ill. 213, 40 N. E. 438 [1894].

³ *Skelton v. Sharp*, 161 Ind. 383, 67 N. E. 535 [1903].

utory provisions allowing such procedure to operate as direct attack, the correctness of this view may be doubted. It has been held that a collateral attack is one in which the invalidity of the judgment which is attacked is predicated upon matters *dehors* the record.³ A proceeding to obtain an injunction against the enforcement of an assessment is a collateral attack upon the assessment.⁴ Resisting the collection of an assessment is a collateral attack;⁵ except where by statute the amount of the assessment may be questioned in an action to foreclose the lien.⁶ Where by statute a judgment of confirmation is to be rendered, and subsequently application for a judgment of sale is to be made; resisting a judgment of sale for matters which have been urged or might have been urged at the rendition of the judgment of confirmation, is a collateral attack upon the judgment of confirmation.⁷

§ 1001. Doctrine of *stare decisis*.

The doctrine of *stare decisis* is occasionally confused with that of estoppel by adjudication. If the court which passes upon the assessment has already, in a proceeding not involving the same parties, upheld such assessment, or has upheld the validity of statutes substantially similar to the one under consideration,¹ it will uphold proceedings undertaken in reliance upon such decision,² even if in the meantime it has held such legislation to be

³ *City of Greensburg v. Zoller*, 28 Ind. App. 126, 60 N. E. 1007 [1901].

⁴ *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899]; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. 741 [1897]; *Argo v. Barthand*, 80 Ind. 63 [1881].

⁵ *Smith v. Clifford*, 99 Ind. 113 [1884]; *Auditor General v. Crane*, — Mich. —, 115 N. W. 1041.

⁶ *The Marion Bond Company v. Johnson*, 29 Ind. App. 294, 64 N. E. 626 [1902].

⁷ *Marshall v. People ex rel. Smith*, 219 Ill. 99, 76 N. E. 70 [1905]; *Johnson v. People ex rel. Reed*, 202 Ill. 306, 66 N. E. 1081 [1903]; *Gage v. City of Chicago*, 201 Ill. 93, 66 N. E. 374 [1903]; *Gross v. People ex rel. Raymond*, 193 Ill. 260, 86 Am.

St. Rep. 322, 61 N. E. 1012 [1901]; *Clover v. People ex rel. Raymond*, 188 Ill. 576, 59 N. E. 429 [1901]; *Thomson v. People ex rel. Foote*, 184 Ill. 17, 56 N. E. 383 [1900]; *Johnson v. People ex rel. Kochersperger*, 177 Ill. 64, 52 N. E. 308 [1898]; *Kunst v. People ex rel. Kochersperger*, 173 Ill. 79, 50 N. E. 168 [1898]; *Young v. People ex rel. Kochersperger*, 171 Ill. 299, 49 N. E. 501 [1898]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Blake v. The People, for use of Caldwell*, 109 Ill. 504 [1884]; *Hopkins v. Mason*, 42 Howard (N. Y.) 115 [1871].

¹ As in *State ex rel. Attorney General v. Hudson*, 44 O. S. 137, 5 N. E. 225 [1886].

² *Shoemaker v. City of Cincinnati*, 68 O. S. 603, 68 N. E. 1 [1903].

invalid.³ So, if such court has already held an assessment to be invalid, it will in a subsequent action between different parties, hold that such assessment is not such a cloud upon the title as will justify a vendee in refusing performance.⁴ A court of last resort is not bound by the decision of a lower court, under the doctrine of *stare decisis*,⁵ and, accordingly, if the decision of such lower court is not rendered in a proceeding between the same parties, neither the doctrine of estoppel by adjudication nor the doctrine of *stare decisis* applies.⁶

§ 1002. Conclusive effect of admissions of record.

A party who has either expressly or impliedly admitted the truth of certain facts by the pleadings which he has filed, or the steps which he has taken in judicial proceedings, is ordinarily bound in such proceedings by such admissions.¹ Thus, a property owner who asks for a revision of an assessment cannot attack the validity thereof, since, by seeking such relief, the validity of the assessment is conceded, and the question of the correctness of the apportionment is the only one raised.² A property owner who claims that the proceedings to establish a drainage district were had under a specified statute and that the district is not properly organized for failure to comply with such statute impliedly recognizes the validity of such statute and can not thereafter in that proceeding attack it as unconstitutional.³ A party who makes a specific objection to the validity of the assessment cannot subsequently in that proceeding deny the truth of the facts claimed by him in making such objection.⁴ An objection based on the theory that the original proceedings were

¹ State ex rel. Attorney General v. Beacom, 66 O. S. 491, 90 Am. St. Rep. 599, 64 N. E. 427 [1902]; State ex rel. Knisely v. Jones, 66 O. S. 453, 90 Am. St. Rep. 592, 64 N. E. 424 [1902].

² Chase v. Chase, 95 N. Y. 373 [1884].

³ Moore v. City of Albany, 98 N. Y. 396 [1885].

⁴ Moore v. City of Albany, 98 N. Y. 296 [1885].

⁵ Haver v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874].

⁶ Crandell v. City of Taunton, 110 Mass. 421 [1872]; Beals v. Inhabit-

ants of Brookline, 174 Mass. 1, 54 N. E. 339 [1897]. A request for revision made to a board having no power to revise is not a waiver. Bates v. District of Columbia, 7 Mackey (D. C.) 76 [1889].

³ Barnes v. Drainage Commissioners of Drainage District No. 7, etc., 221 Ill. 627, 77 N. E. 1124 [1906].

⁴ Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327 [1886]; Cratty v. City of Chicago, 217 Ill. 453, 75 N. E. 343 [1905]; Markley v. City of Chicago, 190 Ill. 276, 60 N. E. 512 [1901]; Ager v. State ex rel. Heaston, 162 Ind. 538, 70 N. E. 808 [1903].

not pending in court when a given statute took effect, estops the objector from claiming that such proceedings were then pending.⁵ An objection that notice was not served on objector as it should be served upon a resident land owner estops him from denying that he is a resident land owner.⁶ A city which has sued upon the theory that it was a duly organized and existing municipality when the assessment was levied cannot claim that its incorporation was void at the time of the assessment, in order to avoid the effect of the statute of limitations.⁷ Filing specific objections is generally an implied admission that no other objections exist. A general defense made to the merits operates as an implied waiver of defects in the notice, and of irregularities not going to the merits.⁸ Failure to file a motion to dismiss for jurisdictional reasons is not a waiver of such ground, even though other objections are filed.⁹ It has been held that even after a reversal of a judgment of confirmation, new objections which existed when the judgment was confirmed originally, can not be made.¹⁰ After a hearing upon the merits, a property owner cannot ask for a change of venue;¹¹ nor can he interpose new objections upon a hearing after a new trial.¹²

§ 1003. Legislative determination not subject to collateral attack.

If courts, or executive or legislative bodies, are given jurisdiction to determine certain facts, the existence and exercise of such power implies that in the absence of statutes specifically providing for a review of the action of such body by some other tribunal, such action must be final. If the action of such body could be reviewed subsequently in judicial proceedings, the ultimate determination as to the facts would be that of the court in the subsequent proceeding to review the action originally taken. Accordingly, it is generally held that in an assessment proceed-

⁵Cratty v. City of Chicago, 217 Ill. 453, 75 N. E. 343 [1905].

⁶Elgin, Joliet & Eastern R. R. Co. v. Hohenshell, 193 Ill. 159, 61 N. E. 1102 [1901].

⁷City of Ballard v. West Coast Improvement Co., 15 Wash. 572, 46 Pac. 1055 [1896].

⁸Ottis v. Sullivan, 219 Ill. 365, 76 N. E. 487 [1906].

⁹Village of Hammond v. Leavitt, 181 Ill. 416, 54 N. E. 982 [1899].

¹⁰Lusk v. City of Chicago, 211 Ill. 183; 71 N. E. 878 [1904].

¹¹Haley v. City of Alton, 152 Ill. 113, 38 N. E. Rep. 750 [1894].

¹²Goodwine v. Leak, 127 Ind. 569, 27 N. E. 161 [1890].

ing, the finding or a court or of a council or of some other legislative, administrative or executive body upon matters within the jurisdiction of such body, cannot be attacked collaterally.¹

§ 1004. Conclusive effect of confirmation by administrative body.

Under the statutes in force in many jurisdictions, a council or executive board, and the like, having jurisdiction conferred by statute, may confirm an assessment, and under such circumstances an assessment after confirmation cannot be attacked collaterally.¹ Confirmation by a board of equalization may also be made final and not subject to collateral attack.² It has been held, however, that confirmation does not cure defects which appear on the face of the record.³ Under some statutes any defense may be made to the merits after confirmation, the confirmation being only *prima facie* valid.⁴ If no notice or opportunity for a

¹ *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895]; *Brown v. Central Bermudez Company*, 162 Ind. 452, 69 N. E. 150 [1903]; *Lane v. Burnap, Drain Commissioner*, 39 Mich. 736 [1878]; *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163 [1901]; *Hause v. City of St. Paul*, 94 Minn. 115, 102 N. W. 221 [1905]; *Fuller v. City of Elizabeth*, 42 N. J. L. (13 Vr.) 427 [1880]; *Treasurer of City of Camden v. Mulford*, 26 N. J. L. (2 Dutcher) 49 [1856]; *Mayer v. Mayor, Aldermen and Commonalty of New York*, 101 (N. Y.) 93 [1883].

² *Lower Kings River Reclamation No. 531 v. Phillips*, 108 Cal. 305, 39 Pac. 630, 41 Pac. 335 [1895]; *Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531 [1904]; *Brown v. Central Bermudez Company*, 162 Ind. 452, 69 N. E. 150 [1903]; *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932 [1901]; *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *White v. Fleming*, 114 Ind. 560, 16 N. E. 487 [1887]; *Osborn v. Sutton*, 108 Ind. 443, 9 N. E. 410 [1886]; *Million v.*

Board of Commissioners of Carroll County, 89 Ind. 5 [1883]; *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351 [1897]; *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; *Morewood v. Corporation of New York*, 6 Howard (N. Y.) 386 [1851]; *Glenn v. Wad-del*, 23 O. S. 605 [1873]; *City of Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632 [1905]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Potter v. City of Whatcom*, 25 Wash. 207, 65 Pac. 197 [1901]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900]; *Northwestern & Pacific Hypotheek Bank v. City of Spokane*, 18 Wash. 456, 51 Pac. 1070 [1898]; *City of New Whatcom v. Bellingham Bay Improvement Company*, 18 Wash. 181, 51 Pac. 360 [1897].

³ *State ex rel. Ashby v. Three States Lumber Co.*, 198 Mo. 430, 95 S. W. 333 [1906]; *Portsmouth Sav. Bank v. City of Omaha*, 67 Neb. 50, 93 N. W. 231 [1903].

⁴ *State ex rel. Baxter, Pros. v. Mayor and Aldermen of Jersey City*, 36 N. J. L. (7 Vr.) 188 [1873].

⁵ *City of Chicago v. Burtice*, 24 Ill. 489 [1860].

hearing is given to the property owners, confirmation is not final as to them;⁵ although the mere fact that the public corporation did not make the formal proof of publication a matter of record, does not render the proceedings invalid.⁶ If a public corporation, or the officers thereof who have assumed to act, have no jurisdiction to confirm the assessment, their action in attempting to confirm the same, is not binding upon the property owner.⁷

§ 1005. Conclusive or prima facie effect of determination of administrative officers.

Under many statutes, a finding by executive officers, the city council, commissioners specially chosen for that purpose, and the like, as to certain specified facts, is made final, at least if jurisdiction exists, and if such finding is free from fraud. Such statutes are ordinarily held to be valid, if the constitutional rights of the property owners are otherwise duly protected, and the property owner cannot therefore attack such finding.¹ A con-

⁵ *Busenbark v. Clements*, 22 Ind. App. 557, 53 N. E. 665 [1899].

⁶ *City of Bloomington v. Phelps*, 149 Ind. 596, 49 N. E. 581 [1897].

⁷ *Klein v. Nugent Gravel Company*, 162 Ind. 509, 70 N. E. 801 [1903]; (reversing, — Ind. App. —, 66 N. E. 486 [1903]); *Diver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542 [1905]; *Carron v. Martin*, 26 N. J. L. (2 Dutch.) 594 [1857]; (reversing, *Martin v. Carron*, 26 N. J. L. (2 Dutch.) 228 [1857]); *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064 [1898]; *Morse v. City of Omaha*, 67 Neb. 426, 93 N. W. 734 [1903]; *Vreeland v. City of Tacoma*, — Wash. —, 94 Pac. 192 [1908].

¹ *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904]; *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777 [1902]; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687 [1896]; *Lower Kings River Reclamation Dist. v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895]; *Emery v.*

Bradford, 29 Cal. 75 [1865]; *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890]; *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1907]; (affirmed in *Hibben v. Smith*, 191 U. S. 310, 24 S. 88 [1903]); *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004 [1901]; *Gorman v. State ex rel. Koester*, 157 Ind. 205, 60 N. E. 1083 [1901]; *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899]; *De Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016 [1892]; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. Rep. 436 [1890]; *McEneney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. Rep. 540 [1890]; *Trustees of the United Brethren in Christ Church v. Rausch*, 122 Ind. 167, 23 N. E. 717 [1889]; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431 [1889]; *Heick v. Voight*, 110 Ind. 279, 11 N. E. 306 [1886]; *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. 711 [1885]; *Simonton v. Hays*, 88 Ind. 70 [1882]; *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499 [1880]; *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22 [1897]; *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1892];

trary view is, however, entertained in some jurisdictions, and it is said that the finding of executive officers as to such questions as benefits cannot be made final.² Where such findings are generally regarded as final, the courts often lay special emphasis on the necessity of proceedings which are free from fraud, intimating that the presence of fraud would prevent such findings from having the conclusive effect which they otherwise would have.³ Fraud thus referred to must exist in the findings of the officials.⁴ If fraud is claimed to exist through the combination of the contractor and the inspector, and this question has been heard before a committee of the common council, and no fraud is claimed to exist in the action of such committee, their findings cannot be attacked collaterally.⁵ Under other statutes the finding of public officials is not made conclusive, but is regarded as *prima facie* valid.⁶ It has been held that the decision of public officials upon questions on which they are authorized by statute to pass, is conclusive, even if they refuse to hear evidence offered by the property owner.⁷ This view seems to be based on the theory that the property owner may, by prompt recourse to the courts, compel such hearing. Even where a finding is conclusive as to the facts existing when the finding was made, it can not be conclusive as to facts which arise subsequently.⁸

In the Matter of Kiernan, 62 N. Y. 457 [1875]; Turnquist v. Cass County Drain Commissioners, 11 N. D. 514, 92 N. W. 852 [1902]; Brient-hall v. Philadelphia, 103 Pa. St. 156 [1883].

²White v. City of Tacoma, 109 Fed. 32 [1901].

³Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351 [1897]; The People ex rel. Samuel, Sr. v. Cooper, 139 Ill. 461, 29 N. E. 872 [1893]; Jenks v. City of Chicago, 48 Ill. 296 [1868]; Elliott v. City of Chicago, 48 Ill. 293 [1868]; Lux and Talbott Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676 [1897]; Patterson v. Baumer, 43 Ia. 477 [1876]; Dennison v. City of Kansas, 95 Mo. 416, 8 S. W. 429 [1888]; State v. Several Parcels of Land, — Neb. —, 110 N. W. 753 [1907]; Turnquist v. Cass County

Drain Commissioners, 11 N. D. 514, 92 N. W. 852 [1902]; City of Toledo v. Ford, 20 Ohio C. C. 290 [1900].

⁴Morewood v. Corporation of New York, 6 Howard (N. Y.) 386 [1851].

⁵Morewood v. Corporation of New York, 6 Howard (N. Y.) 386 [1851].

⁶Driver v. Moore, 81 Ark. 80, 98 S. W. 734 [1906]; Kizer v. Town of Winchester, 141 Ind. 694, 40 N. E. 265 [1895]; Green v. City of Springfield, 130 Ill. 515, 22 N. E. 602 [1890]; Reilly v. City of Albany, 40 Hun, 405 [1886]; Clinton v. Portland, 26 Or. 410, 38 Pac. 407 [1894]; Friedrich v. City of Milwaukee, 118 Wis. 254, 95 N. W. 126 [1903].

⁷Hibben v. Smith, 158 Ind. 206, 62 N. E. 447 [1901]; (affirmed in Hibben v. Smith, 191 U. S. 310, 24 S. 88 [1903]).

⁸Ireland v. City of Rochester, 51 Barb. 414 [1868].

§ 1006. Necessity of jurisdiction to make finding of public officials operative.

Even where the findings of the public officials are made conclusive, it is necessary that jurisdiction should exist. In the absence of jurisdiction their findings are ineffectual, and are not conclusive or binding on the property owners.¹ If the notice required by statute to give jurisdiction has not, in fact, been given, the findings of the public officials are not conclusive.² If, however, notice has, in fact, been given, sufficient to apprise the property owner of the pendency of the proceedings, such notice is sufficient to give jurisdiction although it is irregular.³ If, by statute, the question of the time for which notice should be given to the property owner to do the work is left to the decision of a board, their decision is final in the absence of fraud, and cannot be attacked collaterally on the ground that a sufficient length of time is not given;⁴ although if it is shown that the board acted fraudulently, and fixed so short a time that under the circumstances the property owners could not avail themselves of their right to do the work, their decision is not conclusive.⁵

§ 1007. Illustrations of jurisdictional and non-jurisdictional defects.

Since there is some divergence of authority, partly caused by the varying phraseology of different statutes as to what facts are

¹ *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 [1893]; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431 [1889]; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. The Edward Jones Company*, 20 Ind. App. 87, 50 N. E. 319 [1897]; *Comstock v. Eagle Grove City*, 133 Ia. 589, 111 N. W. 51 [1907]; *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882]; *Sleeper v. Bullen*, 6 Kan. 300 [1870]; *City of Kansas City v. Breyfogle*, 8 Kans. App. 276, 55 Pac. 508 [1898]; *Mayall v. St. Paul*, 30 Minn. 294, 15 N. W. 170 [1883]; *Hall v. Moore*, 3 Neb. Unoff. 574, 92 N. W. 294 [1902]; *Carron v. Martin*, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]; *Town of Cherry Creek v. Becker*, 123 N. Y. 161, 25 N. E. 369, [1890]; *Bowns v.*

May, 120 N. Y. 357, 24 N. E. 947 [1890]; *Corry v. Gaynor*, 22 O. S. 584 [1872]; *Armstrong v. Ogden City*, 12 Utah, 476, 43 Pac. 119 [1895]; *Kline v. Tacoma*, 11 Wash. 193, 39 Pac. 453 [1895]; *Canfield v. Smith*, 34 Wis. 381 [1874].

² *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630; *Mulligan v. Smith*, 59 Cal. 206 [1881]; *Keifer v. City of Bridgeport*, 68 Conn. 401, 36 Atl. 801 [1896]; *Olds v. Erie City*, 79 Pa. St. (29 P. F. Smith) 380 [1875].

³ *Kiphart v. Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, 7 Ind. App. 122, 34 N. E. 375 [1893].

⁴ *Fass v. Seehawer*, 60 Wis. 525, 19 N. W. 533 [1884].

⁵ *Foote v. City of Milwaukee*, 18 Wis. 270 [1864].

jurisdictional and what are not, there is a corresponding divergence of judicial authority as to what findings are conclusive, even where the general principle that the findings of public officials upon questions committed to them for determination by the legislature are conclusive if jurisdiction exists, is well recognized. The finding of public officials is held to be conclusive as to a sufficiency of a petition, where the presentation of a sufficient petition is not jurisdictional;¹ but where the filing of a petition or the obtaining of the assent of the property owners is jurisdictional, such finding is not conclusive.² It has been held that such finding is conclusive if any petition is presented, whether defective or not.³ Where a remonstrance of property owners ousts the public corporation of jurisdiction to proceed, its determination to proceed in spite of the remonstrance is not binding.⁴ The determination of public officials is held to be conclusive as to the kind of improvement which should be made,⁵ as to the performance of the contract for the construction of such improvement,⁶ as to questions of the existence and the amount of benefits,⁷ as to the proportion in which the burden of the cost of the improvement should be shared between the city and the property owners,⁸ and as to the notice to be given,⁹ at least if a

¹ *Brienthall v. City of Philadelphia*, 103 Pa. St. 156 [1883]; *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904]; *De Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016 [1892]; *McEneney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. Rep. 540 [1890]; *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499 [1880]; *In the Matter of Kieran*, 62 N. Y. 457 [1875]; *Quinlan v. Myers*, 29 O. S. 500 [1876].

² *Board of Commissioners of Wyandotte County v. Barker*, 45 Kan. 699, 26 Pac. 591 [1891]; *Sleeper v. Bullen*, 6 Kan. 300 [1870]; *City of Kansas City v. Breyfogle*, 8 Kans. App. 276, 55 Pac. 508 [1898]; *Carron v. Martin*, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]; *Miller v. City of Amsterdam*, 149 N. Y. 288, 43 N. E. 632 [1896]; *Corry v. Campbell*, 25 O. S. 134 [1874]; *Canfield v. Smith*, 34 Wis. 381 [1874].

³ *Seranton v. Jermyn*, 156 Pa. 107, 27 Atl. 66 [1893].

⁴ *Armstrong v. Ogden City*, 12 Utah, 476, 43 Pac. 119 [1895].

⁵ *Harney v. Benson*, 113 Cal. 314, 45 Pac. 687 [1896]; *Leeds v. City of Richmond*, 102 Ind. 372, 1 N. E. 711 [1885].

⁶ *Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777 [1902]; *Emery v. Bradford*, 29 Cal. 75 [1865].

⁷ *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004 [1901]; *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22 [1897]; *Johnson v. Duer*, 115 Mo. 366; 21 S. W. 800 [1892]; *Turnquist v. Cass County Drain Commissioners*, 11 N. D. 514, 92 S. W. 852 [1902]; *Brienthall v. City of Philadelphia*, 103 Pa. St. 156 [1883].

⁸ *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556 [1890].

⁹ *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904]; *Town of Cherry Creek v. Becker*, 123 N. Y. 161, 25 N. E. 369 [1890].

subsequent opportunity for a hearing is afforded. The passage of an ordinance by a sufficient vote is jurisdictional,¹⁰ and the decision of the mayor that a repealing ordinance is lost because the original ordinance had received a three-fourths vote which was necessary by statute, and the repealing ordinance had received merely a majority of the votes cast, is not binding, and may be attacked collaterally.¹¹ The making of a valid contract where jurisdictional,¹² or the enactment of a resolution ordering an improvement,¹³ or the fact of the existence of unpaid taxes where made jurisdictional to the existence of power to adjust arrearages,¹⁴ or the fact of levying the assessment,¹⁵ are all facts upon which the determination of the public officers is not conclusive. The finding of public officials is ordinarily conclusive as to mere irregularities if the jurisdictional facts are established.¹⁶

§ 1008. Collateral attack upon existence of public corporation.

If a taxing district, such as a drainage or irrigation district, has been established by a proceeding before a court of competent jurisdiction, or before a board of county commissioners or some similar board invested with powers substantially those exercised by courts in establishing such districts, a judgment or order of such court or board establishing such district is final and conclusive, and the existence of such district cannot be attacked collaterally.¹ So, if a court establishes a ditch partly within the

¹⁰ *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

¹¹ *City of Chariton v. Holliday*, 60 Ia. 391, 14 N. W. 775 [1882].

¹² *Capron v. Hitchcock*, 98 Cal. 427; 33 Pac. 431 [1893]; *Comstock v. Eagle Grove City*, 133 Iowa, 589, 111 N. W. 51 [1907].

¹³ *Kline v. Tacoma*, 11 Wash. 193, 39 Pac. 453 [1895].

¹⁴ *Bowns v. May*, 120 N. Y. 357, 24 N. E. 947 [1890].

¹⁵ *Hall v. Moore*, 3 Neb. Unoff. 574, 92 N. W. 294 [1902].

¹⁶ *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899].

¹ *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 305, 39 Pac. 630, 41 Pac. 335 [1895];

Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892]; *In re Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272 [1891]; *Rogne v. People ex rel. Goedtner*, 224 Ill. 449, 79 N. E. 662 [1906]; *Barnes v. Drainage Commissioners of Drainage District No. 7*, 221 Ill. 627, 77 N. E. 1124 [1906]; *Tucker v. People ex rel. Wall*, 156 Ill. 108, 40 N. E. 451 [1895]; *The Wabash Eastern Railway Company of Illinois v. The Commissioners of East Lake Fork Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891]; *Gauen v. Moredock & Ivy Landing Drainage District, No. 1*, 131 Ill. 446, 23 N. E. 633 [1890]; *Evans v. Lewis*, 121 Ill. 478, 13 N.

limits of a city, such order cannot be attacked collaterally in a suit to collect assessments,² although if the power of the court so to do is attacked in the original proceeding, it is held that it has no power to lay out a city within the limits of a city or to levy an assessment therefor.³ If the order establishing the district is in effect an adjudication that all the land is benefited, the directors of such district cannot determine thereafter that only a part of such land is benefited.⁴ If no prior opportunity of attacking the organization of the assessment district is given, the doctrine of collateral attack does not apply, and the organization of such district may be attacked in assessment proceedings.⁵ So the organization of a drainage corporation may be attacked collaterally, even after the improvement has been completed.⁶ If the officers of a drainage district have within the exercise of the powers conferred upon them, annexed certain land to such district, the propriety of such action cannot be attacked collaterally, in a proceeding involving the validity of the assessment.⁷ A direct proceeding in *quo warranto* is necessary.⁸ In an action to

E. 246 [1889]; Morrell v. Union Drainage District No. 1, 118 Ill. 139, 8 N. E. 675 [1887]; Blake v. The People for Use of Caldwell, 109 Ill. 504 [1884]; Keigen v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886]; Streuter v. Willow Creek Drainage District, 72 Ill. App. 561 [1897]; McBride v. State for use of Clandy, 130 Ind. 525, 30 N. E. 699 [1891]; Otis v. DeBoer, 116 Ind. 531, 19 N. E. 317 [1888]; Johnson v. State for Use of Davidson, 116 Ind. 374, 19 N. E. 298 [1888]; Montgomery v. Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184 [1888]; Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495 [1887]; Jackson v. State for use of Dyer, 104 Ind. 516, 3 N. E. 863 [1885]. For statutory restriction of right to attack finding made after the district was organized see Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510 [1902].

² State ex rel. Wilcox v. Jackson, 118 Ind. 553, 21 N. E. 221 [1888].

³ Anderson v. Endicott, 101 Ind. 539 [1884].

⁴ State ex rel. Stotts v. Wall, 153 Mo. 216, 54 S. W. 465 [1899]; (a case involving a levee district).

⁵ Reclamation District No. 537 of Yolo County v. Burger, 122 Cal. 442, 55 Pac. 156 [1898]; Mack v. Polecat Drainage District, 216 Ill. 56, 74 N. E. 691 [1905].

⁶ Newton County Drainage Company v. Nofsinger, 43 Ind. 566 [1873].

⁷ Shanley v. People ex rel. Goedter, 225 Ill. 579, 80 N. E. 277 [1907]; Trigger v. Drainage District No. 1, etc., 193 Ill. 230, 61 N. E. 1114 [1901]; The People ex rel. Wood v. Jones, 137 Ill. 35, 27 N. E. 294 [1892]; Bodman v. Lake Fork Special Drainage District, 132 Ill. 439, 24 N. E. 630 [1891]; Gauen v. Moredock & Ivy Landin Drainage District, No. 1, 131 Ill. 446, 23 N. E. 633 [1890]; Evans v. Lewis, 121 Ill. 478, 13 N. E. 246 [1889]; Osborn v. People, 103 Ill. 228 [1882].

⁸ Shanley v. People, 225 Ill. 579, 80 N. E. 277 [1907]; The People ex rel. Wood v. Jones, 137 Ill. 35, 27 N. E. 294 [1892].

foreclose assessments the legality of the incorporation of a city cannot be attacked collaterally.⁹

§ 1009. Collateral attack upon right to public office.

On the same principle a property owner resisting an assessment cannot make a collateral attack upon the right to their offices of the public officers who levy the assessment, as long as they are officers *de facto*;¹ nor can the qualifications of commissioners be attacked collaterally² where such qualifications have been passed upon under statutory authority.

C.—ESTOPPEL IN PAIS.

§ 1010. Operation of doctrine of estoppel in pais.

An assessment may be affected by such irregularities and defects as would enable a property owner to avoid liability thereon, if such irregularities and defects were taken advantage of in a proper time and way, and yet the owner may so act as to prevent himself from taking advantage thereof. In the same way, a city which might have treated an assessment as invalid and not binding, for the purpose of levying a subsequent assessment, may be prevented from taking advantage of such defects and irregularities. These results are usually reached by the application of one of the forms of estoppel, either estoppel by deed or estoppel by record, or estoppel in pais. The facts which give rise to the application of the doctrines of estoppel in pais are often much like those which give rise to the application of the doctrine of waiver or of laches; and, in fact, in many cases the doctrines merge into each other and apply simultaneously. The doctrine of estoppel in pais is held by the great weight of authority to apply to local assessments.¹ It has been held, however, that if the as-

⁹ Willard v. Albertson, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403 [1899].

¹ Petts v. City of Naperville, 214 Ill. 380, 73 N. E. 752 [1905]; Dows v. Village of Irvington, 66 Howard (N. Y.) 93 [1883].

² Walker v. People ex rel. Fochersperger, 169 Ill. 473, 48 N. E. 694 [1897]; Carr v. Duhme, 167 Ind. 76, 78 N. E. 322 [1906]; Dederer v. Voorhies, 81 N. Y. 154 [1880]; Porter v. Purdy, 29 N. Y. 106, 86 Am.

Dec. 283 [1864]; Fisher v. Mayor, etc. of New York, 6 Hun, 64 [1875]; Pittsburg v. Cluley, 74 Pa. St. (24 P. F. Smith) 262 [1873].

¹ Wight v. Davidson, 181 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (reversing, Davidson v. Wight, 16 D. C. App. 371 [1900]); Ricketts v. Spraker, 77 Ind. 371 [1881]; Bidwell v. City of Pittsburgh, 85 Pa. St. 412, 27 Am. Rep. 662 [1877]; Tacoma Land Co. v. City of Tacoma, 15 Wash. 133, 45 Pac. 733 [1896].

assessment is a lien only, and if no personal liability is imposed thereon, the doctrine of estoppel in pais has no application.² Whether the facts are such as to call for the application of the doctrine of estoppel, is a question of fact;³ and is a state question, not a federal one; so that the application by a state court of the doctrine of estoppel presents no question which can be reviewed by the Supreme Court of the United States.⁴ The application of the doctrine of estoppel in pais to a defective assessment, may result in holding the assessment to be valid as to the parties who are estopped, but invalid as to those who are not estopped.⁵ Thus, if certain property owners remonstrate against an improvement on the ground of the expense thereof, but withdraw their remonstrances under an agreement for an extension of time, they may be estopped to deny the power of the public corporation to levy an assessment while other property owners may not be so estopped.⁶ The fact that the doctrine of estoppel operates so as to make the same assessment valid as to some property owners, while leaving it invalid as to others, is no ground for denying the existence or application of the doctrine.⁷ A property owner who takes from the city money to which he is entitled in any event, does not thereby estop himself from attacking the validity of the sale of his property to pay an invalid assessment, by which sale the city acquired a part of the fund

²Union Paving and Contracting Co. v. McGovern, 127 Cal. 638, 60 Pac. 169 [1900].

³Schafer v. Werling, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming, Schaefer v. Werling, 156 Ind. 704, 60 N. E. 149).

⁴Schaefer v. Werling, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming, Schaefer v. Werling, 156 Ind. 704, 60 N. E. 149).

⁵Barlow v. City of Tacoma, 12 Wash. 32, 40 Pac. 382 [1895].

⁶Barlow v. Tacoma, 12 Wash. 32, 40 Pac. 382 [1895].

⁷Barlow v. Tacoma, 12 Wash. 32, 40 Pac. 382 [1895]. "While a void act forever remains so and can never become valid, yet a party may, by his conduct, preclude himself from saying it is void. The act is still

void but if his conduct has said it is valid, he is then precluded from saying it is void. This is the doctrine of estoppel. It has no element of ratification in it. It proceeds upon the ground that a person who has been silent when he ought to have spoken, will not be heard when he ought to be silent. His silence did not and could not ratify the void act, but his former silence precludes him from now saying what he might have said had he spoken in time. Its underlying basis is that it would be a fraud to assert what one's own previous conduct had denied when on the faith of that denial others have acted." *Busenbark v. Clements*, 22 Ind. App. 557, 559, 560, 53 N. E. 665 [1899].

which it paid to such property owner.⁸ Estoppel may operate so as to prevent the city from denying its liability to the contractor by whom the improvement has been constructed.⁹ Estoppel may preclude a property owner from suing individually to set an assessment aside, and yet certiorari may issue at his instance.¹⁰ While a property owner may be estopped from denying his liability to those by whom the improvement was constructed, this estoppel cannot be taken advantage of by an invalid corporation which has subsequently re-incorporated.¹¹

§ 1011. Estoppel against owner who causes improvement on assessment plan.

The property owner who induces a public corporation to make an improvement, or urges the construction thereof, knowing that the improvement is to be made at the expense of the owners of property benefited thereby, and is to be paid for by the levy of an assessment therefor, is estopped from denying the validity of an assessment which is levied as a natural consequence of such conduct on his part.¹ Thus, a party who requests the use of a certain kind of material, is estopped from attacking the improvement on the ground that the material used was defective.² A party who has requested a change in the specifications is estopped from claiming that by reason of such change the improvement was not constructed in accordance with the terms of the ordinance or contract.³ A party who specifically requests that

⁸ *Gaston v. Portland*, 41 Or. 373, 69 Pac. 34, 445 [1902].

⁹ *New Orleans v. Warner*, 175 U. S. 120, 44 L. 96, 20 S. 44 [1899]; (modified on rehearing, 176 U. S. 92, 44 L. 385, 20 S. 280). For other hearings upon the same facts, see *Peake v. New Orleans*, 139 U. S. 342, 11 S. 541 [1891]; *Warner v. New Orleans*, 167 U. S. 467, 17 S. 892 [1897].

¹⁰ *State, Beam, Pros. v. Mayor and Aldermen of the City of Paterson*, 47 N. J. L. (18 Vr.) 15 [1885].

¹¹ *Town of Medical Lake v. Smith*, 7 Wash. 195, 34 Pac. 835 [1893].

¹ *Wight v. Davidson*, 101 U. S. 371, 45 L. 900, 21 S. 616 [1901]; (reversing, *Davidson v. Wight*, 16 D. C. App. 371 [1900]); *Bidwell v. City of*

Pittsburgh, 85 Pa. St. 412, 27 Am. Rep. 662 [1877]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]; *Mott v. Hubbard*, 59 O. S. 199, 53 N. E. 47 [1898]; *Perryville Avenue, Marshall's Appeal*, 210 Pa. 537, 60 Atl. 160 [1904]; *Tacoma Land Co. v. City of Tacoma*, 15 Wash. 133, 45 Pac. 733 [1896].

² *Arnold v. City of Ft. Dodge, Ia.*, 111 Ia. 152, 82 N. W. 495 [1900]; *Henning v. Stengel*, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64, 23 Ky. L. R. 1793; *The Brick & Terra Cotta Co. v. Hull*, 49 Mo. App. 433 [1892].

³ *Lux & Talbott Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *The Brick & Terra Cotta Co. v. Hull*, 49 Mo. App. 433 [1892].

an assessment be levied, cannot deny its validity.⁴ If a lessee, who has agreed to pay assessments, requests that assessments be levied against such lessee, he is not permitted to attack the assessment on the ground that it is levied against the wrong person.⁵ While estoppel of this sort may operate to prevent a property owner from taking advantage of irregularities and defects in levying an assessment, it cannot operate to dispense with the necessity of making a levy.⁶ Accordingly, a property owner who has made suggestions as to the manner in which certain work is to be done, may, nevertheless, deny the existence of a lien on his property, on the ground that the public corporation has never, in fact, attempted to levy an assessment therefor.⁷ Estoppel of this sort can, of course, exist only where the property owner has by some act on his part consented to some improvement which results in the assessment.⁸

§ 1012. Estoppel against petitioner.

A property owner who petitions for the construction of a certain improvement, which construction will, under the law, naturally result in an assessment against such property owner, in case the prayer of his petition is granted, is estopped from denying the validity of such assessment, in so far as such assessment follows in the ordinary course of things from the granting of his petition.¹ A property owner who petitions for the improvement

⁴ Nevins and Otter Creek Township Draining Co. v. Alkire, 36 Ind. 189 [1871].

⁵ Second Universalist Society in Providence v. City of Providence, 6 R. I. 235 [1859].

⁶ Hall v. Moore, 3 Neb. Unoff. 574, 92 N. W. 294 [1902].

⁷ Hall v. Moore, 3 Neb. Unoff. 574, 92 N. W. 294 [1902].

⁸ Hawthorne v. City of East Portland, 13 Ore. 271, 10 Pac. Rep. 342 [1886].

¹ Murdock v. City of Cincinnati, 44 Fed. 726 [1891]; Lux & Talbott Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; City of Burlington v. Gilbert, 31 Ia. 356, 7 Am. Rep. 143 [1871]; Board of Commissioners of Wyandotte County v. Arnold, 49 Kan. 279, 30 Pac. 486 [1892];

Downs v. Board of Commissioners of Wyandotte Co., 48 Kan. 640, 29 Pac. 1077 [1892]; Board of Commissioners of Wyandotte County v. Hoag, 48 Kan. 413, 29 Pac. 758 [1892]; Stewart v. Board of Commissioners of Wyandotte Co., 45 Kan. 708, 23 Am. St. Rep. 746, 26 Pac. 683 [1891]; Bacas v. Adler, 112 La. 806, 36 So. 739 [1904]; Cook v. Covert, 71 Mich. 249, 39 N. W. 47 [1888]; Gillett v. McLaughlin, 69 Mich. 547, 37 N. W. 551; Hall v. Slaybaugh, 69 Mich. 484, 37 N. W. 545; Harwood v. Huntoon, 51 Mich. 639, 17 N. W. 216 [1883]; Mabey v. Drain Commissioner, 45 Mich. 568, 8 N. W. 578; People ex rel. Roediger v. Commissioner of Wayne County, 40 Mich. 745 [1879]; Byram v. City of Detroit, 50 Mich. 56, 12 N. W. 912, 14

of a so-called public street, is estopped from claiming subsequently that it is not a street but a county road.² It has been said that a petitioner is estopped from denying the validity of the assessment except upon the ground that the public corporation never had jurisdiction to make the assessment, or had so far departed from the methods prescribed by law as to lose its jurisdiction.³ In other cases it has been said that one who petitions for an improvement cannot thereafter deny the power of a public corporation to construct the improvement in accordance with the prayer of his petition.⁴ A property owner who petitions for an improvement is estopped from objecting to the petition as invalid for

N. W. 698 [1883]; *Motz v. City of Detroit*, 18 Mich. 494 [1869]; *Rowe, Pros. v. Commissioners of Assessments of East Orange*, 69 N. J. L. (40 Vr.) 600, 55 Atl. 649 [1903]; *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900]; *Turnquist v. Cass County Drain Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]; *City of Mt. Vernon v. State of Ohio ex rel. Berry*, 71 O. S. 428, 104 Am. St. Rep. 783, 73 N. E. 515 [1904]; *Mott v. Hubbard*, 59 O. S. 199, 53 N. E. 47 [1898]; *City of Cincinnati v. Manss*, 54 Ohio St. 257, 43 N. E. 687 [1896]; *City of Columbus v. Sohl*, 44 O. S. 479, 8 N. E. Rep. 299 [1886]; *Tone v. Columbus*, 39 O. S. 281, 48 Am. Rep. 438 [1883]; *State ex rel. City of Columbus v. Mitchell*, 31 O. S. 592 [1877]; *Breuer v. Gibson*, 29 Ohio C. C. 266 [1906]; *Murphy v. Sims*, 27 Ohio C. C. 825 [1905]; *Thornton v. City of Cincinnati*, 26 Ohio C. C. 33 [1904]; *Hendrickson v. Toledo*, 23 Ohio C. C. 256 [1901]; *Doppes v. City of Cincinnati*, 16 Ohio C. C. 183 [1898]; *Baker v. Schott*, 10 Ohio C. C. 81 [1894]; *Edwards v. City of Columbus*, 7 Ohio N. P. 614 [1900]; *Nevin v. City of Dayton*, 4 Ohio N. P. 203 [1897]; *Broad Street, Sewickley Methodist Episcopal Church's*

Appeal, 163 Pa. St. 475, 30 Atl. 1007 [1895]; *Harrisburg v. Baptist*, 156 Pa. St. 526, 27 Atl. 8 [1893]; *Ferson's Appeal*, 96 Pa. St. (15 Norris) 140 [1880]; *Ebensburg Borough v. Little*, 28 Pa. Super. Ct. 469 [1905]; *Moore v. Barry*, 30 S. C. 530, 4 L. R. A. 294, 9 S. E. 589 [1888]; *City of Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632 [1905]; *City of Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446 [1900]; *Tacoma Land Co. v. City of Toledo*, 15 Wash. 133, 45 Pac. 733 [1896]; *Wingate v. City of Tacoma*, 13 Wash. 603, 43 Pac. 874 [1896].

² *Board of Commissioners of Wyandotte County v. Hoag*, 48 Kan. 413, 29 Pac. 758 [1892].

³ *City of Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632 [1905].

⁴ *Stewart v. Board of Commissioners of Wyandotte Co.*, 45 Kan. 708, 23 Am. St. Rep. 746, 26 Pac. 683 [1891]; *Tone v. Columbus*, 39 O. S. 281, 48 Am. Rep. 438 [1883]; (*citing Daniels v. Tearney*, 102 U. S. 415, *Hitchcock v. Galveston*, 96 U. S. 341 [1880]); *Counterman v. Dublin Township*, 38 O. S. 515; *State ex rel. City of Columbus v. Mitchell*, 31 O. S. 592 [1877]; *Harrisburg v. Baptist*, 156 Pa. St. 526, 27 Atl. 8 [1893]; *Wingate v. City of Tacoma*, 13 Wash. 603, 43 Pac. 874 [1896].

want of formality,⁵ or to deny that his property subject to assessment consists of the number of front feet set out in the petition,⁶ or to claim that his property is entirely exempt.⁷ A property owner who petitions for an improvement, knowing that the entire cost of the improvement is to be assessed upon the property benefited, cannot subsequently claim that the amount of the assessment exceeds the benefits.⁸ One who petitions for an improvement after a defective resolution has been passed by the council, is estopped from questioning the validity of such resolution.⁹ One who signs a petition and authorizes its presentation, is estopped from claiming that proper notice of the petition was not given to him.¹⁰ One who petitions for an improvement which can be constructed only under an unconstitutional law,¹¹ as where the statute authorizing such improvement is unconstitutional as being special legislation,¹² or as prescribing an improper rule of apportionment,¹³ is estopped from denying that such legislation is constitutional.¹⁴ If one of two or more co-tenants petition for an improvement, he may be estopped from denying the validity of the assessment therefor, but the remaining co-defendants will not be estopped.¹⁵ No estoppel exists if the petition is ignored as to the method of constructing the improvement, and

⁵ *Rowe, Pros. v. Commissioners of Assessments of East Orange*, 69 N. J. L. (40 Vr.) 600, 55 Atl. 649 [1903].

⁶ *City of Cincinnati v. Manss*, 54 Ohio St. 257, 43 N. E. 687 [1896]; *Doppes v. City of Cincinnati*, 16 Ohio C. C. 183 [1898]; *Edwards v. City of Columbus*, 7 Ohio N. P. 614 [1900].

⁷ *Broad Street, Sewickley Methodist Episcopal Church's Appeal*, 165 Pa. St. 475, 30 Atl. 1007 [1895].

⁸ *Murphy v. Sims*, 27 Ohio Cir. Ct. R. 825 [1905]; *Hendrickson v. Toledo*, 23 Ohio C. C. 256 [1901]; *Moore v. Barry*, 30 S. C. 530, 4 L. R. A. 294, 9 S. E. 589 [1888].

⁹ *Tacoma Land Co. v. City of Tacoma*, 15 Wash. 133, 45 Pac. 733 [1896].

¹⁰ *Murdock v. City of Cincinnati*, 44 Fed. 726 [1891]; *Rowe, Pros. v. Commissioners of Assessments of*

East Orange, 69 N. J. L. (40 Vr.) 600, 55 Atl. 649 [1903].

¹¹ *City of Mt. Vernon v. State of Ohio ex rel. Berry*, 71 O. S. 428, 104 Am. St. Rep. 783, 73 N. E. 515 [1904]; *Mott v. Hubbard*, 59 O. S. 199, 53 N. E. 47 [1898]; *Ebensburg Borough v. Little*, 28 Pa. Super. Ct. 469 [1905].

¹² *City of Mt. Vernon v. State of Ohio ex rel. Berry*, 71 O. S. 428, 104 Am. St. Rep. 783, 73 N. E. 515 [1904]; *City of Columbus v. Sohl*, 44 O. S. 479, 8 N. E. Rep. 299 [1886]; *Tone v. Columbus*, 39 O. S. 281, 48 Am. Rep. 438 [1883]; *State ex rel. City of Columbus v. Mitchell*, 31 O. S. 592 [1877].

¹³ *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900].

¹⁴ *Ferson's Appeal*, 96 Pa. St. 140 [1880].

¹⁵ *Ferson's Appeal*, 96 Pa. St. 140 [1880].

as to the proportion of the cost to be assessed upon the property benefited.¹⁶ The mere fact of joining in a petition does not of itself amount to an estoppel, unless it is shown that the petitioner induced the public corporation to act in such a way that it would be prejudiced if the petitioner were allowed to deny the validity of the assessment.¹⁷ A petition which does not call for an improvement, if its prayer is granted,¹⁸ such as a petition for revision, presented to a board which never had any legal connection with such assessment,¹⁹ or which prays for an improvement which is not necessarily to be paid for by special assessment,²⁰ does not of itself necessarily operate as an estoppel. If a petition is denied, and the property owners are instructed to file a petition for the improvement at a different grade, a property owner who signed the first petition but not the second one is not estopped.²¹

§ 1013. Petitioner not estopped to set up subsequent irregularities.

One who petitions for an improvement may assume that the subsequent action of the corporation, after granting his petition, will be in compliance with the requirements of the law.¹ A property owner who petitions for an improvement, and who makes no objection to the construction thereof, is not estopped since he must be held to intend that the improvement should be constructed and the assessment levied in the manner provided for by law.² Such a petitioner is, therefore, not estopped to attack an assessment because of subsequent failure on the part of the public corporation to comply with the law, which failure is not necessarily involved in the granting of the petition.³ If it is

¹⁶ *Nicodemus v. City of East Saginaw*, 25 Mich. 456 [1872].

¹⁷ *Batty v. City of Hastings*, 63 Neb. 26, 88 N. W. 139.

¹⁸ *Bates v. District of Columbia*, 7 Mackey (D. C.) 76 [1889].

¹⁹ *Bates v. District of Columbia*, 7 Mackey (D. C.) 76 [1889].

²⁰ *Hildebrand v. Toledo*, 27 Ohio C. C. R. 427 [1905].

²¹ *Carlisle v. City of Cincinnati*, 29 Ohio C. C. 81 [1906].

¹ *McLauren v. City of Grand Forks*, 6 Dak. 397, 43 N. W. 710 [1889];

Taylor v. Burnap, 39 Mich. 739 [1878]; *Steckert v. City of East Saginaw*, 22 Mich. 104 [1870]; *In the Matter of Sharp to Vacate an Assessment*, 56 N. Y. 257, 15 Am. Rep. 415 [1874].

² *Ardrey v. City of Dallas*, 13 Tex. Civ. App. 442, 35 S. W. 726 [1896]; *City of Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895].

³ *McLauren v. City of Grand Forks*, 6 Dakota, 397, 43 N. W. Rep. 710 [1889]; *Taylor v. Burnap*, 39 Mich. 739 [1878]; *Steckert v. City of East*

possible to construct an improvement under a constitutional statute, as well as under one which is unconstitutional, a petition for such improvement will be construed as a petition for constructing it under the constitutional statute.⁴ Where a petition is by statute to be effective only if signed by a certain number, one who signs the petition is not estopped from claiming that the requested number did not join in signing the petition.⁵ If a limit on the amount of the assessment is imposed by statute, one who petitions for an improvement is not estopped from attacking the validity of the assessment on the ground that the statutory limit has been exceeded.⁶ One who petitions for an improvement but without specifying the actual frontage of his property, is not estopped from claiming that his land, which lies lengthwise along a street, should not be assessed for a frontage greater than the number of feet which it fronts on the other street.⁷ A petitioner is not estopped from claiming that the assessment exceeds the amount of benefits, if he was not advised in advance that the entire cost of the improvement would be assessed upon the property benefited.⁸ A petitioner is not estopped from claiming that a subsequent notice, the right to which was given to him by statute, was not in fact given.⁹ One who petitions for improving a given road, may be estopped from enjoining an assessment to pay

Saginaw, 22 Mich. 104 [1870]; *Grant v. Bartholomew*, 58 Neb. 839, 80 N. W. 45 [1899]; *Wakeley v. City of Omaha*, 58 Neb. 245, 78 N. W. 511 [1899]; *In the Matter of Sharp to Vacate an Assessment*, 56 N. Y. 257, 15 Am. Rep. 415 [1874]; *Birdseye v. Village of Clyde*, 61 Ohio St. 27, 55 N. E. 169 [1899]; *Borger v. Columbus*, 27 Ohio C. C. R. 812 [1905]; *McGlynn v. City of Toledo*, 22 Ohio C. C. 34 [1901]; *Manns v. City of Cincinnati*, 10 Ohio C. C. 549 [1895]; *Storer v. City of Cincinnati*, 4 Ohio C. C. 279 [1889]; *Strout v. City of Portland*, 26 Ore. 294, 38 Pac. Rep. 126 [1894]; *Ardrey v. City of Dallas*, 13 Tex. Civ. App. 442, 35 S. W. 726 [1896]; *City of Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128 [1895].

⁴ *Perkinson v. Hoolan*, 182 Mo. 189, 81 S. W. 407 [1904].

⁵ *In the Matter of Sharp to Vacate an Assessment*, 56 N. Y. 257, 15 Am. Rep. 415 [1874]; *Tone v. Columbus*, 39 O. S. 281, 48 Am. Rep. 438 [1883]; *Storer v. City of Cincinnati*, 4 Ohio C. C. 279 [1889]; *Woodall v. City*, 5 Ohio N. P. 428 [1898]. *Contra*, *Burlington v. Gilbert*, 31 Ia. 356, 7 Am. Rep. 143 [1871].

⁶ *Birdseye v. Village of Clyde*, 61 O. S. 27, 55 N. E. 169 [1899]; (reversing, *Birdseye v. Village of Clyde*, 14 Ohio C. C. 510).

⁷ *Baker v. Schott*, 10 Ohio C. C. 81 [1895]; *Gibson v. City of Cincinnati*, 9 Ohio C. C. 243 [1894]. See § 1012, note 6.

⁸ *Manns v. City of Cincinnati*, 10 Ohio C. C. 549 [1895].

⁹ *McLauren v. City of Grand Forks*, 6 Dak. 397, 43 N. W. 710 [1889].

the costs upon such proceeding,¹⁰ but is not estopped from enjoining further proceedings under the act, such as grading and improving the road where such injunction is sought, before the improvement is begun.¹¹

§ 1014. Estoppel by acting in official capacity.

If a property owner is appointed as a commissioner, to take charge of the making of an improvement for which an assessment is to be levied, and for the levying of an assessment therefor, and he accepts such appointment and acts as commissioner, he is estopped from denying the validity of the assessment as to his own property.¹ The fact, however, that a property owner was a member of the common council when the assessment was levied, does not estop him from denying the validity of the assessment, if it is not shown that he in any way as such officer recognized the assessment as valid, or that he took any action thereon except moving that a certain day be assigned for hearing appeals on objections thereto.²

§ 1015. Estoppel by acquiescence.

In many jurisdictions there is a growing tendency on the part of the courts to require prompt action on the part of the property owner in interposing objections, so that they may be made in time to enable the public corporation to correct the defects in the proceedings thus pointed out. Failure on the part of the property owner to make objections of this sort in time to enable the public corporation to correct such defects is sometimes referred to as estoppel, sometimes as waiver, and sometimes as laches. In the absence of evidence to show that the property owner took some affirmative action which induced the public corporation to believe that he intended to be bound by the assessment, it is possible to criticise the use of the term estoppel as a technical inaccuracy in cases of this sort, although it is a term often employed in this connection. By whatever name it is known, or on whatever theory it is explained, it is held by many courts that if the

¹⁰ *Mott v. Hubbard*, 59 O. S. 199, 53 N. E. 47 [1898].

¹¹ *Mott v. Hubbard*, 59 O. S. 199, 53 N. E. 47 [1898].

¹ *Ferson's Appeal*, 96 Pa. St. 140 [1880]; *Bidwell v. City of Pittsburgh*, 85 Pa. St. 412, 27 Am. Rep.

662 [1877]. (In this case the property owner was also active in procuring the passage of the ordinance under which the improvement was constructed.)

² *Warren v. City of Grand Haven*, 30 Mich. 24 [1874].

public corporation has acquired jurisdiction to levy an assessment, a property owner who makes no objection to the proceedings, but waits until the improvement has been constructed at the cost, either of the public corporation or of the contractor, and until his property has received full benefits from the improvement, cannot then resist payment of the assessment because of irregularities and defects in the proceedings, although if such objections had been interposed promptly, such defect and irregularities would have rendered the assessment invalid, if they had not been corrected by the public corporation.¹ Special statutes have

¹Treat v. City of Chicago, 125 Fed. 644 [1903]; (affirmed in Treat v. City of Chicago, 130 Fed. 443, 64 C. C. A. 645 [1904]); Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702 [1891]; Weber v. City of San Francisco, 1 Cal. 455 [1851]; Spalding v. City of Denver, 33 Colo. 172, 80 Pac. 126 [1905]; Draper v. City of Atlanta, 126 Ga. 649, 55 S. E. 929 [1906]; Deslauries v. Soucie, 222 Ill. 522, 113 Am. St. Rep. 432, 78 N. E. 799 [1906]; Givins v. People ex rel. Raymond, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902]; Lux & Talbott Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; Taylor v. Patton, 160 Ind. 4, 66 N. E. 91 [1902]; De Pauw Plate Glass Co. v. City of Alexandria, 152 Ind. 443, 52 N. E. 608; City of Bloomington v. Phelps, 149 Ind. 596, 49 N. E. 581 [1897]; Board of Commissioners of Cass County v. Plotner, 149 Ind. 116, 48 N. E. 635 [1897]; Scudder v. Jones, 134 Ind. 547, 32 N. E. 221 [1893]; De Puy v. City of Wabash, 133 Ind. 336, 32 N. E. 1016 [1892]; Porter v. Midland Ry. Co., 125 Ind. 476, 25 N. E. 556; Trustees of the United Brethren in Christ Church v. Rausch, 122 Ind. 167, 23 N. E. 717 [1889]; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431 [1889]; Jenkins v. Stetler, 118 Ind. 275, 20 N. E. 788 [1888]; Montgomery v. Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184 [1888]; Bravard v. Cincinnati, H. & I. R. Co., 115 Ind. 1, 17 N. E. 183;

Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495 [1887]; Davis v. Lake Shore & Michigan Southern Railway Co., 114 Ind. 364, 16 N. E. 639 [1887]; Ross v. Stackhouse, 114 Ind. 200, 16 N. E. 501 [1887]; Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92 [1886]; Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723 [1886]; Strosser v. City of Ft. Wayne, 100 Ind. 443 [1884]; City of Logansport v. Uhl, 99 Ind. 531, 50 Am. Rep. 109 [1884]; Anderson v. Hubble, 93 Ind. 570, 47 Am. Rep. 394 [1883]; Flora v. Cline, 89 Ind. 208 [1883]; City of Evansville v. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214 [1870]; Hellenkemp v. City of Lafayette, 30 Ind. 192 [1868]; Williams v. Little White Lick Gravel Road Company, Wilson's Sup. Ct. Rep. (Ind.) 7 [1871]; Willard v. Albertson, 23 Ind. App. 162, 53 N. E. 1076, 54 N. E. 446 [1899]; Busenbark v. Clements, 22 Ind. App. 557, 53 N. E. 665 [1899]; New Albany Gas Light & Coke Co. v. Crumbo, 10 Ind. App. 360, 37 N. E. 1062 [1894]; Mackay v. Hancock County, — Ia. —, 114 N. W. 552 [1901]; Wood v. Hall, — Ia. —, 110 N. W. 270 [1907]; Edwards & Walsh Construction Co. v. Jasper County, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; Patterson v. Baumer, 43 Ia. 477 [1876]; Simpson v. City of Kansas City, 52 Kan. 88, 34 Pac. 406 [1893]; Downs v. Board of Commissioners of Wyandotte County, 48 Kan. 640, 29 Pac. 1077 [1892]; Stew-

been passed enacting the foregoing rule, and providing that the failure of a property owner to challenge proceedings while in progress, will estop him from questioning the irregularity of the proceedings after they are completed. Such statutes are held to

art v. Board of Commissioners of Wyandotte County, 45 Kan. 708, 23 Am. St. Rep. 746, 26 Pac. 683 [1891]; Sleeper v. Bullen, 6 Kan. 300 [1870]; Kansas Town Co. v. City of Argentine, 5 Kan. App. 50, 47 Pac. 542 [1896]; City of Lexington v. Bowman, 119 Ky. 840, 84 S. W. 1161, 27 Ky. Law Rep. 286 [1905]; (petition for rehearing overruled in 85 S. W. 1191, 27 Ky. Law Rep. 651); Barber Asphalt Paving Co. v. Gaar, 115 Ky. 334, 73 S. W. 1106, 24 Ky. Law Rep. 2227 [1903]; Preston v. Roberts, 75 Ky. (12 Bush.) 570 [1877]; Bacas v. Adler, 112 La. 806, 36 So. 739 [1904]; Cavanaugh v. Sanderson, — Mich. —, 115 N. W. 955 [1908]; W. F. Stewart Co. v. City of Flint, 147 Mich. 697, 111 N. W. 352 [1907]; Shaw v. City of Ypsilanti, 146 Mich. 712, 110 N. W. 40 [1906]; Nowlen v. City of Benton Harbor, 134 Mich. 401, 96 N. W. 450 [1903]; Gates v. City of Grand Rapids, 134 Mich. 96, 95 N. W. 998 [1903]; Wilson v. Woolman, 133 Mich. 350, 94 N. W. 1076 [1903]; Tuller v. City of Detroit, 126 Mich. 605, 85 N. W. 1080 [1901]; Walker Township v. Thomas, 123 Mich. 290, 82 N. W. 48; Smith v. Carlow, 114 Mich. 67, 72 N. W. 22 [1897]; Moore v. McIntyre, 110 Mich. 237, 68 N. W. 130; Fitzhugh v. City of Bay City, 109 Mich. 581, 67 N. W. 904 [1896]; Atwell v. Barnes, 109 Mich. 10, 66 N. W. 583 [1896]; Duffy v. City of Saginaw, 106 Mich. 335, 64 N. W. 581 [1895]; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526 [1894]; Lundbom v. City of Manistee, 93 Mich. 170, 53 N. W. 161; Baisch v. City of Grand Rapids, 84 Mich. 666, 48 N. W. 176 [1891]; Brown v. City of Grand Rapids, 83 Mich. 101, 47 N. W. 117; Byram v.

City of Detroit, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698 [1883]; People ex rel. Roediger v. Drain Commissioner of Wayne County, 40 Mich. 745 [1879]; Motz v. City of Detroit, 18 Mich. 494 [1869]; State of Minnesota ex rel. City of Duluth v. District Court of St. Louis County, 61 Minn. 542, 64 N. W. 190 [1895]; Jaicks v. Merrill, 201 Mo. 91, 98 S. W. 753 [1906]; Brick & Terra Cotta Co. v. Hull, 49 Mo. App. 433 [1892]; Durrell v. City of Woodbury, — N. J. Sup. —, 65 Atl. 198 [1906]; Tusting v. City of Asbury Park, 73 N. J. Law (44 Vr.) 102, 62 Atl. 183 [1905]; Allison Land Company v. Borough of Tenaflly, 68 N. J. L. (29 Vr.) 205, 52 Atl. 231 [1902]; (affirming Allison Land Company, Pros. v. Mayor and Council of Borough of Tenaflly, 69 N. J. L. (40 Vr.) 587, 55 Atl. 39 [1902]); Rosell, Pros. v. Mayor and Council of Neptune City, 68 N. J. L. 509, 53 Atl. 199 [1902]; Zelif v. Bog & Fly Meadow Co., 68 N. J. L. 200, 56 Atl. 302 [1902]; Brewer, Pros. v. City of Elizabeth, 66 N. J. L. (37 Vr.) 547, 49 Atl. 480 [1901]; State, App. Pros. v. Town of Stockton, in the County of Camden, 61 N. J. L. (32 Vr.) 520, 39 Atl. 921 [1898]; State, Post, Pros. v. City of Passaic, 56 N. J. L. (27 Vr.) 421, 28 Atl. 553 [1894]; State, Provident Institution for Savings in Jersey City, Pros. v. Mayor, etc., of Jersey City, 52 N. J. L. (23 Vr.) 490, 19 Atl. 1096 [1890]; State, Rettinger, Pros. v. City of Passaic, 45 N. J. L. (16 Vr.) 146 [1883]; State, Green, Pros. v. Hotaling, 44 N. J. L. (15 Vr.) 347 [1882]; State, Ryerson, Pros. v. City of Passaic, 38 N. J. L. (9 Vr.) 171 [1875]; State, Ropes, Pros. v. Essex Public Road Board, 37 N. J. L. (8 Vr.) 335

be valid.² Acquiescence on the part of the husband of the property owner, who was also her agent in charge of her realty, has been held to estop the property owner.³ In some cases it has been said that the mere failure on the part of the property owner to make prompt objection should not estop him from setting up irregularities or defects as it is the duty of the public corporation to conduct the proceedings in the manner required by law,

[1875]; *State, Hampton, Pros. v. Mayor and Aldermen of the City of Paterson*, 36 N. J. L. (7 Vr.) 159 [1873]; *State, Wilkinson, Pros. v. Inhabitants of the City of Trenton*, 36 N. J. L. (7 Vr.) 499 [1873]; *State, Malone, Pros. v. Water Commissioners of Jersey City*, 30 N. J. L. (1 Vr.) 247 [1863]; *State, Townsend, Pros. v. Mayor and Common Council of Jersey City*, 26 N. J. L. (2 Dutcher) 444 [1857]; *Dusenbury v. Mayor and Council of the City of Newark*, 25 N. J. Eq. (10 C. E. Gr.) 295 [1874]; *Liebstein v. Mayor and Common Council of the City of Newark*, 24 N. J. Eq. (9 C. E. Gr.) 200 [1873]; *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66 [1906]; *Turnquist v. Cass County Drain Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]; *City of Mt. Vernon v. State*, 71 O. S. 428, 104 Am. St. Rep. 783, 73 N. E. 515 [1904]; *Neff v. Bates*, 25 O. S. 169 [1874]; *Kellogg v. Ely*, 15 O. S. 64 [1864]; *Monroe v. City of Cleveland*, 29 Ohio C. C. 633 [1907]; *Bloch v. Godfrey*, 26 Ohio C. C. 781 [1904]; *Storer v. City of Cincinnati*, 4 Ohio C. C. 279 [1889]; *Ulm v. Cincinnati*, 7 Ohio N. P. 278 [1900]; *Kerker v. Bocher*, — Okla. —, 95 Pac. 981 [1908]; *Clinton v. City of Portland*, 26 Or. 410, 38 Pac. 407 [1894]; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691 [1893]; *In re Perrysville Avenue, Marshall's Appeal*, 210 Pa. 537, 60 Atl. 160 [1904]; *Wingate v. City of Tacoma*, 13 Wash. 603, 43 Pac. 874 [1896]; *Pabst Brewing Co. v. City of Milwaukee*,

126 Wis. 110, 105 N. W. 563 [1905]; *State ex rel. Schintgen v. Mayor and Common Council of the City of La Crosse*, 101 Wis. 208, 77 N. W. 167 [1898]; *Wells v. Western Paving & Supply Co.*, 96 Wis. 116, 70 N. W. 1071 [1897]. In *Chadwick v. Kelly*, 187 U. S. 540, 47 L. 293, 23 S. 175, the Supreme Court said: "The plaintiff in error did not raise such question in time to stay the work *in limine*. He awaited the completion of the work, and until his property had received the benefits, whatever they were, of the improvements." As a result of this inactivity, it was held that the property owner could take advantage of the irregularities complained of.

"They rely exclusively upon the fact that the act of the city in opening the street was void. It was void, and had they raised the question at the proper time it would have been declared void. But in contemplation of law they have, without objection permitted money to be expended in work which benefits their land, under a contract with the city, and they cannot now be heard to deny the power of the city to make the contract. Their contract has not ratified the void act of opening the street, but it does prevent them from saying that the act was void." *Busenbark v. Clements*, 22 Ind. App. 557, 561, 53 N. E. 665 [1899].

² *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887].

³ *Arnold v. City of Ft. Dodge, Iowa*, 111 Ia. 152, 82 N. W. 495 [1900].

rather than the duty of a private citizen to see that they are so conducted.* It has been suggested that estoppel cannot operate by reason of the acquiescence of the property owners until the assessment has been levied and the property owners know what they are obliged to contribute.⁵ The public corporation may also be estopped to deny its liability, if it does not object to the irregularity until after it has received the full benefit of performance.⁶

§ 1016. Delay as laches.

To what extent delay in resisting or enforcing assessment proceedings must go in order to amount to laches, and to prevent the relief sought, depends upon the circumstances of the entire case. If the delay is unreasonable, and during such delay the other party, has in good faith changed his position so that he would be injured by such delay, if the relief which is sought were to be given, such delay amounts to laches and precludes relief, even if the circumstances were such that relief should have been given had application been made promptly.¹ On the other hand, mere delay is not of itself laches;² and if the adversary

* *Town of Clay City v. Bryson*, 30 Ind. App. 490, 66 N. E. 498 [1903]; *Wingert v. Snouffer & Ford*, 134 Ia. 97, 108 N. W. 1035 [1906]; *Tallant v. City of Burlington*, 39 Ia. 543 [1874]; *Fox v. Middlesborough Town Company*, 96 Ky. 262, 28 S. W. 776 [1894]; *Cox v. Mignery & Co.*, 126 Mo. App. 669, 105 S. W. 675 [1907]; *Keare v. Klausman*, 21 Mo. App. 485 [1886]; *Hildebrand v. Toledo*, 27 Ohio C. C. R. 427 [1905]; *Ardrey v. City of Dallas*, 13 Tex. Civ. App. 442, 35 S. W. 726 [1896].

⁵ *Beckert v. City of Allegheny*, 85 Pa. St. (4 Norris) 191 [1877]; (following *Dorsey's Appeal*, 72 Pa. St. (22 P. F. Smith) 192 [1872].

⁶ *Peterson v. City of Ionia*, — Mich. —, 116 N. W. 562 [1908]; (a case of failure to advertise for bids). (Citing *Spier v. Kalamazoo*, 138 Mich. 652, 101 N. W. 846; *Arbuckle & Van Co. v. Grand Ledge*, 122 Mich. 491, 81 N. W. 358; *Coit v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 811; *East Jordan Lumber Company v. Village of East Jordan*,

100 Mich. 201, 58 N. W. 1012; *Carey v. City of East Saginaw*, 79 Mich. 73, 44 N. W. 168, and distinguishing *Chittenden v. City of Lansing*, 120 Mich. 539, 79 N. W. 797, as a case where the board of public works, having no authority, modified the contract, the contractor performed, and the council repudiated without delay).

¹ *Ross v. City of Portland*, 105 Fed. 682 [1901]; *Bryam v. City of Detroit*, 50 Mich. 56, 12 N. W. 912, 14 N. W. 698 [1883]; In the Matter of Opening Lexington Avenue, 50 Howard, 174 [1874]; In the Matter of Roberts, 53 Hun, 338, 6 N. Y. Supp. 195 [1889]; In the Matter of the Petition of Lord to Vacate an Assessment, 21 Hun, 555 [1880].

² *Batty v. City of Hastings*, 63 Neb. 26, 88 N. W. 139 [1901]; In the Matter of Petition of Lord to Vacate an Assessment, 78 N. Y. 109 [1879]; In the Matter of the Petition of Chesebrough to Vacate an Assessment for Underground Drains between One Hundred and Eighty-third

party has not changed his position, the mere fact of delay will not prevent relief from being given. The fact that tax bills are issued after a long delay due to protracted litigation over the validity of the original tax bills, does not render such subsequent tax bills invalid.³ It has been questioned by the courts whether the doctrine of laches is applicable to equity only or whether it applies as well to proceedings at law.⁴ The doctrine of laches has no application if the assessment is void and not merely irregular.⁵

§ 1017. Estoppel by acquiescence in case of want of jurisdiction or fraud.

In some jurisdictions it is said that failure on the part of the property owners to object to the proceedings does not amount to estoppel if the public corporation has not acquired jurisdiction to construct the improvement at the expense of the property owner.¹ Conversely, a public corporation cannot estop itself by levying an assessment upon its own property and selling the same, where it has no power so to do.² Failure on the part of the property owner to object to defects or irregularities in the proceedings is said not to operate as an estoppel where the proceedings are absolutely void.³ It does not operate as estoppel in case of fraud;⁴ in part, because the facts which invalidate the contract by reason of fraud are generally unknown to the property owner.

Streets, the Kings Bridge Road and the Hudson River, 56 Howard, 460 [1878].

³Dollar Savings Bank v. Ridge, 183 Mo. 506, 82 S. W. 56 [1904].

⁴In the Matter of the Petition of Chesebrough to Vacate an Assessment for Underground Drains between One Hundred and Eighty-third Streets, the Kings Bridge Road and the Hudson River, 56 Howard, 460 [1878].

⁵Carter v. Cemansky, 126 Ia. 506, 102 N. W. 438 [1905].

¹Pennsylvania Company v. Cole, 132 Fed. 668 [1904]; Rector v. Board of Improvement, 50 Ark. 116, 6 S. W. 519 [1887]; Balfe v. Lambers, 109 Ind. 347, 10 N. E. 92 [1886]; Coggeshall v. City of Des Moines, 78 Ia. 235, 41 N. W. 617, 42 N. W. 650 [1889]; Speir v. Town of New Utrecht, 121 N. Y. 420, 24 N.

E. 692 [1890]; Wright v. Thomas, 26 O. S. 346 [1875]; Andrew v. Settle, 5 Ohio N. P. 394 [1897]; Smith v. Minto, 30 Or. 351, 48 Pac. 160 [1897]; Strout v. City of Portland, 26 Or. 294, 38 Pac. 126 [1894]; City of New Whatcom v. Bellingham Bay Improvement Co., 10 Wash. 378, 38 Pac. 1024 [1894].

²Taylor v. People, 66 Ill. 322 [1872].

³Hille v. Neale, 32 Ind. App. 341, 69 N. E. 713 [1904]; Barker v. Commissioners of Wyandotte County, 45 Kan. 681, 26 Pac. 585 [1891]; Richter v. Merrill, 84 Mo. App. 150 [1900]; Schumm v. Sevmour, 24 N. J. Eq. (9 C. E. Gr.) 143 [1873].

⁴Schumm v. Sevmour, 24 N. J. Eq. (9 C. E. Gr.) 143 [1873]; City of Northport v. Northport Townsite Co., 27 Wash. 543, 68 Pac. 204 [1902].

§ 1018. Estoppel by acquiescence in case of irregularities.

There is a wide divergence of judicial authority as to the extent to which the doctrine of estoppel applies. In some jurisdictions it is very limited in its range, while in others it is so applied as practically to preclude a property owner from interposing objections after the improvement is completed. Where jurisdiction exists, and the property owner complains of mere technical irregularities, there is a strong tendency to hold that the doctrine of estoppel should apply to its fullest extent.¹ It has been said that estoppel applies where the proceedings are conducted in good faith, under color of statutory authority, and the rights of others have intervened.² In other cases, the doctrine of estoppel has been applied to irregularities where the improvement contract has been performed substantially, and it does not appear that the cost thereof is unreasonable.³ It has been said that the doctrine of estoppel applies if the proceedings are not absolutely void.⁴

§ 1019. Defects as to which estoppel operates.

A property owner who has acquiesced in the construction of the improvement without interposing objections to the proceedings, has been held to be estopped to deny the constitutionality of the statute under which the proceedings are conducted,¹ or the proceedings whereby the improvement was laid out,² or the fact that the public corporation has acquired a right to make use of the land upon which the improvement is constructed for that purpose,³ or to deny the authority by which the improvement was

¹ Trustees of the United Brethren in Christ Church v. Rausch, 122 Ind. 167, 23 N. E. 717 [1889]; Jenkins v. Stetler, 118 Ind. 275, 20 N. E. 788 [1888]; Montgomery v. Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184 [1888]; Ross v. Stackhouse, 114 Ind. 200, 16 N. E. 501 [1887]; Willard v. Albertson, 23 Ind. App. 162, 53 N. E. 1076, 54 N. E. 446 [1899]; Patterson v. Baumer, 43 Ia. 477 [1876]; Cook v. Covert, 71 Mich. 249, 39 N. W. 47 [1888]; Zelif v. Bog & Flv Meadow Co., 68 N. J. L. 200, 56 Atl. 302 [1902].

² Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495 [1887].

³ Jaicks v. Merrill, 201 Mo. 91, 98 S. W. 753 [1906].

⁴ New Albany Gas Light & Coke Co. v. Crumbo, 10 Ind. App. 360, 37 N. E. 1062 [1894].

¹ Mackay v. Hancock County, — Ia. —, 114 N. W. 552 [1908]; City of Mt. Vernon v. State, 71 O. S. 428, 104 Am. St. Rep. 783, 73 N. E. 515 [1904].

² State, Ropes, Pros. v. Essex Public Road Board, 37 N. J. L. (8 Vr.) 335 [1875].

³ Cowley v. City of Spokane, 99 Fed. 840 [1900]; Davis v. Lake Shore & Michigan Southern Ry. Co., 114 Ind. 364, 16 N. E. 639 [1887];

made and the assessment levied,⁴ or to deny the power of the public corporation to make the contract for the improvement under which it has been constructed,⁵ or to claim that the public corporation should not have constructed the improvement,⁶ or that it abused its discretion in deciding to replace an existing improvement by a new one.⁷ It has been held that estoppel *in pais* cannot operate to prevent property owners from attacking a statute on the ground of unconstitutionality.⁸

§ 1020. Estoppel to attack validity of ordinance.

By acquiescence a property owner may be estopped from asserting the invalidity of the original ordinance,¹ as where he claims that the yeas and nays were not taken when the ordinance was passed,² or that the ordinance was passed before the expiration of twenty days after the last publication of the resolution of necessity,³ or that the names of the members of the council voting thereon, were not entered on the record as required by statute.*

§ 1021. Estoppel as to notice.

A property owner who has actual knowledge of the construction of the improvement, has been held to be estopped from claiming that the assessment is invalid by reason of want of technical

Busenbark v. Clements, 22 Ind. App. 557, 53 N. E. 665 [1899]; In the Matter of the Petition of McGown to Vacate an Assessment, 18 Hun (N. Y.) 434 [1879]; Neff v. Bates, 25 O. S. 169 [1874]; Wilson v. City of Cincinnati, 5 Ohio N. P. 68 [1897]. But see as apparently *contra*, Speir v. Town of New Utrecht, 121 N. Y. 420, 24 N. E. 692 [1888].

*Taylor v. Patton, 160 Ind. 4, 66 N. E. 91 [1902]; Board of Commissioners of Cass County v. Plotner, 149 Ind. 116, 48 N. E. 635 [1897].

*Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723 [1886]; *contra*; Perkinson v. Hoolan, 182 Mo. 189, 81 S. W. 407 [1904].

*De Puy v. City of Wabash, 133 Ind. 336, 32 N. E. 1016 [1892].

*Draper v. City of Atlanta, 126 Ga. 649, 55 S. E. 929 [1906].

*O'Brien v. Wheelock, 184 U. S.

450, 46 L. 636, 22 S. 354 [1902]; (affirming O'Brien v. Wheelock, 95 Fed. 883, 37 C. C. A. 309 [1899], which affirmed 78 Fed. 673). See however the distinction made in Shepard v. Barron, 194 U. S. 553, 48 L. 1115, 24 S. Ct. 737 [1904].

¹Durrell v. City of Woodbury, — N. J. L. —, 65 Atl. 198 [1906]; Rosell, Pros. v. Mayor and Council of Neptune City, 68 N. J. L. (39 Vr.) 509, 53 Atl. 199 [1902]; State, Post, Pros. v. City of Passaic, 56 N. J. L. (27 Vr.) 421, 28 Atl. 553 [1894]; Kerker v. Bocher, — Okla. —, 95 Pac. 981 [1908].

²Balfe v. Lammers, 109 Ind. 307, 10 N. E. 92 [1886].

³Kansas Town Co. v. City of Argentine, 5 Kan. App. 50, 47 Pac. 542 [1896].

⁴Motz v. City of Detroit, 18 Mich. 494 [1869].

notice,¹ or by reason of irregularity in the notice of the hearing;² or by reason of want of notice of the improvement ordinance.³ He may be estopped from denying the power of the public corporation to make the assessment payable in installments, where, by statute, at the request of the parties liable for assessment, the city may lend its credit for an amount sufficient for the entire cost of the improvement, the property owner to pay the assessment in equal installments,⁴ and a property owner who knows that the city is acting in the belief that he has requested such plan of payment, fails to object, and pays some of the annual installments.⁵ Such property owner cannot take advantage subsequently of a five-year limitation, after which assessments can not be collected, and thus resist payment of installments subsequently accruing.⁶

§ 1022. Estoppel as to validity of contract and performance.

The property owner may be estopped from claiming that the contract was not let to the lowest bidder,¹ or that it was let without competitive bidding,² or that it was let under circumstances which practically prevented competition,³ or that it contained provisions which tended to increase the cost of the improvement,⁴ such as provisions requiring the contractor to employ only laborers residing in the city,⁵ or that a clause therein unauthorized by statute whereby the contractor was required to purchase bonds to provide for the preliminary expenses and the

¹ *Scudder v. Jones*, 134 Ind. 547, 32 N. E. 221 [1893].

² *State, Townsend, Pros. v. Mayor and Common Council of Jersey City*, 26 N. J. L. (2 Dutcher) 444 [1857].

³ *State, Hampton, Pros. v. Mayor and Aldermen of the City of Paterson*, 36 N. J. L. (7 Vr.) 159 [1873].

⁴ *City of Lexington v. Bowman*, 119 Ky. 840, 84 S. W. 1161, 27 Ky. Law Rep. 286 [1905]. Petition for rehearing overruled in 85 S. W. 1191, 27 Ky. L. Rep. 651.

⁵ *City of Lexington v. Bowman*, 119 Ky. 840, 84 S. W. 1161, 27 Ky. Law Rep. 286 [1905]. Petition for rehearing overruled in 85 S. W. 1191, 27 Ky. L. Rep. 651.

⁶ *City of Lexington v. Bowman*, 119

Ky. 840, 84 S. W. 1161, 27 Ky. Law Rep. 286 [1905]. Petition for rehearing overruled in 85 S. W. 1191, 27 Ky. L. Rep. 651.

¹ *City of Bloomington v. Phelps*, 149 Ind. 596, 49 N. E. 581 [1897].

² *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904].

³ As where a local monopoly existed in the article contracted for, *Givens v. People ex rel. Raymond*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902].

⁴ *Treat v. City of Chicago*, 130 Fed. 443 [1903].

⁵ *Edwards & Walsh Construction Company v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

right of way, was invalid.⁶ It has, however, been held that where the statute required the work to be done by contract, a property owner who fails to object at the time may subsequently resist the assessment on the ground that the improvement was constructed by the city, the public officers having hired men by the day to construct the improvement.⁷ A property owner who fails to object promptly has been held to be estopped to claim that the contract was not performed in a proper manner,⁸ or that illegal items were included in the assessment therefor, rendering the entire assessment invalid,⁹ or that the cost of the improvement was excessive.¹⁰

§ 1023. Estoppel as to other defects.

The property owner may be estopped from attacking the formation of the assessment district,¹ or the rule of apportionment of the assessment which was adopted,² or the validity of the assessment petition,³ or an irregularity in levying one assessment for two or more distinct improvements.⁴

§ 1024. Effect of protest or objection.

A protest made by a party owner against the proceedings, prevents the application of the doctrine of estoppel, since the public corporation is thus advised that the property owner does not acquiesce in the proceeding.¹ No formal protest is necessary to have this doctrine apply. It is sufficient if the property owner fairly advises the public corporation that he objects to the method in which the improvement is made, and to the proceed-

⁶ Wood v. Hall, — Iowa —, 110 N. W. 270 [1907].

⁷ Town of Clay City v. Bryson, 30 Ind. App. 490, 66 N. E. 498 [1902].

⁸ Lux & Talbott Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; City of Evansville v. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214 [1870]; *contra*, Wingert v. Snouffer & Ford, 134 Ia. 97, 108 N. W. 1035 [1906].

⁹ Wells v. Western Paving & Supply Co., 96 Wis. 116, 70 N. W. 1071 [1897].

¹⁰ Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702 [1891].

¹ Deslauries v. Soucie, 222 Ill. 522, 113 Am. St. Rep. 432, 78 N. E. 799 [1906].

² Spalding v. City of Denver, 33 Colo. 172, 80 Pac. 126 [1905].

³ Farr v. City of Detroit, 136 Mich. 200, 99 N. W. 19 [1904].

⁴ State, Provident Institution for Savings in Jersey City, Pros. v. Mayor, etc., of Jersey City, 52 N. J. L. (23 Vr.) 490, 19 Atl. 1096 [1890].

¹ Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234 [1894]; Dehail v. Morford, 95 Cal. 457, 30 Pac. 593 [1892]; Nagle v. Murray, 84 Cal. 539, 24 Pac. 107 [1890].

ings relative thereto; and that on such ground he intends to resist the assessment.²

§ 1025. Estoppel at law and in equity.

In many of the foregoing instances the doctrine of estoppel was applied to prevent the property owner from obtaining affirmative relief in proceedings in certorari,¹ or on an application to a court of equity for an injunction.² In some of the cases it has been said that such estoppel is applicable in equity, though it would not be applicable in a proceeding at law or a summary proceeding to collect the assessment.³ The better view, however, seems to be that where such estoppel is operative, it not only prevents the property owner from obtaining affirmative relief when he seeks to have the assessment vacated by order of a court of competent jurisdiction, but that it also prevents him from resisting the enforcement of such assessment, either at law or by summary proceedings.⁴

§ 1026. Failure to file objections.

A common example of the foregoing principles exists where the statute contemplates the formal presentation of objections, remonstrances, protests, and the like, at a certain stage of the assessment proceedings. If the property owner fails to make such formal objection at the stage required by statute, he is precluded from making such objection at a later stage, when the improvements have been completed, the benefits secured to his property, and the assessment levied.¹ Failure to interpose objec-

² *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907]; *Zorn v. Warren-Scharf Asphalt Paving Company*, — Ind. App. —, 81 N. E. 672 [1907]; *Keys v. City of Neodesha*, 64 Kan. 681, 68 Pac. 625 [1902]; *Auditor General v. Stoddard*, 147 Mich. 329, 110 N. W. 944 [1907]; *Forbis v. Bardbury*, 58 Mo. App. 506 [1894]; *Haisch v. City of Seattle*, 10 Wash. 435, 38 Pac. 1131 [1894].

¹ See § 1403 *et seq.*

² See § 1436 *et seq.*

³ *Williams v. Little White Lick Gravel Road Company*, Wilson's Sup. Ct. Rep. (Ind.) 7 [1871].

⁴ *Pabst Brewing Co. v. City of*

Milwaukee, 126 Wis. 110, 105 N. W. 563 [1905].

¹ *Field v. Barber Asphalt Pav. Co.*, 117 Fed. Rep. 925 [1902]; *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. 53 [1905]; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Cummings v. Kearney*, 141 Cal. 156, 74 Pac. 759 [1903]; *Spaulding v. North San Francisco Homestead & Railroad Association*, 87 Cal. 40, 24 Pac. 600, 25 Pac. Rep. 249 [1890]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *The Wabash Eastern Railway Company of Illinois v. The Commissioners of East Lake Fork Special Drainage District*, 134 Ill.

tions in time do not amount to estoppel if the proceedings are absolutely void,² as where the city has no power to assess.³ If no opportunity for making objections is given, failure to object is

384, 10 L. R. A. 285, 25 N. E. 781 [1891]; *The People ex rel. Barber v. Chapman*, 128 Ill. 496, 21 N. E. 507 [1890]; *Brown v. City of Chicago*, 117 Ill. 21, 7 N. E. 108 [1887]; *Drainage Commissioners v. Hudson*, 109 Ill. 659 [1885]; *City of Ottawa v. Chicago & Rock Island Railroad Co.*, 25 Ill. 29 [1860]; *Wray v. Fry*, 158 Ind. 92, 62 N. E. 1004 [1901]; *Gorman v. State ex rel. Koester*, 157 Ind. 205, 60 N. E. 1083 [1901]; *Bowen v. Hester*, 143 Ind. 511, 41 N. E. 330 [1895]; *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112 [1895]; *Lake Erie & Western Railroad Company v. Bowker*, 9 Ind. App. 428, 36 N. E. Rep. 864 [1893]; *Higman v. City of Sioux City*, 129 Ia. 291, 105 N. W. 524 [1906]; *Marshalltown Light, Power & Railway Company v. City of Marshalltown*, 127 Ia. 637, 103 N. W. 1005 [1905]; *Tuttle v. Polk & Hubbel*, 92 Ia. 433, 60 N. W. 733 [1894]; *Tuttle v. Polk*, 84 Ia. 12, 50 N. W. 38 [1891]; *Broadway Baptist Church v. McAtee*, 8 Bush. (Ky.) 508, 8 Am. Rep. 480 [1871]; *State, Society for Establishing Useful Manufactures, Pros. v. City of Paterson*, 40 N. J. L. (11 Vr.) 250 [1878]; *In the Matter of the Opening of Spuyten Duyvil Park Way*, 67 Howard (N. Y.) 341 [1884]; *Sandford v. Mayor, etc., of the City of New York*, 33 Barb. (N. Y.) 147; *In the Matter of the Petition of Hazelton to Vacate an Assessment of Thirteenth Avenue from Twenty-third to Twenty-fourth Streets*, 58 Hun, 112, 11 N. Y. Supp. 557 [1890]; *Lyth v. City of Buffalo*, 48 Hun (N. Y.) 175 [1888]; *In the Matter of Pinckney to Vacate an Assessment*, 22 Hun (N. Y.) 474 [1880]; *Pittman v. Mayor, etc., of the City of New York*, 3 Hun, 370 [1875]; *Brown v. Otis*, 90 N. Y. S. 250, 98 App. Div. 554 [1904]; *San-*

ford v. Mayor, etc., of New York, 12 Abb. Pr. 23 [1860]; *Commissioners of Putnam County v. Krauss*, 53 O. S. 628, 42 N. E. 831 [1895]; *City of Chester v. Bullock*, 187 Pa. St. 544, 41 Atl. 452 [1898]; *Omega Street, Travers' Appeal*, 152 Pa. St. 129, 25 Atl. 528 [1893]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900]; *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353 [1897]; *City of New Whatcom v. Bellingham Bay Improvement Co.*, 16 Wash. 131, 47 Pac. 236 [1896]; *Wright v. City of Tacoma*, 3 Wash. Terr. 410, 19 Pac. 42 [1888]. "The claim is now made that some basis of apportionment as according to the frontage of the lots assessed on the improvement made should have been adopted in advance of the reassessment. Whether the objection is well founded we do not determine. As based on the facts of this case, it is, at most, purely technical. If it had any merit, it should have been made pending the reassessment, when opportunity for the correction of errors was offered, and will not be given, *weizht now*." *Tuttle v. Polk*, 92 Ia. 433, 446, 60 N. W. 733 [1894]. (Citing *Tuttle v. Polk*, 84 Ia. 12, 50 N. W. 38 [1891]; *Ford v. Town of North Des Moines*, 80 Ia. 626, 45 N. W. 1031 [1890]; *Macklot v. City of Davenport*, 17 Ia. 379 [1864]).

² *Winfrey v. Linger*, 89 Mo. App. 159 [1901]; *Richter v. Merrill*, 84 Mo. App. 150 [1900]; *Palmer's Petition*, 1 Abb. Pr. (N. S.) 30 [1865]; *Howell v. City of Tacoma*, 3 Wash. 711, 28 Am. St. 83, 29 Pa. 447 [1892].

³ *Breed v. Allegheny*, 85 Pa. St. 214 [1877].

not, of course, a waiver of defenses.⁴ A contractor who is, by statute, to be paid in bonds to be redeemed out of a fund created by assessment, is not a party to the assessment proceedings, and hence, though he has made no objections while the proceedings were pending, he may object to their validity when tendered bonds.⁵ In some cases it seems to be held that failure to make objections pending the proceedings does not operate as a waiver or estoppel, since it is rather the duty of the city to act according to the statutes controlling than it is the duty of the property holder to object to any departure therefrom.⁶ A property owner who has protested against the improvement, cannot be said to make an implied promise to pay therefor because he makes no further objection, but makes suggestion as to the proper method of constructing the improvement.⁷ If a suit to cancel an illegal contract is brought before any substantial amount of work has been done thereunder, and before bonds have been sold to be paid for by special assessments, and before the assessment has been levied, the fact that at the time of the trial the contract has been performed and the bonds have been sold, does not estop the property owner from claiming that the contract was invalid.⁸ On the other hand, it has been held that an injunction cannot be obtained before an assessment is levied.⁹ The mere fact that the assessment has been made, does not of itself estop the property owner who has not objected up to that time.¹⁰

§ 1027. Failure to object in manner prescribed by statute as estoppel or waiver.

In many statutes provisions are found which point out the method in which the property owner must object to defects or irregularities in the proceedings. It is generally held that if a fair and ample opportunity is given to the property owner to be

⁴ Collier Estate v. Western Paving & Supply Co., 180 Mo. 362, 79 S. W. 974 [1904].

⁵ State of Washington on the Relation of the Barber Asphalt Paving Company v. City of Seattle, 42 Wash. 370, 85 Pac. 11 [1906].

⁶ Wingert v. Snouffer & Ford, — Iowa, —, 108 N. W. 1035 [1906]; State v. Mayor and Aldermen of City of Paterson, 37 N. J. L. (8 Vr.) 412 [1875]; Hopkins v. Mason, 61 Barb.

469 [1871]; Palmer's Petition, 1 Abb. Pr. (N. S.) 30 [1865].

⁷ Nagle v. McMurray, 84 Cal. 539, 24 Pac. 107 [1890].

⁸ Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898].

⁹ Ballard v. City of Appleton, 26 Wis. 67 [1870].

¹⁰ State, Ogden, Pros. v. Mayor and Common Council of the City of Hudson, 29 N. J. L. (5 Dutcher) 475 [1861].

heard by virtue of such statutory provision, he must make his objections in the manner pointed out by statute, and that if he does not object he cannot subsequently resist or attack the assessment for reasons which he might have urged in the method provided for by statute.¹ The loss of such defenses to the property owner is sometimes referred to principles of estoppel,² though it is also occasionally spoken of as waiver,³ or as laches,⁴ or as resting on the principle that proceedings cannot be attacked collaterally.⁵ A property owner is not estopped by reason of failure to present defenses to a board which had no power to pass upon them.⁶

§ 1028. Circumstances under which failure to object is not waiver.

Mere delay on the part of the property owner to object is not such acquiescence on his part as to amount to estoppel in the absence of facts which amount to laches.¹ A property owner who has no notice, actual or constructive, that the public corporation intends to pay for the improvement by a special assessment, is not estopped from denying the validity of the assessment by failure to object to the proceedings.² He may assume that the as-

¹ *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126 [1905]; *Trigger v. Drainage District No. 1, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *McKinney v. State for use of Dixon*, 101 Ind. 355 [1884]; *Bradley v. City of Frankfort*, 99 Ind. 417 [1884]; *Nixon v. City of Burlington*, — Ia. —, 115 N. W. 239 [1908]; *McKusick v. City of Stillwater*, 44 Minn. 372, 46 N. W. 769 [1890]; *Dows v. Village of Irvington*, 66 Howard (N. Y.) 93 [1883]; *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691 [1893]; *Renard v. City of Spokane*, — Wash. —, 93 Pac. 517 [1908]; *Ferry v. City of Tacoma*, 34 Wash. 652, 76 Pac. 277 [1904].

² *Wilson v. City of Salem*, 24 Or. 504, 34 Pac. 9, 691 [1893]; *Ferry v. City of Tacoma*, 34 Wash. 652, 76 Pac. 277 [1904].

³ *Duncan v. Ramish*, 142 Cal. 686,

76 Pac. 661 [1904]; *Bradley v. City of Frankfort*, 99 Ind. 417 [1884].

⁴ See § 1016.

⁵ See § 986 *et seq.*

⁶ *Cavanaugh v. Sanderson*, — Mich. —, 115 N. W. 955 [1908].

¹ *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897].

² *Pennsylvania Co. v. Cole*, 132 Fed. 668 [1904]; *Troyer v. Dyar*, 102 Ind. 396, 1 N. E. 728 [1885]; *Spaulding v. Baxter*, 25 Ind. App. 485, 58 N. E. 551 [1900]; *Gallaher v. Garland*, 126 Ia. 206, 101 N. W. 867 [1904]; *Robinson v. City of Burlington*, 50 Ia. 240 [1878]; *Hager v. City of Burlington*, 42 Ia. 661 [1876]; *Gilmore v. Fox*, 10 Kan. 509 [1872]; *Guinotte v. Egelhoff*, 64 Mo. App. 356 [1895]; *People of the State of New York ex rel. Troy & Lansingburgh Railroad Company v. Coffey*, 66 Hun, 160, 21 N. Y. Supp. 34 [1892].

assessment is to be paid out of the general funds of the public corporation.³ If an improvement is constructed under a resolution that its costs should be paid from the general funds of the city, the property owner is not estopped because he does not make objection to the proceedings until after the improvement has been completed and has been paid for by the city.⁴ So, a property owner who is told that certain work is being done without the consent of the proper city authorities, and that he will not have to pay therefor, is not estopped by reason of failure to object.⁵ A property owner who does not know that the improvement has been constructed, is not estopped by reason of his failure to object thereto before its completion.⁶ The property owner who has no notice, actual or constructive, of the facts that make the improvement invalid, is not estopped because he fails to object to the proceedings as invalid on account of such facts which are unknown to him.⁷ Thus, a property owner who has no notice of defects in an improvement petition,⁸ or of the invalidity of the contract,⁹ or of the invalidity of the ordinance,¹⁰ is not estopped by reason of his failure to object thereto on those grounds. In like manner, a contractor who does not know that the levy of the assessment by the city is not in compliance with law, may enforce payment of the contract price by the city, even though such assessments are invalid.¹¹ Since a property owner is not estopped as to facts of which he has no notice, he is not estopped to deny that the assessment is invalid by reason of facts occur-

³ *Hager v. City of Burlington*, 42 Ia. 661 [1876]; *Gilmore v. Fox*, 10 Kan. 509 [1872].

⁴ *Spaulding v. Baxter*, 25 Ind. App. 485, 58 N. E. 551 [1900].

⁵ *Guinotte v. Egelhoff*, 64 Mo. App. 356 [1895].

⁶ *Teegarden v. Davis*, 36 O. S. 601 [1881]; *O'Malley v. Olyphant Borough*, 198 Pa. St. 525, 48 Atl. 483 [1901].

⁷ *Marion and Monroe Gravel Road Co. v. McClure*, 66 Ind. 468 [1879]; *Board of Commissioners of Wyandotte County v. Browne*, 49 Kan. 291, 30 Pac. 483 [1892]; *Board of Commissioners of Wyandotte County v. Barker*, 45 Kan. 699, 26 Pac. 591 [1891]; *City of St. Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317

[1895]; *Galbreath v. Newton*, 30 Mo. App. 381 [1888]; *Perkinson v. McGrath*, 9 Mo. App. 26 [1880]; *Lear v. Halstead*, 41 O. S. 566 [1885].

⁸ *Board of Commissioners of Wyandotte County v. Browne*, 49 Kan. 291, 30 Pac. 483 [1892]; *Board of Commissioners of Wyandotte County v. Barker*, 45 Kan. 699, 26 Pac. 591 [1891]; *Lear v. Halstead*, 41 O. S. 566 [1885].

⁹ *Galbreath v. Newton*, 30 Mo. App. 381 [1888].

¹⁰ *Perkinson v. McGrath*, 9 Mo. App. 26 [1880].

¹¹ *Moore v. Mayor, Aldermen and Commonalty of the City of New York*, 73 N. Y. 238, 29 Am. Rep. 134 [1878].

ring subsequent to his acquiescence.¹² A street railroad company which has no notice that the public corporation intends to assess its right of way, is not estopped from denying its liability for the assessment,¹³ if the city had no authority to assess its right of way,¹⁴ or if the action of the city might have been under statutory authority by which such assessment would not be levied upon such right of way.¹⁵ So a railroad company is not estopped where it has no notice that the city intends to assess against it more than the share provided by statute.¹⁶ A property owner who has no notice that the public corporation intends to act in an irregular manner, may assume that it intends to act in compliance with the law; and he is therefore not estopped from attacking the proceedings for a subsequent irregularity, because of his failure to object to the improvement.¹⁷ Thus, failure to object to the construction of a ditch does not estop a property owner from resisting the proceedings for assessing his land for an amount, part of which should be assessed upon the property of another.¹⁸ The owner of a corner lot who does not object to an improvement under an ordinance assessing him for the whole length of the lot abutting upon the street, has been held not to be estopped from taking advantage of a rule of law¹⁹ which limits the assessable length of his property to the width of the frontage upon the other street upon which such corner lot fronts.²⁰

§ 1029. Objection on specified grounds as waiver of other grounds.

If the property owner makes objection to the assessment proceedings upon certain specified grounds, such action is not merely

¹² *Wright v. Rowley*, 44 Mich. 557, 7 N. W. 235 [1880].

¹³ *Western Paving & Supply Co. v. Citizens' St. R. R. Co.*, 155 25 Am. St. Rep. 462, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88 [1891]; *Louisiana Improvement Co. v. Baton Rouge Electric & Gas Co.*, 114 La. 534, 38 So. 444 [1905].

¹⁴ *Western Paving, etc., Co. v. Citizens' St. Ry. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88 [1891]; *Louisiana Improvement Company v. Baton Rouge Electric & Gas Co.*, 114 La. 534, 38 So. 444 [1905].

¹⁵ *People ex rel. Troy R. R. Co. v.*

Coffey, 66 Hun, 160, 21 N. Y. Supp. 34 [1892].

¹⁶ *City of Muscatine v. Chicago, Rock Island & Pacific Railroad Co.*, 88 Ia. 291, 55 N. W. 100 [1893].

¹⁷ *Hunt v. State for use of Downey*, 26 Ind. App. 518, 58 N. E. Rep. 557 [1900]; *Rooney v. City of Toledo*, 9 Ohio C. C. 267 [1894].

¹⁸ *Hunt v. State for use of Downey*, 26 Ind. App. 518, 58 N. E. Rep. 557 [1900].

¹⁹ *Haviland v. City of Columbus*, 50 O. S. 471, 34 N. E. 679 [1893]. See § 704.

²⁰ *Rooney v. City of Toledo*, 9 Ohio C. C. 267 [1894].

an omission on his part to object on other grounds which he does not specify, but it also tends to mislead the public authorities to believe that the grounds of objection thus urged are the only grounds upon which the property owner complains of the assessment, and are the ones upon which he intends to rely. Accordingly, the conduct of the property owner in filing certain specified objections is held to prevent him from subsequently relying upon other and different objections to defeat the assessment.¹ Thus, a general objection that the proceedings were void, without pointing out that the petition is claimed to be insufficient because signed by the executors of deceased property owners instead of by their heirs at law, prevents a subsequent attack upon the assessment on account of such defect.² So, the objection that the property assessed is rural property and cannot on that account be assessed according to the front foot rule, is waived by interposing other specific objections.³ An objection that a drainage district is unnecessary waives the objection that the lands of the objector are not included in the description given in the petition.⁴ If property owners appear and are given a hearing, they thereby waive objection to the sufficiency of the notice of such hearing, if they do not at such appearance object specifically to the notice.⁵

¹ *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844 [1892]; *Dickey & Baker v. People ex rel. Hanberg*, 213 Ill. 51, 72 N. E. 791 [1904]; *Gross v. People ex rel. Raymond*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901]; *Porter v. City of Chicago*, 176 Ill. 605, 52 N. E. 318 [1898]; *Boswell v. City of Marion*, — Ind. App. —, 79 N. E. 1056 [1907]; *Mackay v. Hancock County*, — Ia. —, 114 N. W. 552 [1908]; *Wood v. Hall*, — Ia. —, 110 N. W. 270 [1907]; *Stewart v. City of Detroit*, 137 Mich. 381, 100 N. W. 613 [1904]; *Goodwillie v. City of Detroit*, 103 Mich. 283, 61 N. W. 526 [1894]; *Pepper v. City of Philadelphia to use of Horter*, 114 Pa. St. 96, 6 Atl. 899 [1886]; *Barlow v. City of Tacoma*, 12 Wash. 82, 40 Pac. 382 [1895].

² *Stewart v. City of Detroit*, 137 Mich. 381, 100 N. W. 613 [1904].

³ *Pepper v. City of Philadelphia to use of Horter*, 114 Pa. St. 96, 6 Atl. 899 [1886].

⁴ *Mackay v. Hancock County*, — Ia. —, 114 N. W. 552 [1908].

⁵ *Waite v. People*, 228 Ill. 173, 81 N. E. 837 [1907]; *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903]; *Hintze v. City of Elgin*, 186 Ill. 251, 57 N. E. 856 [1900]; *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *Nicholes v. People ex rel. Kochersperger*, 165 Ill. 502, 46 N. E. 237 [1897]; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893]; *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885]; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867 [1885]; *State of Minnesota ex rel. Thompson v. District Court of Ramsey County*, 51 Minn. 401, 53 N.

And thus, if the property owners object to the improvement on account of its great expense, and withdraw their objections when given an extension of the time of payment,⁶ or if they are heard upon the merits,⁷ they cannot subsequently object to the sufficiency of the notice. If, however, the property owners object to the notice, their mere appearance does not amount to a waiver of the sufficiency thereof.⁸ The fact that a property owner objects to the improvement of one street upon which objection a hearing is given to him, does not estop him from denying the right of the public corporation to improve another street without giving notice thereof.⁹

§ 1030. Failure to appeal as waiver.

Under some statutes provision is made for an appeal upon certain classes of disputed questions. If the public corporation has acquired jurisdiction to levy the assessment, a property owner who has an opportunity to appeal and who does not appeal, is regarded as waiving any objections upon which he might have been heard on appeal, and to be estopped from subsequently interposing such objections.¹ By such conduct a property owner

W. 714 [1892]; *Shannon v. City of Omaha*, 73 Neb. 507, 103 N. W. 53, 106 N. W. 592 [1905]; *State Henderson, Pros. v. Mayor, etc., of Jersey City*, 41 N. J. L. (12 Vr.) 489 [1879]; *State, Forbes, Pros. v. City of Elizabeth*, 42 N. J. L. (13 Vr.) 56 [1880]; *State, Townsend, Pros. v. Mayor and Common Council of Jersey City*, 26 N. J. L. (2 Dutch.) 444 [1857]; *Merritt v. Village of Port Chester*, 71 N. Y. 309, 27 Am. Rep. 47 [1877]; *Beaumont v. Wilkes Barre City*, 142 Pa. St. 198, 21 Atl. 888 [1891].

⁶ *Barlow v. City of Tacoma*, 12 Wash. 32, 40 Pac. 382 [1895]. An objection that the property owners were not consulted does not waive want of notice. *State, Brinley, Pros. v. Inhabitants of the City of Perth Amboy*, 29 N. J. L. (5 Dutcher) 259 [1861]. Failure to object to a total want of notice while the improvement is in process of construction is held to waive notice. *State, Hamp-*

ton, Pros. v. Mayor and Aldermen of the City of Paterson, 36 N. J. L. (7 Vr.) 159 [1873].

⁷ *Porter v. City of Chicago*, 176 Ill. 605, 52 N. E. 318 [1898].

⁸ *State, Central R. R. Co. of New Jersey, Pros. v. Mayor, etc., of Bayonne*, 51 N. J. L. (22 Vr.) 428, 17 Atl. 971 [1889].

⁹ *Stephenson v. Town of Salem*, 14 Ind. App. 386, 42 N. E. 44, 943 [1895].

¹ *Brown v. Drain*, 112 Fed. 582 [1901]; *English v. Territory*, — Ariz. —, 89 Pac. 501 [1907]; *Petaluma Paving Co. v. Singley*, 136 Cal. 616, 69 Pac. 426 [1902]; *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720 [1897]; *Smith v. Hazard*, 110 Cal. 145, 42 Pac. 465 [1895]; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Dowling v. Conniff*, 103 Cal. 75, 36 Pac. 1034 [1894]; *Treanor v. Houghton*, 103 Cal. 53, 36 Pac. 1081 [1894]; *Ryan v. Altschul*, 103 Cal. 174, 37 Pac.

may be prevented from attacking an assessment subsequently on the ground that the improvement was ordered by the public officials at an irregular session,² or that his property is not assessed in a proper proportion,³ or that property in front of which work has already been done is not exempted,⁴ or that the assessment is inadequate,⁵ or that unlawful items are included,⁶ or that the contract has not been performed properly,⁷ or that a certified copy of the assessment has not been made out as required by statute.⁸ It is occasionally held, however, that failure to appeal

339 [1894]; *McSherry v. Wood*, 102 Cal. 647, 36 Cal. 1010 [1894]; *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Perine v. Forbush*, 97 Cal. 306, 32 Pac. 226 [1893]; *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943 [1892]; *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891]; *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220 [1873]; *City of Meriden v. Camp*, 46 Conn. 284 [1878]; *Carr v. People ex rel. Goedtner*, 224 Ill. 160, 79 N. E. 648 [1906]; *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890]; *Morrell v. Union Drainage District No. 1*, 118 Ill. 139, 8 N. E. 675 [1887]; *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150 [1903]; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899]; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. 741 [1897]; *Robinson v. City of Valparaiso*, 136 Ind. 616, 36 N. E. 644 [1893]; *Millikan v. Wall*, 133 Ind. 51, 32 N. E. 828 [1892]; *Terre Haute & Logansport R. R. Co. v. Soice*, 128 Ind. 105, 27 N. E. 429 [1890]; *McEneny v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540 [1890]; *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175 [1889]; *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *White v. Fleming*, 114 Ind. 560, 16 N. E. 487 [1887]; *Davis*

v. Lake Shore & Michigan Southern Ry. Co., 114 Ind. 364, 16 N. E. 639 [1887]; *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481 [1887]; *Balfe v. Lammers*, 109 Ind. 347, 10 N. E. 92 [1886]; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867 [1885]; *Cauldwell v. Curry*, 93 Ind. 363 [1883]; *Foster v. Paxton*, 90 Ind. 122 [1883]; *Powell v. Clelland*, 82 Ind. 24 [1882]; *Potter v. City of Whatcom*, 25 Wash. 207, 65 Pac. 197 [1901].

² *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175 [1889].

³ *Dowling v. Conniff*, 103 Cal. 76, 36 Pac. 1034 [1894]; *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150 [1903].

⁴ *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893].

⁵ *Potter v. City of Whatcom*, 25 Wash. 207, 65 Pac. 197 [1901].

⁶ *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943 [1892].

⁷ *Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777 [1902]; *Petaluma Paving Co. v. Singley*, 136 Cal. 616, 69 Pac. 426 [1902]; *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720 [1897]; *Smith v. Hazard*, 110 Cal. 145, 42 Pac. 465 [1895]; *Diggins v. Harts-horne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Robinson v. City of Valparaiso*, 136 Ind. 616, 36 N. E. 644 [1893]; *Millikan v. Wall*, 133 Ind. 51, 32 N. E. 828 [1892].

⁸ *Davis v. Lake Shore & Michigan Southern Ry. Co.*, 114 Ind. 364, 16 N. E. 639 [1887].

does not prevent the property owner from interposing objections to the regularity and validity of the assessment,⁹ but this view is ordinarily confined to cases where the ordinance and the proceedings thereunder are claimed to be void.¹⁰

§ 1031. Failure to appeal not waiver of jurisdictional defects.

An appeal is ordinarily held not to be necessary if no jurisdiction exists, and therefore it is generally held that objections going to the jurisdictions are not waived by failure to appeal.¹ If drainage commissioners have no authority to attach streets and alleys of an adjacent village to the drainage district, the village authorities waive no rights by failing to appeal.² If benefits can be assessed against highway commissioners only if a highway exists, such commissioners waive no rights by failing to appeal if their defense to the assessment is that no road exists.³ On the other hand, if no jurisdiction exists, the fact that the property owner files an appeal, is not a waiver of such lack of jurisdiction.⁴ If the assessment is void on its face, it has been said that an

⁹ *The Mayor of Baltimore v. Grand Lodge of Maryland of the Independent Order of Odd Fellows*, 44 Md. 436 [1875].

¹⁰ *The Mayor of Baltimore v. Grand Lodge of Maryland of the Independent Order of Odd Fellows*, 44 Md. 436 [1875].

¹ *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901]; *California Improvement Co. v. Moran*, 128 Cal. 373, 60 Pac. 969 [1900]; *Kenny v. Kelly*, 113 Cal. 364, 45 Pac. 699 [1896]; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *City of Meriden v. Camp*, 46 Conn. 284 [1878]; *Drainage Commissioners of District No. 1 v. Village of Cerro Gordo*, 217 Ill. 488, 75 N. E. 516 [1905]; *Commissioners of Big Lake Special Drainage District v. Commissioners of Highways of Sand Ridge*, 199 Ill. 132, 64 N. E. 1094 [1902]; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899]; *Pittsburg, Cincinnati, Chicago and St. Louis Ry. Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. 741 [1897]; *McCullum v. Uhl*, 128 Ind. 304, 27 N.

E. 152, 27 N. E. 725 [1890]; *McEnaney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540 [1890]; *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *White v. Fleming*, 114 Ind. 560, 16 N. E. 487 [1887]; *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481 [1887]; *Comstock v. Eagle Grove City*, 133 Ia. 589, 111 N. W. 51 [1907]; *Provident Institution for Savings v. Allen*, 37 N. J. Eq. (10 Stew.) 36 [1883].

² *Drainage Commissioners of District No. 1 v. Village of Cerro Gordo*, 217 Ill. 488, 75 N. E. 516 [1905].

³ *Commissioners of Big Lake Special Drainage District v. Commissioners of Highways of Sand Ridge*, 199 Ill. 132, 64 N. E. 1094 [1902].

⁴ *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901]; *California Improvement Co. v. Moran*, 128 Cal. 373, 60 Pac. 969 [1900]; *Dehail v. Morford*, 95 Cal. 457, 30 Pac. 593 [1892]; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435 [1891]; *Dougherty v. Coffin*, 69 Cal. 454, 10 Pac. 672 [1886].

appeal is not necessary.⁵ Thus, if an assessment for street intersections is apportioned separately from that done on the main street, so that the lots at the intersections are charged for double the amount legally chargeable thereon,⁶ or if the act of the superintendent in awarding a contract is absolutely void,⁷ the assessment is void on its face, no jurisdiction exists, and appeal has been held not to be necessary. On the other hand, including the cost of items not mentioned in the plans and specifications, but not amounting to an entire departure from the general plan of the improvement as described in the resolution of intention, is erroneous, but does not render the assessment void, and accordingly an appeal must be taken if the property owner wishes to preserve his rights.⁸

§ 1032. Use of improvement as waiver.

Questions of estoppel or waiver are sometimes presented where a property owner has voluntarily made use of a public improvement, and at the same time attempts to resist an assessment therefor. Questions of this sort are most frequently presented in the case of sewers, where the abutting lot owners have voluntarily connected their lands with such sewer,¹ or in case of drains where owners of land have voluntarily connected their lands with public drains.² If the public corporation has no statutory authority to levy an assessment for such improvement, it has been held that the voluntary use of such improvement does not prevent the property owner from resisting an assessment therefor.³ If statutory power to levy an assessment for a given improvement exists, it has been held that the act of the property owners in making use of such improvement voluntarily precludes them from attacking the validity of an assessment or charge made

⁵ *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339 [1894].

⁶ *Kenny v. Kelly*, 113 Cal. 364, 45 Pac. 699 [1896].

⁷ *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972 [1891].

⁸ *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893].

¹ *State, New Brunswick Rubber Company v. Commissioners of Streets and Sewers*, in the *City of New Brunswick*, 38 N. J. L. (9 Vr.) 190,

20 Am. Rep. 380 [1875]; *City of Watertown v. Fairbanks*, 65 N. Y. 588 [1875]; *Hermann v. State ex rel.*, 54 O. S. 506, 32 L. R. A. 734, 43 N. E. 990 [1896].

² *Drainage Comrs. of Drainage District No. 2 v. Drainage Comrs. of Union Drain Dist. No. 3*, 211 Ill. 328, 71 N. E. 1007 [1904]; (affirming, 113 Ill. App. 114).

³ *City of Watertown v. Fairbanks*, 65 N. Y. 588 [1875].

therefor.⁴ If an assessment has been held to be invalid, and the public corporation has then fixed a certain charge to be made upon all who make use of the improvement, it has been held that the voluntary use of such improvement imposes upon the property owner the obligation of paying the sum thus fixed for such privilege.⁵

§ 1033. Waiver or estoppel by express contract.

A property owner may waive his rights to object to an assessment, and may estop himself from attacking its validity by expressly waiving the defects for which he subsequently attempts to attack the assessment.¹ If a property owner enters into a contract to pay an assessment, such agreement operates as a waiver of a right to attack the assessment for pre-existing irregularities.² A request that the work be done has been held, in some jurisdictions, to amount to an implied promise to pay.³ If the owner has protested against the improvement, the fact that he made suggestions subsequently as to the proper method of doing the work, does not amount to a promise to pay therefor.⁴ Under some statutes it is provided that assessments shall be payable in full at once unless the property owners enter into an agree-

¹ *Drainage Comrs. of Drainage District No. 2 v. Drainage Comrs. of Union Drain Dist. No. 3*, 211 Ill. 328, 71 N. E. 1007 [1904]; (affirming, 113 Ill. App. 114); *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *State, New Brunswick Rubber Company v. Commissioners of Streets and Sewers in the City of New Brunswick*, 38 N. J. L. (9 Vr.) 190, 20 Am. Rep. 380 [1875].

² *City of Fergus Falls v. Boen*, 78 Minn. 186, 80 N. W. 961 [1899]; *Hermann v. State ex rel.*, 54 O. S. 506, 32 L. R. A. 734, 43 N. E. 990 [1896].

³ *Shepard v. Barron*, 194 U. S. 553, 48 L. 1115, 24 S. 737 [1904]; *Heft v. Payne*, 97 Cal. 108, 31 Pac. 844 [1892]; *Betts v. City of Naperville*, 214 Ill. 360, 73 N. E. 752 [1905]; *Flora v. Cline*, 89 Ind. 208 [1883]. See also *Hendrickson v. Toledo*, 23 Ohio C. C. R. 256 [1901].

⁴ *Murdock v. City of Cincinnati*, 44 Fed. 726 [1891]; *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 557 [1896]; *Floyd v. Atlanta Banking Co.*, 109 Ga. 778, 35 S. E. 172 [1899]; *People of the State of Illinois v. Weber*, 164 Ill. 412, 45 N. E. 723; *Scott v. Hayes*, 162 Ind. 348, 70 N. E. 879 [1903]; *Sleeper v. Bullen*, 6 Kan. 300 [1870]; *Flora v. Cline*, 89 Ind. 208 [1883]; *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *City of Springfield v. Harris*, 107 Mass. 532 [1871]; *Inhabitants of Boston v. Brayer*, 11 Mass. 447 [1814]; *Jackson v. City of Detroit*, 10 Mich. 248 [1862]; *Corry v. Gaynor*, 22 O. S. 584 [1872]; *Thornton v. Cincinnati*, 26 Ohio C. C. R. 33 [1904].

⁵ *Moore v. Barry*, 30 S. C. 530, 4 L. R. A. 294, 9 S. E. 589 [1888].

⁶ *Nagle v. McMurray*, 84 Cal. 539, 24 Pac. 107 [1890].

ment to waive all irregularities, and in consideration thereof, obtain the privilege of paying such assessment in installments. Such statutes are held to be valid, and property owners who agree to waive irregularities in order to obtain such extension of time, are precluded from setting up such irregularities subsequently to defeat the assessment.⁵ A special contract between the holder of a certificate payable by assessments and the property owner, whereby an extension of time is given has also been held to preclude the property owner from attacking the validity of such assessments.⁶ Requesting and obtaining an extension of time is said to operate as a waiver of irregularities.⁷ Conversely, if a public corporation has agreed to exempt certain property from assessment in consideration of the right to make use of a part of such property for a public improvement, it has been held that a public corporation cannot retain the property which they have acquired under such agreement, and at the same time deny the validity of the contract to exempt the remaining property from assessment.⁸ An offer by a property owner to pay an assessment under certain circumstances, which offer is not accepted by the public corporation, is not a waiver of a right to attack the assessment.⁹ An agreement made on behalf of a public corporation by a person not authorized to represent it, is, on the other hand, not binding on the corporation.¹⁰ A consideration is necessary to make such contract operative as a waiver,¹¹ at least if no action in reliance on the promise is shown to exist. A promise to pay an assessment after the proceedings are completed and not shown to be supported by any consideration, has been held not to be a waiver.¹² An agree-

⁵ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903]; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; *Dunkirk Land Co. v. Zehner*, 35 Ind. App. 694, 74 N. E. 1099 [1905]; *Richcreek v. Moorman*, 14 Ind. App. 370, 42 N. E. 943 [1895]; *Sisson v. Board of Supervisors of Buena Vista County*, 128 Iowa, 442, 70 L. R. A. 440, 104 N. W. 454 [1905].

⁶ *Farmer's Bank v. Orr*, 25 Ind. App. 71, 55 N. E. 35 [1900].

⁷ *Board of Commissioners of Cass County v. Plotner*, 149 Ind. 116, 48 N. E. 635 [1897].

⁸ *Hendrie v. City of Boston*, 179 Mass. 59, 60 N. E. 386 [1901]; *Coit v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 811 [1898].

⁹ *Winnebago Furniture Manufacturing Company v. Fond du Lac County*, 113 Wis. 72, 88 N. W. 1018 [1902].

¹⁰ *Drainage District No. 15 of Skagit County v. Armstrong*, 44 Wash. 23, 87 Pac. 52 [1906].

¹¹ *State v. Several Parcels of Land*, — Neb. —, 110 N. W. 753 [1907].

¹² *City of Philadelphia to use of McManus v. Unknown Owner*, 149 Pa. St. 22, 24 Atl. 65 [1892].

ment between the property owners and the public corporation, whereby a prior assessment is repaid to the property owners, precludes them from denying that such original assessment was invalid in a subsequent proceeding by the public corporation to levy a re-assessment.¹³

§ 1034. Waiver by entering into improvement contract.

A property owner who has taken a contract for the construction of a public improvement is held to be estopped from denying the validity of the proceedings up to the time that the contract was let to him, or by reason of any irregularities due to his own conduct.¹ A property owner who has taken a contract, and subsequently has assigned it, is estopped from setting up any pre-existing irregularities,² but if the assignee does not perform the contract, the assignor is not precluded from setting up this fact as a defense to an assessment.³

§ 1035. Payment of installment as waiver.

By the express provisions of some statutes, a payment by a property owner of one or more installments of an assessment precludes him from denying the validity of such assessment in a proceeding to recover subsequent installments.¹ If, however, the judgment of confirmation is based upon a void ordinance, it may be set aside by the court on motion of the city, even if payment has been made thereon.² In the absence of express statutory provisions it has been held in some jurisdictions that the mere payment of an installment of an assessment does not estop the property owner from resisting the collection of subsequent installments.³ This is true, especially if the facts are not known

¹³ State ex rel. Putnam v. Egan, 64 Minn. 331, 67 N. W. 77 [1896].

¹ Harwood v. Huntoon, 51 Mich. 639, 17 N. W. 216 [1883]; People ex rel. Roediger v. Drain Commissioner, of Wayne County, 40 Mich. 745 [1879]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902].

² Callender v. Patterson, 66 Cal. 356, 5 Pac. 610 [1885].

³ Union Paving and Contracting Co. v. McGovern, 127 Cal. 638, 60 Pac. 169 [1900].

¹ Treat v. City of Chicago, 125 Fed.

644 [1903]; (affirmed in Treat v. City of Chicago, 130 Fed. 443, 64 C. C. A. 645 [1904]); McDonald v. People ex rel. Hanberg, 206 Ill. 624, 69 N. E. 509 [1904]; Downey v. People ex rel. Raymond, 205 Ill. 230, 68 N. E. 807 [1903].

² City of Chicago v. Walsh, 203 Ill. 318, 67 N. E. 774 [1903].

³ Upton v. People ex rel. Murrie, 176 Ill. 632, 52 N. E. 358 [1898]; Robinson v. City of Burlington, 50 Ia. 240 [1878]; Tallant v. City of Burlington, 39 Ia. 543 [1874]; Wake-

to the property owner at the time that he makes such payment.* Voluntary payment of an assessment is not ratification of the plat with reference to which the assessment was levied, nor is it an estoppel to deny its validity.⁵ In other cases it has been held that the voluntary payment of installments of an assessment precludes the property owner from attacking the validity of such assessment subsequently.⁶ By an extension of this principle the voluntary payment of an assessment for a change of grade precludes a property owner from resisting a subsequent assessment for grading such street in accordance with such grade, on the ground of defects in the original proceedings.⁷ In the absence of any change of position on the part of the city, in reliance upon such conduct, it is difficult to see any reason for regarding such payments as operating as an estoppel. If, however, he has paid installments falling due while the work was progressing and the public corporation has constructed the improvement in reliance on the apparent validity of the assessment, the owner is clearly estopped from denying the validity of the assessment.⁸ A public corporation which collects an assessment has been held to be estopped to deny its validity as against the party who has made such payments.⁹ If benefits are set off against damages,

ley v. City of Omaha, 58 Neb. 245, 78 N. W. 511 [1899]; McLaughlin v. Miller, 124 N. Y. 510, 26 N. E. 1104 [1891]; Speir v. Town of New Utrecht, 121 N. Y. 420, 24 N. E. 692 [1890]; City of Cincinnati v. James, 55 O. S. 180, 44 N. E. 925 [1896]; Metcalf v. Carter, 19 Ohio C. C. 196 [1900].

*Ycst v. Toledo & Ohio Central Railway Co., 24 Ohio C. C. 169 [1902].

⁵Sheridan v. Empire City, 45 Ore. 296, 77 Pac. 393 [1904].

⁶Farmer's Bank v. Orr, 25 Ind. App. 71, 55 N. E. 35 [1900]. (Payment in the above case was coupled with a request for an extension of time, without informing the holder of the certificate that the property owner claimed payment in labor and materials.) Thompson v. Mitchell, 133 Iowa 527, 110 N. W. 901 [1907]; Bacas v. Adler, 112 La. 806, 36 So. 739 [1904]; State of Minnesota ex rel. City of Duluth v. District Court

of St. Louis County, 61 Minn. 542, 64 N. W. 190 [1895].

⁷State of Minnesota ex rel. Chapin v. District Court of Ramsey County, 40 Minn. 5, 41 N. W. 235 [1889].

⁸Fitzgerald v. Walker, 55 Ark. 148, 17 S. W. 702 [1891].

⁹"At the time of the payment, the liability of the defendant was asserted by the plaintiff, no question of the validity of the law was then raised, the defendant was apparently bound to pay the money, and could not have recovered it back; and it would be strange doctrine now to hold that the city was not also bound, when it was she who asserted her legal right to recover the money, and obtained it by force of her adverse proceeding and the assertion of her right, accompanied with a demand for the money on peril of legal proceedings to enforce the payment of her claim." Pittsburg v. Town of Pittsburg, 165 Pa. St. 516, 518, 30 Atl. 1917 [1895].

the fiction of a payment by the property owner of benefits, and a repayment of such amount to him as damages, cannot estop him from attacking an assessment levied for the excess of the benefits over the damages.¹⁰ A property owner who deposits money, not as a payment of an assessment, but to protect the city on an appeal taken by himself, is not thereby estopped from denying the validity of the assessment; and he may recover such payment if the appeal is decided in his favor.¹¹ Payment by a predecessor in interest of a party attacking an assessment, has been held to be an estoppel of such successor in interest,¹² although the opposite view has also been entertained.¹³ Whatever effect payment of an assessment may have as an estoppel to deny its validity, it does not estop a property owner making such payment from claiming that the street or alley for which the assessment is levied is located upon his own land.¹⁴

§ 1036. Formal certificate as waiver or estoppel.

If a public officer gives a certificate that certain property is free from assessments and taxes, the public corporation is estopped if such officer is empowered by statute to give such certificate;¹ but otherwise no estoppel exists.² If the officers of a public corporation omit to place an assessment upon the records so that an examination of the records would not disclose the existence of such assessment, it has been held that such failure estops the city from setting up such assessment as against a grantee who takes for value and without notice,³ although the opposite view has been expressed.⁴ If the records are imperfect, but proper inquiry would have disclosed the existence of the assessment, no estoppel exists.⁵

¹⁰ *Keifer v. The City of Bridgeport*, 68 Conn. 401, 36 Atl. 801 [1896].

¹¹ *Murtland v. City of Pittsburg*, 189 Pa. St. 371, 41 Atl. 1113 [1899].

¹² *Gilfeather v. Grout*, 91 N. Y. S. 533, 101 App. Div. 150 [1905].

¹³ *Fitzgerald v. City of Sioux City*, 125 Iowa, 396, 101 N. W. 268 [1904].

¹⁴ *City of Chicago v. Borden*, 190 Ill. 430, 60 N. E. 915 [1901].

¹ *City of Elizabeth v. Shirley*, 35 N. J. Eq. (8 Stew.) 515 [1882].

² *Fahl v. Love*, 37 N. J. L. (8 Vr.) 5 [1874].

³ *Elder v. Fox*, 18 Colo. App. 263, 71 Pac. 398 [1903]; *Curnen v. The Mayor, Aldermen and Commonalty of the City of New York*, 79 N. Y. 511 [1880]; *City of Philadelphia v. Matchett*, 116 Pa. St. 103, 8 Atl. 854 [1887].

⁴ *Curnen v. The Mayor, Aldermen and Commonalty of the City of New York*, 7 Daly (N. Y.) 544 [1878].

⁵ In the Matter of the Petition of Brown to Vacate an Assessment, 14 Daly (N. Y.) 103 [1886].

§ 1037. Estoppel against public corporation.

A public corporation which has treated an assessment as valid is estopped, as to parties who have dealt with such corporation in reliance upon the apparent validity of the assessment, from denying its validity subsequently.¹ So it has been held that by assessing property, a city may estop itself from claiming an interest therein.² On the other hand, it has been held that the fact that a city has collected taxes and assessments from the parties who claim to own certain lands, on the theory that it is private property, does not estop it from claiming subsequently that such property is a public street.³ If a city has by ordinance declared an assessment to be void, it may be estopped to claim in proceedings in mandamus to compel a re-assessment, that such assessment is valid.⁴ Conduct on the part of the public corporation or its officers, whereby subsequent grantees are misled as to the existence of an assessment, and purchase under the belief, induced by the act of such officers, that there is no assessment which is a lien upon such property, may prevent the public corporation from asserting the lien of such assessment as against such grantees. Thus, if an assessment is omitted from the record, and is interlined after the conveyance,⁵ or if the assessment is marked "paid" on the record at the time of the conveyance,⁶ or if a formal certificate of payment is given by an officer authorized for that purpose,⁷ such assessment cannot be enforced as against a subsequent grantee. If the lien of an assessment for the use of water is lost if the water is not turned off thirty days prior to the expiration of the collection period, and the water is not in

¹ Warner v. City of New Orleans, 87 Fed. Rep. 829, 31 C. C. A. 238, 59 U. S. App. 131 [1898]; City of Davenport v. Boyd, 109 Ia. 248, 77 Am. St. Rep. 536, 80 N. W. 314 [1899]; Sleeper v. Bullen & Dustin, 6 Kan. 300 [1870]; People ex rel. Brooklyn Park Commissioners v. City of Brooklyn, 3 Hun (N. Y.) 596 [1875]; Seaman v. Hicks, 8 Paiges' Chan. Rep. 655 [1841].

² City of Davenport v. Boyd, 109 Ia. 248, 77 Am. St. Rep. 536, 80 N. W. 314 [1899]; Seaman v. Hicks, 8 Paiges' Chan. Rep. 655 [1841].

³ Reynolds v. Newton, 14 Ohio C. C. 433 [1893].

⁴ Phillips v. City of Olympia, 21 Wash. 153, 57 Pac. 347 [1899].

⁵ Lyon v. Alley, 130 U. S. 177, 32 L. 899, 9 S. 480 [1889]; (affirming, Alley v. Lyon, 14 D. C. (3 Mackey) 457 [1885]).

⁶ Curnen v. Mayor, Aldermen and Commonalty of the City of New York, 79 N. Y. 511 [1880].

⁷ City of Elizabeth v. Shirley, 35 N. J. Eq. (8 Stewart) 515 [1882].

fact turned off,⁸ or if a permit for the use of water cannot issue unless the applicant has shown that he has paid for the cost of laying the pipe in front of his premises, and the permit has in fact issued,⁹ subsequent grantees who buy in reliance upon the apparent freedom of the property from such liens, hold free therefrom. A., the owner of certain property, agreed to convey a portion of it to the city for widening the street, under an agreement that the amount of the assessment to be levied against the residue of such property should be deducted from the compensation of the amount thus taken. Subsequently, but before the assessment was completed, A. sold such property to B., who took possession, and after the assessment was completed A. received an order for the amount to be paid for that portion of the property taken by the city, and received payment for the full amount instead of deducting the amount of such assessment. Under such facts, it was held that the city had no lien for such assessment against the property in the hands of B.¹⁰

§ 1038. Necessity of pleading estoppel.

A public corporation which wishes to take advantage of an estoppel, must plead the facts which give rise to such estoppel.¹ It cannot take advantage of an estoppel under averments which show that the proceedings were conducted regularly.²

⁸ City of Chicago v. Northwestern Mutual Life Insurance Co., 218 Ill. 40, 1 L. R. A. (N. S.) 770, 75 N. E. 803 [1905].

⁹ City of Philadelphia v. Matchett, 116 Pa. St. 103, 8 Atl. 854 [1887].

¹⁰ Little v. City of Rochester, 87 Hun, 493, 34 N. Y. S. 1010 [1895].

¹ Town of Greendale v. Suit, 163 Ind. 282, 71 N. E. 658 [1904]; Taylor v. Patton, 160 Ind. 4, 66 N. E. 91 [1902]; Scudder v. Jones, 134 Ind. 547, 32 N. E. 221 [1893].

² Town of Greendale v. Suit, 163 Ind. 282, 71 N. E. 658 [1904].

CHAPTER XX.

NATURE OF LIABILITY CREATED BY ASSESSMENT.

§ 1039. Theory that personal liability cannot be imposed for benefits.

Whether an assessment is a personal liability of the owner of the property benefited which may be collected out of any of his property generally, or whether it is a charge upon the land benefited which may be collected only out of that specific property, or whether it is both a personal liability and a charge upon the land benefited, are questions which have been presented in many cases for judicial determination. If it is sought to make an assessment for benefits conferred by an improvement the personal debt of the owner of the property benefited, serious objections can be made thereto. In order to have the question of the personal liability of the owner become material, it is usually necessary that the assessment cannot be collected by the sale of the property benefited; that is, the property after it has been benefited by the improvement is worth less than the amount assessed against it for the increased value due to benefits, or else, if the assessment is subordinate to prior liens, the value of the property after satisfying prior liens, is not sufficient to pay the amount of the assessment. In either case, either the whole or a part of the assessment, if paid at all, can be collected only by treating it as a personal debt of the owner, and it is, in cases like this, that the question of his personal liability becomes material. Under facts like this, it is evident that in the greater number of cases the result of enforcing the assessment as a personal debt against the property owner, will be to impose upon him a charge in excess of the increase in value of his property due to the improvement for which the assessment is levied, and often in excess of the entire value of the property. In many cases it is held that to do this ignores every theory on which the law of benefits is based, and amounts to a taking of property without due process of law; and accordingly it is held that statutes which provide specifically that the assessment is a personal debt of the property

owner are unconstitutional.¹ There can be no personal liability for special taxation, based upon the theory of benefits.² Under this theory, no personal liability can exist even if the property owner enters his appearance and contests the validity of the assessment.³ An assessment is furthermore not a personal debt of a decedent, to be paid out of his personal property,⁴ especially where the improvement is constructed after the death of the property owner.⁵ Indeed, the elements of personal liability have been regarded as a test for distinguishing assessments from other forms of liability imposed by the government, and it has been said that if a personal liability is created by the statute the charge cannot be an assessment.⁶

¹ Santa Cruz Rock Pavement Company v. Bowie, 104 Cal. 286, 37 Pac. 934 [1894]; Manning v. Den, 90 Cal. 610, 27 Pac. 435 [1891]; Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351 [1890]; Randolph v. Bayue, 44 Cal. 366 [1872]; Baffnet v. Gough, 36 Cal. 104 [1868]; Guerin v. Reese, 33 Cal. 292 [1867]; Beaudry v. Valdez, 32 Cal. 269 [1867]; Walsh v. Mathews, 29 Cal. 123 [1865]; Creighton v. Manson, 27 Cal. 614 [1865]; Gage v. City of Chicago, 225 Ill. 218, 80 N. E. 127 [1907]; City of Chicago v. Hayward, 176 Ill. 130, 52 N. E. 26 [1898]; (reversing City of Chicago v. Hayward, 60 Ill. App. 582); Illinois Central Railroad Company v. People ex rel. Alexander, 161 Ill. 244, 43 N. E. 1107 [1896]; Dempster v. People ex rel. Kern, 158 Ill. 36, 41 N. E. 1022 [1895]; Craw v. Village of Tolono, 96 Ill. 255, 36 Am. Rep. 143 [1880]; Mix v. Ross, 57 Ill. 121 [1870]; Brown v. Joliet, 22 Ill. 123 [1859]; Jackson v. McHargue, — Ky. —, 106 S. W. 871 [1908]; Orth v. Park, 26 Ky. Law Rep. 184, 80 S. W. 1108 [1904]; (denying rehearing of Orth v. R. B. Park Co., 117 Ky. 779, 79 S. W. 206, decree subsequently modified in 81 S. W. 251, 26 Ky. L. R. 342); Scherm v. Short, 77 S. W. 357, 25 Ky. Law Rep. 1108 [1903]; Pfaffinger v. Kremer, 115 Ky. 498, 74 S. W. 238, 24 Ky. L. R. 2368 [1903]; Meyer v. Covington, 103 Ky. 546, 45

S. W. 769, 20 Ky. L. R. 239; Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125, 18 Ky. L. R. 238 [1896]; Barker v. Southern Construction Co., — Ky. —, 47 S. W. 608, 20 Ky. L. R. 796; Sutton's Heirs v. Louisville, 35 Ky. (5 Dana) 28 [1837]; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451 [1879]; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330, 14 S. E. 521 [1892]; Asberry v. City of Roanoke, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360 [1895]. See however Emery v. Bradford, 29 Cal. 75 [1865].

² "Special taxation of contiguous property can no more be made a personal liability of the owners of the contiguous property so taxed than can a special assessment be made a personal liability of the owners of property against which an assessment is made on account of supposed benefits. Both are proceedings *in rem* and not *in personam* under our constitution." Craw v. Village of Tolono, 96 Ill. 255, 262, 36 Am. Rep. 143 [1880].

³ Hoover v. People ex rel. Peabody, 171 Ill. 182, 49 N. E. 367 [1898].

⁴ Hancock v. Whitmore, 50 Cal. 522 [1875].

⁵ Hancock v. Whitmore, 50 Cal. 522 [1875].

⁶ Village of Lemont v. Jenks, 197 Ill. 363, 90 Am. St. Rep. 172, 64 N. E. 362 [1902].

§ 1040. Special theories as to validity of personal liability.

In Missouri it was held originally that the liability imposed by an assessment was "personal as well as *in rem*,"¹ and that accordingly statutes which authorized personal judgments on assessments were constitutional.² Subsequently, however, for the reasons already suggested, these earlier cases were overruled,³ and it was held that statutes providing for a personal liability against the property owner were unconstitutional.⁴ Under recent Missouri legislation, no attempt appears to be made to impose a personal liability upon the property owner. A decree in which the court finds that the defendant is indebted to the plaintiff in the amount of the tax bill upon which suit is brought, and which decrees the amount to be a lien upon the property against which the tax bill is issued, is said to be susceptible to criticism, but nevertheless, a decree which cannot be construed as a personal judgment.⁵ In Virginia the validity of a statute providing for the personal liability of the property owner, seems at first to have been assumed.⁶ Subsequently, while still apparently assuming the validity of such statutes, a statute authorizing the city to "tax a lot adjoining a street on which paving is done," was held not to make such assessment a personal debt of the owner, but only a charge upon the property.⁷ In a still later case the validity of a statute providing that an assessment "shall also be a personal debt of the owner of the property;" was

¹ City of St. Louis to Use of Depelbauer v. Newman, 45 Mo. 138 [1869].

² City of St. Louis to Use of Depelbauer v. Newman, 45 Mo. 138 [1869]. See to the same effect City of St. Louis v. Clemens, 49 Mo. 552 [1872]; City of St. Louis v. Clemens, 36 Mo. 467 [1865]. This question was not passed upon in City of St. Louis to Use of Rotchford v. DeNoue, 44 Mo. 136 [1869].

³ City of St. Louis to Use of Seibert v. Allen, 53 Mo. 44 [1873]; Neenan v. Smith, 50 Mo. 525 [1872].

⁴ Heman Construction Co. v. Washash Railway Company, 206 Mo. 172, 104 S. W. 67 [1907]; Heman Construction Co. v. Loevy, 179 Mo. 455, 78 S. W. 613 [1903]; Barber Asphalt Paving Co. v. French, 158 Mo. 534,

54 L. R. A. 492, 58 S. W. 934 [1900]; Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014 [1895]; The State ex rel. Mispagel v. Angert, 127 Mo. 456, 30 S. W. 118 [1894]; City of Pleasant Hill v. Dasher, 120 Mo. 675, 25 S. W. 566 [1893]; City of Clinton to Use of Thornton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; Louisiana v. Miller, 66 Mo. 467 [1877]; Siebert v. Copp, 62 Mo. 182 [1876]; Kiley v. Forsee, 57 Mo. 390 [1874]; Carlin v. Cavender, 56 Mo. 286 [1874]; Strasshein v. Jerman, 56 Mo. 104 [1874].

⁵ Hill-O'Meara Construction Co. v. Sessinghaus, 106 Mo. App. 163, 80 S. W. 747 [1904].

⁶ Moseley v. Boush, 25 Va. (4 Randolph) 392 [1826].

⁷ Green v. Ward, 82 Va. 324 [1886].

denied entirely on the ground that if the assessment were made a personal debt of the property owner, its character would be changed to that of an ordinary tax, in which case it would be invalid unless it conformed to the constitutional requirements of equality and uniformity.⁸

§ 1041. Theory that personal liability can be imposed.

The reasons already given for denying the power of the legislature to make an assessment the personal debt of a property owner, go further, however, than merely to deny the existence of such liability. Carried to their logical conclusion, they show that in these cases the assessment itself exceeded the amount of the benefits conferred by the improvement, and that accordingly the assessment should have been declared invalid, or reduced in amount at some stage of the proceedings, either by the officers of the public corporation which levied the assessment, or by the courts. As has been said elsewhere,¹ however, the courts in many states are unwilling to review facts which have been determined by officers of public corporations under statutory authority, after a notice and an opportunity for a hearing have been given to the property owners; and, accordingly, in cases of this sort, even while denying the existence of a personal liability on the part of the property owner, the courts are unwilling to declare the assessments to be invalid. The reasons given for denying the existence of a personal liability are even more effective as a basis for denying the validity of the assessment. Accordingly, in many jurisdictions, it is held that an assessment otherwise valid may be made a personal debt of the owner of the property benefited if the legislature so provides.² Accordingly, a warrant may issue

⁸ *Asberry v. City of Roanoke*, 91 Va. 562, 42 L. R. A. 636, 22 S. E. 360 [1895]. This case was decided under the following constitutional provision: "Taxation except as hereinafter provided, whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other

species of property of equal value." Article X., § 1, Constitution of Virginia [1867].

¹ See § 666 *et seq.*

² *Higgins v. City of Chicago*, 18 Ill. 276; *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897]; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896]; *Risdon v. Shank*, 37 Ia. 82 [1873]; *Atchison, Topeka & Santa Fe Ry. Company v. Peterson*, 5 Kan. App. 103, 48 Pac. 877 [1897]; *Sharp v. Johnson*, 4 Hill (N. Y.) 92,

for the collection of an assessment without waiting for the sale of the realty.³ In other cases the validity of statutes which impose a personal debt upon the owner of the property benefited seems to be assumed without discussion.⁴ Whether a statute imposing personal liability is constitutional or not is a question which has been raised but not decided in a case in which the assessment was levied under an earlier statute which did not impose personal liability.⁵

§ 1042. Compromise theories of validity of personal liability.

In some cases a compromise doctrine has been suggested and the courts have held that an assessment is a personal debt of the property owner, up to the value of the property which is assessed for the improvement.¹ The existence of a liability thus qualified

40 Am. Dec. 259 [1843]; *Davis v. Cincinnati*, 36 O. S. 24 [1880]; *Gest v. City of Cincinnati*, 26 O. S. 275 [1875]; *Corry v. Gaynor*, 21 O. S. 277 [1871]; *Maloy v. City of Marietta*, 11 O. S. 636 [1860]; *Hill v. Higdon*, 5 O. S. 243, 67 Am. Dec. 289 [1855]; *Franklin v. Hancock*, 204 Pa. 110, 53 Atl. 644 [1902]; *Vacation of Howard Street, Philadelphia*, 142 Pa. St. 601, 21 Atl. 974 [1891]; *In re Vacation of Centre Street*, 115 Pa. St. 247, 8 Atl. 56 [1886]; *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154 [1896]; *Bennison v. City of Galveston*, 18 Tex. Civ. App. 20, 44 S. W. 613 [1898]; *Lovenberg v. City of Galveston*, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897]; *Allen v. Drew*, 44 Vt. 174 [1872]; *Evans v. Sharp*, 29 Wis. 564 [1872].

³ *Higgins v. City of Chicago*, 18 Ill. 276 [1857].

⁴ *City of Waterbury v. Schmitz*, 58 Conn. 522, 20 Atl. 606 [1890]; *Beck v. Tolen*, 62 Ind. 469 [1878]; *Succession of Irwin*, 33 La. Ann. 63 [1881]; *Hutchison v. City of Rochester*, 92 Hun (N. Y.) 393, 36 N. Y. S. 766 [1895]; *DePeyster v. Murphy*, 39 N. Y. Sup. Ct. Rep. 255 [1875]; *Gilbert v. Havemeyer*, 4 N. Y. Sup. Ct. Rep. 506 [1849].

⁵ *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553 [1890].

¹ *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883]; *Gould v. The Mayor and City Council of Baltimore*, 59 Md. 378 [1883]; *Clemens v. Mayor and City Council of Baltimore to use of Volkmar*, 16 Md. 208 [1860]; *Eschbach v. Pitts*, 6 Md. 71 [1854]. "It is difficult to see how the property could be assessed except as belonging to somebody and of course that somebody would be the person to pay for the property for the property could not pay for itself. It is undoubtedly a personal debt to the extent of the property charged with the tax. The tax was intended to be and is a lien on the property, and the owner, to that extent, is answerable for its payment as for a personal debt of any other kind but we do not wish to be understood that his liability for the tax would extend beyond the value of the property taxed for the improvement. We do not understand that question, last suggested, to be involved, but we deem it proper to say that we express no opinion on that aspect of the case till it arises." *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883].

has been said to be beyond controversy.² In some of these cases the court has declined to express an opinion as to the liability of the property owner in excess of the value of the property which is taxed.³ Such liability may be enforced in assumpsit,⁴ and it is a personal debt of the estate of a decedent.⁵ This doctrine is illogical, though not, in practice, unjust. If any limit is to be imposed upon the personal liability of the property owner, it should be rather the extent of the benefits conferred than the value of the property taxed. If it can be made a personal debt at all, it must be on the theory that the assessment is valid and does not exceed the benefits conferred; in which case it is hard to see why the courts should review the question of the amount of benefits in a proceeding to enforce an assessment against the property. The other cases in which it is said that there can be no liability beyond the value of the land, proceed on the more logical theory that no personal liability can be imposed upon the property owner by statute.⁶

§ 1043. Personal liability on special contract.

If the assessment is a real or apparent lien upon real property, the existence of such liability is a sufficient consideration for a promise by the property owner to discharge it in some particular method; and, accordingly, if a property owner enters into a contract to pay such lien, he may be held personally liable upon such contract, irrespective of the question whether or not the assessment was a personal debt of his in the first instance.¹

² *Handy v. Collins*, 60 Ind. 229 [1883]; *Gould v. Mayor and City Council of Baltimore*, 59 Md. 378 [1882]; *Gould v. Mayor and City Council of Baltimore*, 58 Md. 46 [1881]; *Dashiell v. Mayor and City Council of Baltimore*, 45 Md. 615 [1876].

³ *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883].

⁴ *Clemens v. Mayor and Common Council of Baltimore*, 16 Md. 208 [1860].

⁵ *Gould v. The Mayor and City Council of Baltimore*, 59 Md. 378 [1883].

⁶ *Wood v. Curran*, 99 Cal. 137, 33 Pac. 774 [1893]; *Hancock v. Whitmore*, 50 Cal. 522 [1875]; *Taylor v.*

Palmer, 31 Cal. 240 [1866]; *Emery v. Bradford*, 29 Cal. 75 [1865].

¹ *Wayne County Savings Bank v. Gas City Land Company*, 156 Ind. 662, 59 N. E. 1048 [1900]; *Flora v. Cline*, 89 Ind. 208 [1883]; *Hull v. Brearley Run Draining Association*, 58 Ind. 520 [1877]; *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554, 57 N. E. 583 [1900]; *Talcott v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899]; *Sleeper v. Bullin*, 6 Kan. 300 [1870]; *Clemens v. Mayor and City Council of Baltimore to use of Volkmar*, 16 Md. 208 [1860]; *Adkins v. Case*, 81 Mo. App. 104 [1899]; *Moore v. Barry*, 30 S. C. 530, 4 L. R. A. 294, 9 S. E. 589 [1889].

Thus, if a property owner promises to pay for an improvement, in order to induce the contractor to perform the work,² or if he petitions for the improvement upon the understanding that he is to assist in paying therefor,³ or if he promises to pay the assessment as a part of a compromise agreement, reducing the amount thereof,⁴ or if he agrees to pay the assessment in order to secure the extension of time provided for by statute,⁵ or if he enters into a special contract with the party for whose benefit the assessment is levied, in order to secure an extension of time,⁶ he is personally liable upon such contract. Property owners who mutually agree to submit to the award of arbitration determining how much each property owner should pay as benefits, or receive as damages on account of the widening of a street upon which their property abuts,⁷ or a trustee who receives money under an agreement to apply it upon an assessment if the assessment was held to be valid,⁸ become personally liable. A property owner who, in an action to set aside an illegal assessment, offers to pay all legal assessments may be held liable personally for the amount of legal assessments, irrespective of the terms of the statute imposing liability.⁹ A party who enters into an appeal bond to pay an assessment, if the same should be held upon an appeal to be valid, is personally liable on such bond,¹⁰ and it is not necessary that the lien of the assessment be enforced against the land benefited before suit is brought upon the bond.¹¹ However, a lessee who covenants with his lessor that the lessee shall pay the assessments levied upon the leased property, does not thereby become personally liable for the assessment,¹² if the

² *Flora v. Cline*, 89 Ind. 208 [1883]; *Sleeper v. Bullin*, 6 Kan. 300 [1870].

³ *In the Matter of Hun*, 144 N. Y. 472, 39 N. E. 376 [1895]; *Moore v. Barry*, 30 S. C. 530, 4 L. R. A. 294, 9 S. E. 589 [1889].

⁴ *Clemens v. Mayor and Common Council of Baltimore*, 16 Md. 208 [1860].

⁵ *Wayne County Savings Bank v. Gas City Land Company*, 156 Ind. 662, 59 N. E. 1049 [1900]; *Edward C. Jones Co. v. Perry*, 26 Ind. App. 554, 57 N. E. 583 [1900]; *Talcott Brothers v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899].

⁶ *Hull v. Brearley Run Draining Association*, 58 Ind. 520 [1877]; *Adkins v. Case*, 81 Mo. App. 104 [1899].

⁷ *Boston v. Brazer*, 11 Mass. 447 [1814].

⁸ *Gould v. Mayor and City Council of Baltimore*, 58 Md. 46 [1881].

⁹ *Farwell v. Des Moines Brick Mfg. Company*, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896].

¹⁰ *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

¹¹ *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

¹² *Davis v. Cincinnati*, 36 O. S. 24 [1880]. See also *Chicago, Rock Island & Pacific R. R. Co. v. City of*

statute provides that the owner shall be liable,¹³ since this covenant is said to be for the sole benefit of the lessor.¹⁵ It has been said that whatever effect an express promise to pay may have upon the personal liability of the promisor, it does not create a lien if no valid lien existed at the time of making such promise.¹⁶ The fact that the owners of the property lying next to the improvement, which is primarily liable for the assessment, have signed a waiver of irregularities does not release owners of lands lying back from the improvement, which are liable on the assessment only if the assessment on the land in front proves insufficient, from the lien of such improvement.¹⁷

§ 1044. Personal liability for assessments under police power.

Regardless of the theories of the existence of personal liability in assessments based upon the doctrine of benefits, it is generally held that a charge made under the police power upon a property owner to reimburse the public for the cost of doing something which the property owner was himself legally bound to do, may be made a personal debt of such property owner.¹ Thus, charges for constructing a sidewalk,² may be made the personal debts of the property owners who are legally bound to construct such improvements. In the absence of statutory provision therefor, however, such charges are not personal liabilities.³

§ 1045. Personal liability for goods sold.

A charge imposed for goods sold and delivered, to be used upon certain property, may be made the personal debt of the owner of such property,¹ even if a tenant is in actual possession

Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900].

¹³ Davis v. Cincinnati, 36 O. S. 24 [1880].

¹⁵ Chicago, Rock Island & Pacific R. R. Co. v. City of Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900].

¹⁶ Heft v. Payne, 97 Cal. 108, 31 Pac. 844 [1892].

¹⁷ Voris v. Pittsburg Plate Glass Company, 163 Ind. 599, 70 N. E. 249 [1904].

¹ Inhabitants of the Village of Houstania v. Grubbs, 80 Mo. App. 433 [1899]; Washington v. Mayor

and Aldermen of Nashville, 31 Tenn. (1 Swan.) 177 [1851].

² Butler v. Nevin, 88 Ill. 575 [1878]; Inhabitants of the Village of Houstania v. Grubbs, 80 Mo. App. 433 [1899]; Washington v. Mayor and Aldermen of Nashville, 31 Tenn. (1 Swan.) 177 [1851].

³ City of Owensboro v. Hope, — Ky. —, 110 S. W. 272 [1908].

¹ Board of Public Works of City of Niles v. Pinch, — Mich. —, 116 N. W. 408 [1908]; City of East Grand Forks v. Luck, 97 Minn. 372, 107 N. W. 393 [1906].

at the time such goods are furnished.² Cases of this sort are presented in charges for water,³ furnished by a public corporation. Under a statute permitting an action "on the common counts," any form of assumpsit will lie,⁴ and suit may be brought against the guarantor of light and water bills for light and water furnished by the city upon his special contract.⁵ A similar charge, based on the amount of sewage disposed of, may be made for the privilege of connecting with a sewer.⁶

§ 1046. Personal liability as affected by Federal constitution.

The United States Supreme Court has held that the clause in the Fourteenth Amendment to the United States Constitution, which provides that the state shall not deprive persons of property without due process of law, has no application to the question of the personal liability of the property owner if he is a resident of the state and within its jurisdiction,¹ and that accordingly the question of the validity and construction of statutes which are claimed to impose a personal liability, is a question for the state courts, and not for the Federal courts.² If, however, the property owner is a non-resident, and is not within the jurisdiction of the state, personal liability cannot be imposed upon him, and the attempt of the state to do so under statutory authority is the taking of his property without due process of law.³

§ 1047. Personal liability non-existent in absence of statute.

Whether a personal liability shall be imposed or not rests entirely within the discretion of the legislature in states in which

² City of East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393 [1906].

³ City of East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393 [1906].

⁴ Board of Public Works of City of Niles v. Pinch, — Mich. —, 116 N. W. 408 [1908].

⁵ Board of Public Works of City of Niles v. Pinch, — Mich. —, 116 N. W. 408 [1908].

⁶ Carson v. Brockton Sewerage Commissions, 182 U. S. 398, 48 L. 1115, 21 S. 860 [1901]; (affirming, Carson v. Sewerage Commissioners of Brockton, 175 Mass. 242, 48 L. R. A. 277, 56 N. E. 1 [1900]).

¹ Wood v. Brady, 150 U. S. 18, 37 L. 981, 14 S. 6 [1878]; (affirming, Brady v. Burke, 90 Cal. 1, 27 Pac. 52 [1891]); Davidson v. New Orleans, 96 U. S. 97, 24 L. 616 [1877]; Murdock v. City of Cincinnati, 44 Fed. Rep. 726 [1891].

² Davidson v. New Orleans, 96 U. S. 97, 24 L. 616 [1877]; Murdock v. City of Cincinnati, 44 Fed. Rep. 726 [1891].

³ Dewey v. Des Moines, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899]; (reversing Dewey v. City of Des Moines, 101 Ia. 416, 70 N. W. 605 [1897]; on the ground that a non-resident cannot be made personally liable.)

it is held that the legislature may impose such liability; and, accordingly, in the absence of a statute which specifically, or by necessary implication, provides for such liability, no liability of this sort exists.¹

§ 1048. Personal liability as affected by statutory construction.

A statute which provides that an assessment shall be collected as taxes are collected, does not impose a personal liability for assessments, even though such liability is imposed in the case of taxes.¹ A statute which provides that "municipal taxes" shall be collected "from the personal property of the person . . . owing the same," does not include assessments, and does not authorize the collection of assessments from the personal property of the owner of the property benefited.² Under a statute imposing a personal liability upon the owners of property, a

¹ *Chadwick v. Kelley*, 187 U. S. 540, 23 S. 175 [1903]; (affirming *Kelley v. Chadwick*, 104 La. 719, 29 So. 295 [1901]); *State ex rel. Ely v. Aetna Life Insurance Company*, 117 Ind. 251, 20 N. E. 144 [1888]; *Otis v. DeBoer*, 116 Ind. 531, 19 N. E. 317 [1888]; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676 [1897]; *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836 [1898]; *Des Moines v. Casady*, 21 Ia. 570 [1866]; *City of Owensboro v. Hope*, — Ky. —, 110 S. W. 272 [1908]; *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *Moody and Company v. Chadwick*, 52 La. Ann. 1888, 28 So. 361 [1900]; *Barber Asphalt Paving Co. v. Watt*, 51 La. Ann. 1345, 26 So. 70 [1899]; *Rosetta Gravel Paving & Improvement Co. v. Jollisaint*, 51 La. Ann. 804, 26 So. 477; *Boatman v. Macy*, 82 Ind. 490 [1882]; *City of Roxbury v. Nickerson*, 114 Mass. 544 [1874]; *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553 [1890]; *Farrell v. City of St. Paul*, 62 Minn. 271, 54 Am. St. Rep. 641, 29 L. R. A. 778, 64 N. W. 809 [1895]; *Philadelphia Mortgage & Trust Co. v. City of Omaha*, 63 Neb. 280, 90 Am. St. Rep. 442, 57 L. R. A. 150, 88 N. W. 523 [1901]; *In the Matter of Hun*, 144

N. Y. 472, 39 N. E. 376 [1895]; *Sharp v. Spier*, 4 Hill. 76 [1843]; *Wetmore v. Campbell*, 4 N. Y. Sup. Ct. Rep. 341 [1849]; *Dreake v. Beasley*, 26 O. S. 315 [1875]; *Wilson v. Hall*, 6 Ohio C. C. 570 [1892]; *Hawthorne v. City of East Portland*, 13 Ore. 271, 10 Pac. Rep. 342 [1886]; *Scranton City v. Sturges*, 202 Pa. St. 182, 51 Atl. 764 [1902]; *Wolf v. City of Philadelphia*, 105 Pa. St. 25 [1884]; *Haddington Methodist Episcopal Church v. City of Philadelphia to Use, etc.*, 108 Pa. St. 466 [1885]; *Hagemen's Appeal*, 88 Pa. St. (7 Norris) 21 [1878]; *Council v. Moyamensing*, 2 Pa. St. (2 Barr.) 224 [1845]; *Theobald v. Sylvester*, 27 Pa. Super. Ct. 362 [1905]; *Harriott Ave.*, 24 Pa. Super. Ct. 597 [1904]; *City of Galveston v. Heard*, 54 Tex. 420 [1881]; *McCrowell v. Bristol*, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1893]; *City of Seattle v. Yesler*, 1 Wash. 577 [1878]. See also *Terre Haute and Logansport R. R. Co. v. Soice*, 128 Ind. 105, 27 N. E. 429 [1890].

¹ *Mix v. Ross*, 57 Ill. 121 [1870].

² *State of Nebraska ex rel. Ransom v. Irey*, 42 Neb. 186, 60 N. W. 601 [1894].

commanding officer of a volunteer corps, who has acquired property for the use of such corps, is not personally liable, since the property really belongs to the crown.³ Under a statute imposing personal liability upon the owner of property at the date of the assessment, one who is merely shown to be the owner of the property at the date of the commencement of the suit to enforce the assessment, is not personally liable.⁴ Under a statute authorizing the construction of improvements at the expense of the owners of the lots abutting upon such improvements, a personal liability is not imposed.⁵ However, a statute which authorizes the construction of a sidewalk in case the property owner does not construct it after being notified so to do, and which provides that the cost may be recovered from such property owner by suit, imposes a personal liability.⁶ A statute which provides specifically for personal liability is not repealed by a subsequent statute which provides that such assessment shall be a lien upon the property assessed.⁷

§ 1049. Validity of statutes imposing lien.

Under many statutes it is provided that an assessment made in compliance with the mandatory statutory formalities, shall be a lien upon the property which is assessed. These statutes are held to be valid with reference to assessments based upon the theory of benefits,¹ charges imposed for the cost of performing

³ Hornsey Urban District Court v. Hennell, 2 K. B. 73, 71 L. J. (K. B.) 479, 86 L. T. 423, 50 Weekly Rep. 521, 66 J. P. 613 [1902].

⁴ Corry v. Gaynor, 21 O. S. 277 [1871].

⁵ Ivanhoe v. City of Enterprise, 29 Ore. 245, 35 L. R. A. 58, 45 Pac. 771 [1896].

⁶ Washington v. Mayor and Aldermen of Nashville, 31 Tenn. (1 Swan) 177 [1851]. See also Risdon v. Shank, 37 Ia. 82 [1873].

⁷ Farwell v. Des Moines Brick Mfg. Company, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896].

¹ Seattle Dock Co. v. Seattle & Lake Washington Waterway Company, 195 U. S. 624, 25 S. Ct. 789 [1904]; (*per curiam*); affirming without report Seattle & Lake Washington Wa-

terway Company v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 845 [1904]); Sanders v. Brown, 65 Ark. 498, 47 S. W. 461 [1898]; Santa Cruz Rock Pavement Company v. Bowie, 104 Cal. 286, 37 Pac. 934 [1894]; Gillis v. Cleveland, 87 Cal. 214, 25 Pac. 351 [1890]; Phelan v. Dunne, 72 Cal. 229, 13 Pac. 662 [1887]; People of the State of California v. Hagar, 52 Cal. 171 [1877]; Gaffney v. Gough, 36 Cal. 104 [1868]; Beaudry v. Valdez, 32 Cal. 269 [1867]; Taylor v. Palmer, 31 Cal. 240 [1866]; Walsh v. Mathews, 29 Cal. 123 [1865]; Creighton v. Manson, 27 Cal. 614 [1865]; Lucas, Turner & Co. v. San Francisco, 7 Cal. 463 [1857]; City of Hartford v. Mechanics' Savings Bank, 79 Conn. 38, 63 Atl. 658 [1906]; Hudson v. People ex rel.

a legal duty which the owner was bound to perform,² and charges for goods furnished, used upon the property.³

McKee, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964 [1900]; Gauen v. Moredock & Ivy Landing Drainage Dist., 131 Ill. 446, 23 N. E. 633 [1890]; Garrick v. Chamberlain, 97 Ill. 620 [1881]; Kilgour v. Drainage Com'rs, 111 Ill. 342 [1885]; The People ex rel. McCrea v. Atchison, 95 Ill. 452 [1880]; Shirk v. Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906]; State ex rel. Ely v. Aetna Life Insurance Co., 117 Ind. 251, 20 N. E. 144 [1888]; Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676 [1897]; Smith v. City of Des Moines, 106 Ia. 590, 76 N. W. 836 [1898]; Kendig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882]; City of Burlington v. Quick, 47 Ia. 222 [1877]; Moxley v. Lawler, — Ky. —, 97 S. W. 365 [1906]; Bacas v. Adler, 112 La. 806, 36 So. 739 [1904]; Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70 [1899]; Succession of Rousseau, 23 La. Ann. 1 [1871]; City Bank of New Orleans v. Huie, 1 Robinson (La.) 236 [1842]; Moale v. Mayor and City Council of Baltimore, 61 Md. 224 [1883]; Eschbach v. Pitts, 6 Md. 71 [1854]; Roxbury v. Nickerson, 114 Mass. 544 [1874]; Beecher v. City of Detroit, 92 Mich. 268, 52 N. W. 731 [1892]; Frost v. Leatherman, 55 Mich. 33, 20 N. W. 705 [1884]; Williams v. Mayor, etc., of Detroit, 2 Mich. 560 [1853]; Clapp v. Minnesota Grass Twine Co., 81 Minn. 511, 84 N. W. 344 [1900]; Town of Macon v. Patty, 57 Miss. 378, 24 Am. Rep. 451 [1879]; Heman Construction Co. v. Wabash Ry. Co., 206 Mo. 172, 104 S. W. 67 [1907]; Barber Asphalt Paving Co. v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900]; (affirmed, French v. Barber Asphalt Paving Co., 181 U. S. 324, 21 S. 625 [1901]); Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014 [1895]; The State ex rel. Mispagel

v. Angert, 127 Mo. 456, 30 S. W. 118 [1894]; City of Pleasant Hill v. Dasher, 120 Mo. 675, 25 S. W. 566 [1893]; City of St. Louis to Use of Deppelbauer v. Newman, 45 Mo. 135 [1869]; City of St. Louis to Use of Creamer v. Bernoudy, 43 Mo. 552 [1869]; In the Matter of Hun, 144 N. Y. 472, 39 N. E. 376 [1895]; Nichols v. Voorhis, 74 N. Y. 28 [1878]; Mayor, Aldermen, etc., of New York v. Colgate, 12 N. Y. 140 [1854]; DePeyster v. Murphy, 39 N. Y. Sup. Ct. Rep. 255 [1875]; Mayor, Aldermen and Commonalty of the City of New York v. Colgate, 9 N. Y. Sup. Ct. Rep. 1 [1853]; Baker v. French, 18 Ohio C. C. 420 [1899]; Ivanhoe v. City of Enterprise, 29 Ore. 245, 35 L. R. A. 58, 45 Pac. 771 [1896]; Hawthorne v. East Portland, 13 Ore. 271, 10 Pac. Rep. 342 [1886]; *In re* Vacation of Centre Street, 115 Pa. St. 247, 8 Atl. 56 [1886]; Wolf v. City of Philadelphia, 105 Pa. St. 25 [1884]; Fenelon's Petition, 7 Pa. St. (7 Barr.) 173 [1847]; Wood v. City of Galveston, 76 Texas 126, 13 S. W. 227 [1890]; Lufkin v. City of Galveston, 58 Tex. 545 [1883]; Highland v. City of Galveston, 54 Tex. 527 [1881]; City of Galveston v. Heard, 54 Tex. 420 [1881]; McCrowell v. Bristol, 89 Va. 652, 20 L. R. A. 653, 16 S. E. 867 [1893]; City of Seattle v. Yesler, 1 Wash. 577 [1878].

² Huff v. City of Jacksonville, 39 Fla. 1, 21 So. 776 [1897].

³ Provident Institution for Savings v. Mayor and Aldermen of Jersey City, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1884]; (affirming, Provident Institution for Savings v. Allen, 37 N. J. Eq. (10 Stew.) 627 [1883]); Wagner v. City of Rock Island, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545 [1893]; Vreeland v. Mayor and Aldermen of Jersey City, 37 N. J. Eq. (10 Stew.) 574 [1883]; (affirming,

§ 1050. Lien non-existent in absence of statute.

The existence of a lien is, however, purely statutory, and no lien exists unless the statute provides therefor.¹ A statute which provides that assessments shall be recovered as taxes are to be recovered, is held to impose a lien upon the property assessed, if such lien is imposed in the case of ordinary taxes.² Under such statutes a vendee at a void assessment sale has a lien if the vendee at a void tax sale would, by statute, have a lien.³ Statutes which refer to liens for general taxes do not necessarily affect liens for assessments.⁴ A statutory period of limitations for a suit to foreclose a tax lien, does not apply to a suit to foreclose an assessment lien, even if the statute provides that liens for assessments shall be foreclosed as provided by law for the foreclosure of tax liens.⁵ It has, however, been held that a statute which provides that assessments shall be placed on the tax duplicate and collected as taxes, makes an assessment a lien if a tax is, by statute, made a lien.⁶ Power to collect an assessment does not confer power to a public corporation to make an assessment a lien.⁷ In the absence of statutory authority therefor, a city can-

Vreeland v. O'Neil, 36 N. J. Eq. (9 Stew.) 399; *Pittsburg v. Brace Bros.*, 158 Pa. St. 174, 36 Am. St. Rep. 30, 27 Atl. 854 [1893].

¹*Schwiesau v. Mahon*, 110 Cal. 543, 42 Pac. Rep. 1065 [1895]; *Creighton v. Manson*, 27 Cal. 614 [1865]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Eagle Manufacturing Company v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897]; *Town of Rayne v. Harrel*, 119 La. 652, 44 So. 330 [1907]; *Hoboken Manufactures Co. v. Mayor, etc., of City of Hoboken*, — N. J. L. —, 68 Atl. 1098 [1908]; *State, Waln, Pros. v. Common Council of Beverly*, 53 N. J. L. (24 Vr.) 560, 22 Atl. 340 [1891]; *Hudson Trust and Savings Institution v. Carr-Curran Paper Mills Co.*, 58 N. J. Eq. (12 Dick.) 59, 43 Atl. 418 [1899]; *Jones v. Town of Tonawanda*, 158 N. Y. 438, 53 N. E. 280 [1899]; *City of Meadville v. Dickson*, 129 Pa. St. 1, 18 Atl. Rep. 513 [1889]; *The Borough of Mauch Chunk v. Shortz*, 61 Pa. St. (11 P.

F. Smith) 399 [1869]; *M'Causland v. Leuffer*, 4 Wharton (Pa.) 175 [1839]; *City of El Paso v. Mundy Bros.*, 85 Tex. 316, 20 S. W. 140 [1892]; *Moseley v. Boush*, 5 Va. (4 Randolph) 392 [1826]; *Linne v. Bredes*, 43 Wash. 540, 6 L. R. A. (N. S.) 707, 86 Pac. 858 [1906].

²*Pittsburg v. Brace Bros.*, 158 Pa. St. 174, 27 Atl. 854 [1893].

³*Skelton v. Sharp*, 161 Ind. 383, 67 N. E. 535 [1903].

⁴*City of Hartford v. Mechanics' Savings Bank*, 79 Conn. 38, 63 Atl. 658 [1906].

⁵*City of Hartford v. Mechanics' Savings Bank*, 79 Conn. 39, 63 Atl. 658 [1906].

⁶*Blackwell v. Village of Coeur D'Alene*, 13 Idaho, 357, 90 Pac. 353 [1907].

⁷*Inhabitants of the Village of Houstonia v. Grubbs*, 80 Mo. App. 433 [1899]; *City of Meadville v. Dickson*, 129 Pa. St. 1, 18 Atl. Rep. 513 [1889]; *El Paso v. Mundy Bros.*, 85 Tex. 316, 20 S. W. 140 [1892].

not provide by ordinance that an assessment shall be a lien.⁸ So water furnished on the meter plan has been held to be a personal debt and not a lien, especially with reference to the land on which such water was not used.⁹

§ 1051. Liens of sub-contractors and material men.

Under the provisions of some statutes, sub-contractors and material men may acquire liens as against the principal contractor, to be paid out of the funds in the hands of the public corporation which are due to the principal contractor.¹ Such liens can be acquired only by substantial compliance with the statutes which authorize them. It is proper to limit the judgment in favor of the lien holders to the amount due to the principal contractor.²

§ 1052. Invalid assessment not lien.

If the assessment is so irregular or defective as to be invalid or unenforceable, it is generally said that such assessment does not create a lien.¹ This statement, however, means, in most jurisdictions, merely that under such circumstances no lien exists which can be enforced without further proceedings on the part of the public corporation having charge of the improvement.² It is generally assumed, however, that if the improvement is one

⁸ *Johnson v. The District of Columbia*, 6 Mackey (D. C.) 21 [1887]; *Inhabitants of the Village of Hous-tonia v. Grubbs*, 80 Mo. App. 433 [1899]; *Linne v. Bredes*, 43 Wash. 540, 6 L. R. A. (N. S.) 707, 86 Pac. 858 [1906].

⁹ *Hoboken Manufactures Co. v. Mayor, etc., of City of Hoboken*, — N. J. L. —, 68 Atl. 1098 [1908].

¹ *Rockland Lake Trap Rock Co. v. Village of Port Chester*, 185 N. Y. 590, 78 N. E. 1111 [1906]; (affirming, 92 N. Y. S. 631, 102 App. Div. 360 [1905]).

² *Rockland Lake Trap Rock Co. v. Village of Port Chester*, 185 N. Y. 539, 78 N. E. 1111 [1906]; (affirming, 92 N. Y. S. 631, 102 App. Div. 360 [1905]).

¹ *Frenna v. Sunnyside Land Com-pany*, 124 Cal. 437, 57 Pac. 302

[1899]; *Rauer v. Lowe*, 107 Cal. 229 40 Pac. 337 [1895]; *Warren v. Fer-guson*, 108 Cal. 535, 41 Pac. 417 [1895]; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]; *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220 [1873]; *Haskell v. Bartlett*, 34 Cal. 281 [1867]; *Hoover v. People ex rel. Pea-body*, 171 Ill. 182, 49 N. E. 367 [1898]; *Peru and Indianapolis Rail-road Co. v. Hanna*, 68 Ind. 562 [1879]; *Becker v. Baltimore & Ohio Southwestern Ry. Co.*, 17 Ind. App. 324, 46 N. E. 685 [1897]; *Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705 [1884]; *City of Springfield ex rel. Gilsonite Const. Co. v. Schmook*, 120 Mo. App. 41, 96 S. W. 257 [1906]; *Eyerma v. Hardy*, 8 Mo. App. 311 [1880].

² See Chapter XVII.

for which an assessment could be levied, and it has been undertaken under the assessment plan, there is an unenforceable or a potential lien for the amount of benefits conferred which can be rendered enforceable by the act of the public corporation in levying a re-assessment, if the statute authorizes such procedure. A lien cannot be enforced if it includes improper items, as well as proper ones, in such a way that the two cannot be separated.³ Thus, in Pennsylvania an assessment cannot be levied for repaving; and a lien for an improvement which consists in part of an original paving, and in part of repaving, cannot be enforced, although the lien might have been enforced for the original paving alone.⁴

§ 1053. Upon whose interest an assessment is a lien—Heir and executor.

In the absence of statutory provisions restricting the lien of the assessment to some particular estate in the land, it is generally held that the lien of an assessment is a burden upon the land itself, and that all estates or interests therein are subordinate thereto.¹ Under a statute which provides that a wife's inchoate interest in her husband's land becomes absolute and vested upon the judicial sale thereof, it has been held that her interest is subordinate to the lien of an assessment levied against her husband's land, and that if the wife dies after the judicial sale, and before the sale under the assessment claimed, and her interest descends to her husband, it passes subject to the lien of the assessment.² Under some statutes an assessment may be levied against the owners and occupants of land.³ An occupant of the premises benefited must, however, be assessed by name in the assessment proceedings.⁴ It may be provided by statute, however, that an assessment is a lien upon the interest of the owner in whose name it is listed.⁵ Under a will by which realty is de-

³ *City of Philadelphia v. Yewdall*, 190 Pa. St. 412, 42 Atl. 956 [1899].

⁴ *City of Philadelphia v. Yewdall*, 190 Pa. St. 412, 42 Atl. 956 [1899].

¹ *The Wabash Eastern Railway Company of Illinois v. The Commissioners of East Lake Fork Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781; *Highland*

v. City of Galveston, 54 Tex. 527 [1881].

² *Elliott v. Cale*, 113 Ind. 383, 14 N. E. 708 [1887].

³ *Gilbert v. Havemeyer*, 4 N. Y. Sup. Ct. Rep. 506 [1849].

⁴ *Wetmore v. Campbell*, 4 N. Y. Sup. Ct. Rep. 341 [1849].

⁵ *Berger v. Multnomah County*, 45 Or. 402, 78 Pac. 224 [1904].

vised, and the executor is directed to pay the "annual taxes" upon such realty, the term "annual taxes" does not include local assessments.⁶ If the local assessment is not a personal debt of the owner of the realty, such assessment is not to be paid by his executor, but the heir or devisee takes such property *cum onere*.⁷ If the assessment is the personal debt of the owner thereof, the executor of a deceased owner should pay an assessment which was levied prior to the death of such owner out of the personal property of the estate, as other debts are paid.⁸ If assessments have been levied upon an unimproved tract of realty which is held in trust, and the trustees have no funds with which to pay such assessments, they may obtain a decree authorizing them to sell such property and to reinvest the proceeds.⁹

§ 1054. Interest of lessor and lessee.

If two or more persons have different interest in the same tract of realty, which is subject to local assessment, questions are often presented as to the duty of the city to apportion the assessments between such owners; and as to the rights of the owners of different interests as to apportionment between themselves where the city is not obliged to apportion the assessment between them. If land is occupied by a tenant under a lease, the legislature would undoubtedly have power to provide that the public corporation should apportion the assessment between the different interests in the property according to the benefit conferred upon each interest, and under such statute the public corporation might make such apportionment. If the improvement confers a benefit only upon the owner of the reversion, no part of the assessment can be charged against the tenant for years in the absence of a covenant on his part to pay assessments. If realty is occupied by a tenant under a lease, the city may assess the entire cost

⁶ Warren v. Warren, 148 Ill. 641, 36 N. E. 611 [1894]. "The improvement may be local as affecting the locality in which the property is situated, but it is of special benefit to the particular property assessed because it increases its value, not only the permanent value inuring to the benefit of the reversioner, but also the rental value during the existence of the life estate." Warren v. Warren, 148 Ill. 641, 652, 653 [1894].

⁷ Hancock v. Whittemore, 59 Cal. 522 [1875]; In the Matter of the Petition of Hun, 144 N. Y. 472, 39 N. E. 376 [1895]; Wilson v. Hall, 6 Ohio C. C. 570 [1892].

⁸ Gould v. Mayor and City Council of Baltimore, 59 Md. 378 [1882]; Vanderbeck v. City of Rochester, 122 N. Y. 285, 10 L. R. A. 178, 25 N. E. 408 [1890].

⁹ Lackland v. Walker, 151 Mo. 210, 52 S. W. 414 [1899].

of the improvement to the owner of the fee if the only benefit arising out of the improvement accrues to him.¹ A sewer has been said to be an improvement which is in the nature of a permanent addition to the freehold, and therefore to be charged against the owner of the fee and not the tenant for years, even though the lease contains an option to the tenant to purchase at a specified price.² A lessee of state lands is not liable on an assessment which purports to be against the entire property and not merely his leasehold, the improvement ordinance for which was passed before the lease was issued and probably before it was bid in by the tenant.³ In the absence of a statute specifically authorizing the public corporation to apportion the assessment between the lessor and the lessee, the assessment is a charge *in rem* against the land and the benefits cannot be separately apportioned against the interests of the lessor and of the lessee.⁴ In the absence of a statute or a covenant in the lease imposing a liability upon the tenant for years, such tenant is not liable for taxes,⁵ or for assessments.⁶ Under a statute which imposes a personal liability on the "owner" of property, a lessee for years is not to be regarded as the owner, and is not personally liable.⁷ Under a statute, however, which makes an assessment a personal charge upon the owner or occupant of the realty assessed, personal liability may be imposed upon any one in possession claiming any interest in the property.⁸ A tenant in possession under a lease of ninety-nine years, renewable forever, may represent the land in petitioning for an improvement so as to enable the city to charge upon the fee its fair proportion of the entire assessment, even if it exceeds twenty-five per cent. of the value of the property, which is the statutory limit in the absence of

¹ Reese's Appeal in the Matter of Widening Kearney Street, 32 Cal. 568 [1867].

² Boers v. Barrett, 2 Cin. Sup. Ct. Rep. 67 [1870].

³ Rabel v. City of Seattle, 44 Wash. 482, 87 Pac. 520 [1906].

⁴ Chicago Union Traction Co. v. City of Chicago, 204 Ill. 363, 68 N. E. 519 [1903]. (Lease of street railway for ninety-nine years, renewable for extension of charter.) That an assessment is levied upon the

corpus of the property, see also Village of St. Bernard v. Fennor, 60 O. S. 244, 45 L. R. A. 662, 54 N. E. 267 [1899].

⁵ Clinton v. Shugart, 126 Iowa 179, 101 N. W. 785 [1904].

⁶ Chicago Union Traction Co. v. City of Chicago, 204 Ill. 363, 68 N. E. 519 [1903].

⁷ Davis v. Cincinnati, 36 O. S. 24 [1880].

⁸ Gilbert v. Havenmeyer, 4 N. Y. Sup. Ct. Rep. 506 [1849].

petition.⁹ A charge for water against a tenant cannot, under some statutes, be a lien on the lessor's interest;¹⁰ and the fee cannot be sold to pay such charge;¹¹ but under other statutes it has been held that such a charge may be a lien upon the lessor's interest in the property.¹² A rule that water charges shall be charged against the owner, and not to the tenant, and another rule that water shall be turned off if charges are not paid, so that a tenant cannot have it turned on without paying charges incurred by a former tenant, have been held void as unreasonable.¹³

Under many leases the lessee covenants that he will pay assessments. Such covenant is ordinarily inserted for the sole benefit of the lessor, and the public corporation cannot hold the lessee personally liable for the amount of the assessment under such covenant.¹⁴ A lessee who has agreed to pay assessments is a "party aggrieved" by an assessment within the meaning of a statute which authorizes a party aggrieved by an assessment to sue to vacate it.¹⁵ The presence of such covenant in the lease does not relieve the fee from the lien of the assessment, and if the assessment is not paid by the lessee the fee may be sold.¹⁶ It seems that the lessee may obtain relief against the lessor if, under such lease, the lessor obtains an improvement by fraud to benefit the reversion.¹⁷ A covenant to pay "taxes" does not include local assessments unless the context shows that such was the intention of the parties.¹⁸ Thus, a covenant to pay "all the

⁹ Village of St. Bernard v. Kemper, 60 O. S. 244, 45 L. R. A. 662, 54 N. E. 267 [1899]; (reversing Kemper v. Village of St. Bernard, 14 Ohio C. C. 134 [1897]).

¹⁰ Carpenter v. Mayor and Council of the City of Hoboken, 33 N. J. Eq. (6 Stew.) 27 [1880].

¹¹ Carpenter v. Mayor and Council of the City of Hoboken, 33 N. J. Eq. (6 Stewart) 27 [1880].

¹² See § 353.

¹³ Burke v. City of Water Valley, 87 Mass. 732, 112 Am. St. Rep. 468, 40 So. 820 [1905].

¹⁴ Chicago, Rock Island & Pacific R. R. Co. v. City of Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900].

¹⁵ In the Matter of the Petition of Burke to Vacate an Assessment, 62 N. Y. 224 [1875].

¹⁶ Brown v. Hammond, 2 Chan. Cases 249 [1878].

¹⁷ Willard v. Presbury, 81 U. S. (14 Wall.) 676, 20 L. 719 [1869]. (Evidence of fraud was, however, wanting in this case.) As to the rights of the parties under such a lease where the lessee is obliged to pay a re-assessment after the original assessment which has been paid by the lessor, is returned to the latter, see Cram v. Munro, 1 Ed. Ch. (N. Y.) 123 [1831].

¹⁸ DeClercq v. Barber Asphalt Paving Co., 167 Ill. 215, 47 N. E. 367 [1897]; Municipality Number Two v.

water tax and one-half of all other taxes,"¹⁹ or to pay "the taxes of every name and kind that should be assessed on the premises,"²⁰ or to pay all "taxes and other public dues in any manner accruing,"²¹ does not include local assessments. On the other hand, a covenant to pay "all the taxes assessed" has been held to include local assessments.²² Even where the rule is said to be that the term "taxes" does not *prima facie* include local assessments, the surrounding circumstances, the most important of which is the duration of the lessee's interest, may give it a different meaning.²³ Thus, a lease was given for the joint use of a railroad for the term of nine hundred ninety-nine years, the cost of maintaining the property to be divided in proportion to its use, with a provision "taxes on property jointly used shall be included in the cost of maintenance." Under such a provision the term "taxes" was held to include local assessments.²⁴ Thus, a tenant from year to year may lay a sidewalk, which is required by the public corporation, and recover the cost from the life tenant, his lessor; although the latter cannot recover from the remainderman.²⁵ A covenant to pay "all taxes, general and special," includes assessments.²⁶ If the lessee covenants to pay "assessments," this provision *prima facie* includes local assessments.²⁷ A covenant in a lease whereby lessee agrees to pay all "taxes and assessments,"²⁸ "taxes, assessments, impositions and

Currell, 13 La. 318 [1839]; Torrey v. Wallis, 57 Mass. (3 Cush.) 442 [1849]; Ittner v. Robinson, 35 Neb. 133, 52 N. W. 846 [1892]; Beals v. Providence Rubber Co., 11 R. I. 381, 23 Am. Rep. 472 [1876].

¹⁹ DeClercq v. Barber Asphalt Paving Co., 167 Ill. 215, 47 N. E. 367 [1897].

²⁰ Beals v. Providence Rubber Co., 11 R. I. 381, 23 Am. Rep. 472 [1876].

²¹ Bolling v. Stokes, 29 Va. (2 Leigh) 178, 21 Am. Dec. 606 [1830].

²² Cassady v. Hammer, 62 Ia. 359, 17 N. W. 588.

²³ In speaking of the rule that "taxes" *prima facie* excludes assessments the court said, "The force of this consideration manifestly varies inversely with the duration of the lease." Chicago Great Western Ry.

Co. v. Kansas City Northwestern Ry. Co., 75 Kan. 167, 88 Pac. 1085 [1907]. The same view was expressed in President and Fellows of Harvard College v. Aldermen of Boston, 104 Mass. 470, 483 [1870]; with reference to the construction of a statutory exemption.

²⁴ Chicago Great Western Ry. Co. v. Kansas City Northwestern Ry. Co., 75 Kan. 167, 88 Pac. 1085 [1907].

²⁵ Hitner v. Ege, 23 Pa. St. (11 Harris) 305 [1854].

²⁶ Thomas v. Hooker-Coville Steam Pump Co., 22 Mo. App. 8 [1886].

²⁷ Boulton v. Blake, 12 Ont. 532 [1886].

²⁸ Astor v. Miller, 2 Paige Ch. (N. Y.) 68 [1830]; Oswald v. Gilfert, 11 Johns (N. Y.) 443 [1814]; Rector of Trinity Church v. Higgins, 27 N. Y. Sup. Ct. Rep. 1 [1866].

payments,"²⁹ "all taxes and assessments, whether in the nature of taxes now in being or not,"³⁰ "taxes, charges and assessments that may at any time during said demise be levied, charged or assessed on said premises or parts thereof,"³¹ or "taxes, rates, charges and assessments"³² binds the lessee to pay local assessments. Under a covenant which provides that the lessee should pay "all assessments for paving, flagging, or repairing the streets adjoining such premises," it was held that lessor was bound to pay the cost of the construction of a new granite block street at an expense equal to two years' rent.³³ Such covenants bind the lessee to pay assessments, even if installments thereof do not become due until after the lease terminates.³⁴ The English courts, however, seem to regard the term "assessments" as not including local assessments,³⁵ especially if the lease is for a short time only.³⁶ The reasons assigned for this view are that the covenant applies only to charges of a temporary nature,³⁷ or that the assessment did not come within the terms of the particular covenant; as where a covenant to pay "rates and assessments," "charged, assessed or imposed on the premises," was held not to include an assessment which was by statute a personal charge upon the owner in respect of the premises.³⁸ However, under a covenant to pay "taxes, rates, duties and assessments," a lessee must pay the cost of paving.³⁹ A covenant to pay assessments includes an assessment which may be levied under a statute passed

²⁹ *Mayor, Aldermen and Commonalty of the City of New York v. Cashman*, 10 Johns. (N. Y.) 96 [1813].

³⁰ *Codman v. Johnson*, 104 Mass. 491 [1870].

³¹ *Borgman v. Spellmire*, 7 Ohio Dec. 344.

³² *Walker v. Whittemore*, 112 Mass. 187 [1873].

³³ *Ten Eyck v. Rector and Inhabitants of the City of Albany in Common with the Protestant Episcopal Church in the State of New York*, 65 Hun (N. Y.) 194, 20 N. Y. Sup. 157 [1892].

³⁴ *Borgman v. Spellmire*, 7 Ohio Dec. 344. (A covenant to pay "taxes charges and assessments that may at any time during said demise be levied

charged or assessed on said premises of parts thereof.")

³⁵ *Baylis v. Jiggins* [1898]; 2 Q. B. 315; *Allum v. Dickinson*, 9 Q. B. D. 632 [1882].

³⁶ *Wilkinson v. Collyer*, 13 Q. B. D. 1 [1884]; (a lease for three years.)

³⁷ *Baylis v. Jiggins* [1898], 2 Q. B. 315. (A covenant to pay rates, taxes and assessments.)

³⁸ *Allum v. Dickinson*, 9 Q. B. D. 632 [1882]. A covenant to pay "rates, taxes and assessments payable in respect of the premises during the term" was held not to include an assessment for street improvements. *Wilkinson v. Collyer*, 13 Q. B. D. 1 [1884].

³⁹ *Thompson v. Lapworth*, L. R. 3 C. P. 149.

after the lease was executed.⁴⁰ If the lessee covenants to pay all assessments, and part of the premises are taken for a public improvement, and damages therefor are assessed to the owner and to the lessee according to their respective interests, the lessee must pay the assessment for the benefit which is laid upon the rest of the property.⁴¹ A covenant to pay "all assessments whatsoever levied," does not bind the lessee to pay general taxes.⁴² A covenant to pay "all manner of taxes, rates, charges, assessments and impositions whatsoever" does not include a charge for repairing a drain so as to abate a nuisance, at English law.⁴³ A covenant to pay assessments in general, *prima facie* includes only valid assessments and the lessee is not estopped from denying the validity of alleged assessments.⁴⁴ Expressions may be employed other than the term "assessment," which show the intention of the parties to include assessments within the covenant. Thus, a covenant to pay to lessor a rent "clear of and over and above all taxes and reprises,"⁴⁵ or to pay "all taxes, charges and impositions,"⁴⁶ or to pay "all taxes and duties,"⁴⁷ or to pay "rates, taxes and duties of every kind that shall be levied or assessed,"⁴⁸ includes assessments in each case. As between the lessor and the lessee the question of what constitutes breach of covenants by the lessee to pay assessments is often material. The mere failure to pay the assessment has been said to be a breach of such covenant.⁴⁹ In order that the landlord may forfeit a lease for a breach of such covenant, it is necessary that the landlord make demand upon the tenant to pay the assessments in question.⁵⁰

⁴⁰ Under a covenant to pay "all assessments for which the premises shall be liable." *Post v. Kearney*, 2 N. Y. 394. 51 Am. Dec. 303 [1849]; *Kearney v. Post*, 3 N. Y. Sup. Ct. Rep. 105 [1847].

⁴¹ *Trinity Church v. Cook*, 11 Abb. Prac. 371 [1860].

⁴² *Stephani v. Catholic Bishop of Chicago*, 2 Bradwell (Ill.) 249 [1878].

⁴³ *Rawlins v. Briggs*, L. R. 3 C. P. Div. 368 [1878]; (following *Tidswell v. Whitworth*, L. R. 2 C. P. 326).

⁴⁴ *Clark v. Colidge*, 8 Kan. 189 [1871]; *Scott v. Society of Russian*

Israelites, 59 Neb. 571, 81 N. W. 624 [1900].

⁴⁵ *Delaware and Hudson Canal Co. v. Von Storch*, 196 Pa. St. 102, 46 Atl. 375 [1900].

⁴⁶ *Rleecker v. Ballou*, 3 Wend. (N. Y.) 263 [1829].

⁴⁷ *Simonds v. Turner*, 120 Mass. 328 [1876]; *Blake v. Baker*, 115 Mass. 188 [1874].

⁴⁸ *Curtis v. Pierce*, 115 Mass. 186 [1874].

⁴⁹ *Bradwell v. Banks*, 134 Fed. 470 [1905].

⁵⁰ *Carpenter v. Wilson*, 100 Md. 13, 59 Atl. 186 [1904].

Under a covenant by which a tenant is to pay assessments, and it is provided that in case of neglect on his part so to do the landlord may pay them and collect such payments as rent, a tenant is held not to be guilty of breach of this covenant until he has received notice that the landlord has paid such assessments.⁵¹ The lessor has a right of action upon the breach of such covenant by the lessee, but he can recover only nominal damages unless such lessor has himself paid the assessment.⁵² Enforcement of the assessment by a sale of the lessee's interest is held not to be a breach of the covenant.⁵³ Covenants by the lessee to pay the taxes and assessments are covenants running with the land.⁵⁴ The devisee of the lessor may enforce such covenants.⁵⁵ A lessee who has covenanted to pay assessments may recover such payments after the lessor has had the assessments set aside.⁵⁶ If a street railway company is given permission to use a street on the condition that it repays to the owners of the property thereon a certain proportion of the assessment paid by them or their predecessors in title, for improving such street, the owner of the fee who is entitled to the possession of the property, or his heirs, is entitled to such payment, even if the assessment was paid by a lessee in possession who had covenanted to pay assessments.⁵⁷ If a lessee of a tract of land has sublet different tracts therein, or made partial assignment thereof, the city is not bound to recognize such smaller tracts as separate parcels, but may assess the entire tract.⁵⁸ A lessor may have contribution from a lessee of part of the entire tract who has covenanted to pay assessments if the lessor has been obliged to pay the entire assessment;⁵⁹ but it has been intimated that if the report shows that the entire assessment is charged against the lessor he cannot go outside of the report to make a case for contribution.⁶⁰ A covenant by which the lessor agrees

⁵¹ Dockrill v. Schenk, 37 Ill. App. 44 [1890].

⁵² Rector, Church Wardens and Vestrymen of Trinity Church v. Higgins, 27 N. Y. Superior Ct. (4 Robertson) 1.

⁵³ Goode v. Ruehle, 23 Mich. 30 [1871].

⁵⁴ Lehmaier v. Jones, 91 N. Y. S. 687, 100 App. Div. 495 [1905].

⁵⁵ Broadwell v. Banks, 134 Fed. 470 [1905].

⁵⁶ Pursell v. Mayor, Aldermen and Commonalty of the City of New York, 85 N. Y. 330 [1881].

⁵⁷ Harkness v. Schiely, 13 Ohio C. C. 177 [1896].

⁵⁸ Bartnett's Executor v. Board of Public Schools, 60 Mo. App. 539 [1895].

⁵⁹ Williams v. Craig, 2 Edward's Ch. (N. Y.) 297 [1834].

⁶⁰ Williams v. Craig, 2 Edward's Ch. (N. Y.) 297 [1834].

to pay assessments levied for opening a street may rebut the presumption of dedication which in that jurisdiction would otherwise arise from the fact that in the lease reference was made to the leased property as enclosed by certain streets.⁶¹ If a lessee makes use of water furnished in rooms which remained under control of the lessor, and makes such use under a claim of right, lessor cannot recover from lessee in assumpsit on the theory of a waiver of trespass under the statute there in force if the declaration does not refer to the statute and does not allege the trespass.⁶²

§ 1055. Interest of particular tenant and remainderman.

The existence of particular estates followed by remainders or reversions cannot prevent the public from levying and collecting an assessment against the corpus of the property itself, without reference to the different estates therein, under statutes authorizing such assessment.¹ In many jurisdictions an assessment may be levied upon the realty itself, and the nature of the interest of the person in possession is immaterial.² If a tax bill has in fact been issued against the remaindermen, the holder thereof cannot alter it by striking out their names and inserting the name of the life tenant.³ As between the particular tenant and the remainderman, however, a different question arises. Must the assessment be borne by the particular tenant, as an annual tax is borne, or must it be borne by the remainderman; or must it be borne by both, according to some fixed proportion? If the assessment is levied on the theory of benefits, and the improvement is one which can confer a benefit both upon the estate of the particular tenant and on the estate of the remainderman, the weight of authority, and considerations of justice demand that the burden of the assessment be apportioned between the particular tenant and the remainderman,⁴ though there is not entire harmony as to the rule of apportionment. As between life tenant and remainderman, the just principle with reference to apportionment, is undoubtedly to apportion the assessment according to the benefits which the improvement confers upon their re-

⁶¹ Glenn v. Mayor and City Council of Baltimore, 67 Md. 390, 10 Atl. 70 [1887].

⁶² Wiedman v. Wilson, — Mich. —, 116 N. W. 593 [1908].

¹ See § 1053.

² Zion Church of the City of Balti-

more v. Mayor and City Council of Baltimore, 71 Md. 524, 18 Atl. 895 [1889].

³ Kafferstein v. Knox, 56 Mo. 186 [1874].

⁴ Chamberlin v. Gleason, 163 N. Y. 214, 57 N. E. 487 [1900].

spective interests. Some improvements are temporary in their nature, as, for example, sprinkling, and the assessment should be borne entirely by the life tenant; while other improvements, such as streets and sewers, are more nearly permanent in their nature, and should, as between the parties, be apportioned according to the benefit conferred to each.⁵ In some cases, however, it has been held that a life tenant,⁶ such as a tenant by curtesy,⁷ or a tenant in dower,⁸ is bound to pay the entire assessment; and that the assessment is a lien upon the life estate only.⁹ If the remaindermen are not parties to the proceedings, and to the sale, their interests are not affected thereby.¹⁰ A., who owned certain mortgaged realty, died, having devised such realty to B. for life, with remainder to C. The assessments were not paid by the owners and the mortgagee redeemed the premises from a tax sale, and paid the taxes and assessments thereon. It was held that the right of the mortgagee to protect his interests in this manner was not affected by any right of contribution or apportionment as between the life tenant and the remainderman.¹¹ A life tenant who borrows to pay an assessment, cannot have the property sold to reimburse him.¹² A tenant by curtesy who does not insist that his wife be made a party to the assessment proceeding, is presumed to waive the defect of parties, and to assume the entire burden of the assessment.¹³ In other jurisdictions, however, the more just rule of requiring an apportionment between the life tenant and the remainderman is adopted, and it has even been held that the public corporation must apportion the assessment between the two interests.¹⁴ In other jurisdictions, while the public corporation is not required to apportion the assessment, the life tenant and the remainderman

⁵ *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711 [1898].

⁶ *Warren v. Warren*, 148 Ill. 641, 26 N. E. 611 [1894]; *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234, 50 S. W. 33 [1899]; *Roche v. Waters*, 72 Md. 264, 7 L. R. A. 533, 19 Atl. 535 [1890].

⁷ *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234, 50 S. W. 33 [1899].

⁸ *Warren v. Warren*, 148 Ill. 641, 26 N. E. 611 [1894].

⁹ *Umbria Street*, 32 Pa. Super. Ct. 333 [1907].

¹⁰ *Meanor v. Goldsmith*, 216 Pa. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907].

¹¹ *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163 [1882].

¹² *Roche v. Waters*, 72 Md. 264, 7 L. R. A. 533, 19 Atl. 535 [1890].

¹³ *Dann v. Woodruff*, 51 Conn. 203 [1883].

¹⁴ *Williams v. Brace*, 5 Conn. 190 [1824]; *City of Newark v. State, Edwards, Pros.*, 34 N. J. L. (5 Vr.) 523 [1870].

are regarded as having the right of apportionment as between themselves.¹⁵ If it is necessary to sell the property which is subject to assessment, the amount of the assessment should be paid out of the corpus of the estate.¹⁶ If real property is subject to a life estate, provision is made under some statutes that if a life tenant is obliged to pay the assessment to prevent the sale of the land, he may have the property sold to reimburse him for the share of the assessment which should have been borne by the reversioner.¹⁷ If the improvement is one which confers a benefit upon the particular estate and also upon the remainder or reversion, the assessment for such improvement should, as between the particular tenant and the remainderman, be apportioned between them in proportion to the value of their several estates, according to the general weight of authority.¹⁸ In other cases it has been said to be the true rule of apportionment, that the life tenant should pay an amount equal to the interest upon the assessment for his expectancy of life, and that the remainderman should pay the rest.¹⁹ The results reached under these two rules of apportionment are substantially the same. If the improvement is one which will not in the probable course of events outlast the particular estate, no part of the assessment should be apportioned to the remainderman.²⁰ The practical difficulty consists in determining what improvements will, in the natural course of things, outlast the particular estate, and what will not. If the improvement consists in widening streets,²¹ or in raising

¹⁵ *Hay v. McDaniel*, 26 Ind. App. 683, 60 N. E. Rep. 729 [1901]; *Peck v. Sherwood*, 56 N. Y. 615 [1874]; *Norsworthy v. Bergh*, 16 Howard (N. Y.) 315 [1858]; *Fleet v. Dorland*, 11 Howard (N. Y.) 489 [1854].

¹⁶ *Van Dusen's Estate*, 1 Penn. District Rep. 156 [1892].

¹⁷ *Norsworthy v. Bergh*, 16 Howard (N. Y.) 315 [1858]; *Dikeman v. Dikeman*, 11 Paiges' Chan. Rep. 484 [1845].

¹⁸ *Huston v. Tribbetts*, 171 Ill. 547, 63 Am. St. Rep. 275, 49 N. E. 711 [1897]; *Bobb v. Wolff*, 54 Mo. App. 515 [1893]; *Thomas v. Evans*, 105 N. Y. 601, 59 Am. Rep. 519, 12 N. E. 571; *Fleet v. Dorland*, 11 How. Pr. (N. Y.) 489 [1854]; *Rhode Is-*

land Hospital Trust Co. v. Babbitt, 22 R. I. 113, 46 Atl. 403 [1900]; *Chambers v. Chambers*, 20 R. I. 370, 39 Atl. 243 [1898].

¹⁹ *Plympton v. Boston Dispensary*, 106 Mass. 544 [1871]; *Chamberlin v. Gleason*, 163 N. Y. 214, 57 N. E. 487 [1900].

²⁰ *Wordin's Appeal*, 71 Conn. 531, 71 Am. St. Rep. 219, 42 Atl. 659. (Paving a street with asphalt; no evidence submitted as to whether it was a permanent improvement.) *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482 [1887]. (Paving a street with granite blocks on a concrete foundation.)

²¹ *Miller's Estate*, Tucker (N. Y.) 346 [1867].

the grade of streets,²² it is undoubtedly of a permanent nature and the assessment should be apportioned between the life tenant and the remainderman. Language has been used, however, which would indicate that in case of any improvement which would wear out in time, no part of the assessment should be apportioned to the remainderman.²³ The cost of the construction of a sidewalk,²⁴ has been charged upon the life tenant exclusively. Under other statutes the life tenant in possession is personally liable for the assessment, and no liability is imposed upon the reversioner or remainderman.²⁵ In other jurisdictions the assessment must be borne entirely by the remainderman if the improvement is of a permanent character, such as a sewer.²⁶ The cost of constructing improvements under the police power, which the owner of the property may be compelled by law to construct himself, may be imposed upon the life tenant alone, such as the cost of a sidewalk,²⁷ and under such statutes such assessment need not be apportioned between the life tenant and the remainderman,²⁸ and the interest of the remainderman or reversioner cannot be sold to satisfy such lien.²⁹ Thus, the cost of the sidewalk is charged upon the life tenant alone, in some jurisdictions for two distinct reasons first, that it is merely a temporary improvement; and second, that it is a legal duty imposed upon the particular tenant. A widow who is entitled to unassigned dower, and who pays an assessment to protect her interests, is a mere volunteer, and cannot recover such payment, even if the assessment is invalid.³⁰ A will by which testator devises realty

²² *Moore v. Simonson*, 27 Or. 117, 39 Pac. 1105 [1895].

²³ *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482 [1887].

²⁴ *Delker v. Owensboro*, (Ky.) 98 S. W. 1031, 30 Ky. L. R. 440 [1907]; *Hitner v. Ege*, 23 Pa. St. (11 Harris) 305 [1854]; *Whyte v. Mayor and Aldermen of Nashville*, 32 Tenn. (2 Swan.) 364 [1852].

²⁵ *Moseley v. Boush*, 25 Va. (4 Randolph) 392 [1826].

²⁶ *In re Lever* [1897], 1 Ch. 32 *Bradley's Estate*, 3 Pa. Dist. Rep. 359 [1894].

²⁷ *Delker v. Owensboro*, (Ky.) 98 S. W. 1031, 30 Ky. L. R. 440 [1907]; *Hackworth v. Louisville Artificial*

Stone Co., 106 Ky. 234, 50 S. W. 33 [1899]; *Meanor v. Goldsmith*, 216 Pa. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907]; *Whyte v. Mayor and Aldermen of Nashville*, 32 Tenn. (2 Swan.) 364 [1852].

²⁸ *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234, 50 S. W. 33 [1899].

²⁹ *Meanor v. Goldsmith*, 216 Pa. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907].

³⁰ *Vanderbeck v. City of Rochester*. 122 N. Y. 285, 10 L. R. A. 178, 25 N. E. 408 [1890]; (affirming, *Vanderbeck v. City of Rochester*, 46 Hun (N. Y.) 88).

to his wife for life, and provides that she shall pay "all taxes," does not impose upon her the duty of paying an assessment for paving a street.³¹

§ 1056. Interest of co-tenants.

If realty subject to an assessment belongs to two or more co-tenants, the entire amount of the assessment cannot be charged against one of the co-tenants.¹ A co-tenant who pays a judgment rendered against the realty for an assessment is entitled to contribution from the other co-tenant.² It has been said, however, that a co-owner who has paid all the assessment cannot recover from the city for the amount in excess of his share.³ A corporation which has authority to sell a lot, has no authority to sell an undivided fraction thereof.⁴ If two or more persons have concurrent interests in the same property, as in the case of joint tenancy, co-tenancy, and the like, it is held in some jurisdictions that the public corporation may, and possibly must, apportion the assessment according to the share of each. Thus, one co-tenant may pay his proportion of the assessment to relieve his interest from the lien thereof,⁵ and accordingly failure to notify one co-tenant cannot be taken advantage of by the other co-tenant. If some of the co-owners are minors, and their interests cannot be sold, the public corporation may nevertheless sell the interests of the adult co-owners.⁶ An assessment against one joint owner alone is said not to be erroneous as a matter of law, since it may be his interest alone which is benefited.⁷ A joint judgment against heirs of a deceased ancestor, who are tenants in common of the property assessed, which requires each one to pay the entire sum, is erroneous.⁸ In other cases it is said that an assessment must exist against the property, and that the public corporation has no power to apportion the assessment and

³¹ *Chamberlain v. Gleason*, 163 N. Y. 214, 57 N. E. 487 [1900].

¹ *Clark v. Porter*, 53 Cal. 409 [1879].

² *Schneider Granite Company v. Taylor*, 64 Mo. App. 37 [1895]. See also *Birket v. City of Peoria*, 185 Ill. 369, 57 N. E. 30 [1900].

³ *Cone v. City of Hartford*, 28 Conn. 363 [1859].

⁴ *Jordan v. Hyatt*, 3 Barb. 275 [1848].

⁵ *Birket v. City of Peoria*, 185 Ill. 369, 57 N. E. 30 [1900].

⁶ *Soullier v. Kern*, 69 Pa. St. (19 P. F. Smith) 16 [1871].

⁷ *Cone v. City of Hartford*, 28 Conn. 363 [1859].

⁸ *Sutton's Heirs v. Louisville*, 35 Ky. (5 Dana) 28 [1837].

levy a part of it against the right and title of one joint owner.⁹ One tenant in common may sue to remove a cloud from the property without joining his co-owner.¹⁰ A co-tenant who pays the entire assessment voluntarily may, in partition, have credit for such payments in an accounting with the remaining co-owners.¹¹ In a partition suit to which the city is not a party, the city cannot be bound by a decree of the invalidity of the assessment.¹² It has been said that a joint assessment may be made where there is a joint ownership and a separate assessment where there are distinct interests.¹³ In this case A. and B. owned one tract jointly, and in three other tracts A. owned a life estate and B. owned a fee. An assessment made against all four tracts together was said to be irregular, though not wholly void.¹⁴

§ 1057. Interests in mortgaged property and equitable estates.

If a mortgagor covenants to pay taxes and assessments upon a mortgaged property, such covenant includes local assessments,¹ but it does not include taxes levied against the interest of the mortgagee in such land.² A. conveyed to B., and B. executed a purchase money mortgage to A., in which B. covenanted to keep all legal taxes and charges against the realty paid, as the same became due. Under these facts, it was held that B. could not show that by oral agreement at the time of the execution of the deed A. had agreed to pay the assessment for a street improvement which was then in progress.³ If assessments upon the mortgaged realty are not paid, the mortgagee may pay them and enforce such payments as a part of the mortgage,⁴ even if no

⁹ *City of Reading v. O'Reilly*, 169 Pa. St. 366, 32 Atl. 420 [1895].

¹⁰ *Bates v. District Columbia*, 7 Mackey (D. C.) 76 [1889].

¹¹ *Ward v. Ward*, 9 Ohio C. C. 454 [1895].

¹² *Leinen v. Elter*, 43 Hun (N. Y.) 249 [1887].

¹³ *City of New London v. Miller*, 60 Conn. 112, 22 Atl. 499 [1891].

¹⁴ *City of New London v. Miller*, 60 Conn. 112, 22 Atl. 499 [1891]. The court said: "An assessment for benefits is a kind of taxation. And like all taxes it must be wholly joint or wholly several. It cannot be joint and several. There is no joint and

several liability for taxes." *City of New London v. Miller*, 60 Conn. 112, 115, 22 Atl. 499 [1891].

¹ *National Life Insurance Co. v. Butler*, 61 Neb. 449, 87 Am. St. Rep. 462, 85 N. W. 437 [1901]; *Northwestern Mutual Life Insurance Co. v. Butler*, 57 Neb. 198, 77 N. W. 667 [1898].

² *Fuller v. Kane*, 110 Mich. 549, 64 Am. St. Rep. 362, 34 L. R. A. 308, 68 N. W. 267 [1896].

³ *Jones v. Schulmeyer*, 39 Ind. 119 [1872].

⁴ *Weinrich v. Hensley*, 121 Cal. 647, 54 Pac. 254 [1898]; *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524 [1898].

tax clause exists in such mortgage,⁵ and even if such assessments are irregular,⁶ as the mortgagee is not bound to contest the validity of apparently valid assessments, and if he has paid by a mistake and recovered from the mortgagor, the mortgagor may recover from the public corporation.⁷ On the other hand, a mortgagee may attack street assessments which are a lien prior to his mortgage, if his security is impaired by reason of such assessments.⁸ A mortgagee who buys in a mortgaged realty for less than the amount of the mortgaged debt, is *prima facie* the party aggrieved, and may sue to have the assessment vacated unless it is shown that the mortgagor is personally liable for the deficiency and that he is able to discharge such liability.⁹ Questions of priority as between assessments and mortgages are discussed elsewhere.¹⁰ If the improvement contract is let after the mortgage is filed, the assessment is in some jurisdictions subordinate to the mortgage.¹¹ A re-assessment is prior to a mortgage given after the improvement and the original invalid assessment, but before the re-assessment.¹² A mortgage given after the improvement is begun, but before it is made a lien, is subordinate to the assessment.¹³ A mortgagee is not injured by condemnation proceedings to which he is not a party if there is sufficient land left to satisfy the mortgage.¹⁴ Whether the city may levy an assessment for the cost of opening and improving a street without first extinguishing a mortgage thereon, such defense must be made when the assessment is confirmed and judgment entered, and it cannot be interposed after judgment.¹⁵ A trustee may bring suit to sell trust property to discharge the

⁵ *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163 [1882]; (citing, *Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch. 631; *Burr v. Veeder*, 3 Wend. 412; *Brevoort v. Randolph*, 7 How. Pr. 398; *Faure v. Winans*, Hopk. Ch. 283; *Marshall v. Davies*, 78 N. Y. 414, *Robinson v. Ryan*, 25 N. Y. 320; *Williams v. Townsend*, 31 N. Y. 411).

⁶ *Bates v. People's Savings and Loan Association*, 42 O. S. 655 [1885].

⁷ *Bates v. People's Savings and Loan Association*, 42 O. S. 655 [1885].

⁸ *Bidwell v. Huff*, 103 Fed. 362 [1900].

⁹ *In the Matter of the Petition of Walter to Vacate Certain Assessments*, 75 N. Y. 334 [1878].

¹⁰ See § 1068.

¹¹ *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986 [1895].

¹² *Commissioners of the Sinking Fund of New Jersey v. Inhabitants of the Township of Linden*, 40 N. J. Eq. (13 Stewart) 27 [1885].

¹³ *Donohue v. Brotherton*, 7 Ohio N. P. 367 [1900].

¹⁴ *Smith v. City of Detroit*, 120 Mich. 572, 79 N. W. 808 [1899].

¹⁵ *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829 [1899].

lien of an assessment thereon, if he has no fund which can be devoted to the payment of such assessment.¹⁶ A trustee who receives funds under an agreement that he will pay the assessment out of the proceeds thereof, is liable for such assessment.¹⁷

§ 1058. Interest of vendee.

If property is bought after an improvement has been constructed and before an assessment has been levied therefor, the presumption is that the purchaser is to pay such assessment in the absence of a covenant to the contrary in the deed or contract. An assessment levied after the contract is made and before the deed is delivered is not within the meaning of a clause in the contract providing that the deed shall contain a covenant of warranty against encumbrances.¹ The vendor is not liable to the vendee for an assessment levied against the land during the time in which the performance of the contract was postponed by mutual consent,² especially as the improvements were to be made in the future, but might be abandoned by the city, in which case the assessments could not be collected.

§ 1059. Assessment a lien upon separate lots.

An assessment is an entirety as to each lot or tract of land.¹ Hence, if a lot is owned in severalty by two or more owners, and an assessment is levied against it as an entirety and such assessment is not corrected, the lien of such assessment cannot be discharged as to a part of such tract by payment thereof.² On the other hand, an assessment is separate in another sense as to each separate lot or tract of land; and is not entire as to all the

¹⁶ *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414 [1899].

¹⁷ *Gould v. Mayor and City Council of Baltimore*, 58 Md. 46 [1881].

¹ *Carey v. Gundelfinger*, 12 Ind. App. 645 [1895]; *Kotthelf v. Stranahan*, 138 N. Y. 345, 20 L. R. A. 455, 34 N. E. 286 [1893]; (modifying, 19 N. Y. Supp. 161). "The street and sewer assessments afterwards created for improvements in pursuance of the provisions of the statute did not diminish the value of the subject of the contract. The theory of the statute is that the real estate was en-

hanced in value to the amount of the assessments. The purchaser and not the vendor received the benefit of the improvements and we are of the opinion that such assessments are not incumbrances within the meaning of the contract." *Carey v. Gundelfinger*, 12 Ind. App. 645, 646, 647 [1895].

² *Gotthelf v. Stranahan*, 138 N. Y. 345, 20 L. R. A. 455, 34 N. E. 286 [1893].

¹ *Williams v. Bergin*, 127 Cal. 578, 60 Pac. 164.

² *Williams v. Bergin*, 127 Cal. 578, 60 Pac. 164.

tracts assessed.³ A foreclosure of a lien on one lot is not a bar to foreclosure of the lien of the assessment upon another lot.⁴ Since the assessment is a lien upon each lot separately,⁵ a release or bar of the assessment as to one lot, as by the foreclosure of the lien thereon,⁷ does not prevent enforcing an assessment upon another lot owned by the same person. A decree for the sale of two or more lots for the aggregate amount of the assessments due upon such lots, is erroneous, since the decree should be for the sale of each lot for the assessment due upon such lot.⁸ Such decree is not, however, void, and if it is not set aside for error a sale thereunder is valid as against collateral attack.⁹ If an assessment has been levied against several lots owned by different persons, and the owner of one of the lots subsequently pays in an amount agreed upon between himself and the public corporation as the share due upon his land, the public corporation cannot assert a lien upon the remaining land as against a subsequent mortgagee claiming under the owner thereof.¹⁰ The fact that a petition to enforce a lien prays for the sale of more land than is subject to the lien, does not render the petition invalid.¹¹ A property owner cannot complain of a decree which orders the sale of less land than properly may be subjected to the lien.¹² The condition of the land at the time that the lien attached,¹³ or the improvement ordinance is passed,¹⁴ determines what realty may be subjected to the lien. A lien which attaches to an entire tract is not divested by the subsequent subdivision of such tract,¹⁵ and the assessment may be enforced against the

³ *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351 [1890].

⁴ *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351 [1890].

⁵ *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351 [1890]; *Becker v. Baltimore & Ohio Southwestern Ry. Co.*, 17 Ind. App. 324, 46 N. E. 685 [1896]; *Fowler v. City of St. Joseph*, 37 Mo. 228 [1866]; *Ross v. Gates*, 117 Mo. App. 237, 93 S. W. 856 [1906].

⁶ *Ross v. Gates*, 117 Mo. App. 237, 93 S. W. 856 [1906].

⁷ *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351 [1890].

⁸ *Ottis v. Sullivan*, 219 Ill. 365, 76 N. E. 487 [1906].

⁹ *Gray v. Bowles*, 74 Mo. 419 [1881].

¹⁰ *Lane v. Morrel*, 3 Edward's Chan. Rep. 185 [1838].

¹¹ *Holt v. Figg*, — Ky. —, 94 S. W. 34, 29 Ky. Law Rep. 613 [1906].

¹² *Illinois Central R. R. Co. v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609 [1901].

¹³ *Clanton v. Taylor*, 49 Mo. App. 117 [1892].

¹⁴ *Shriner v. Village of Norwood*, 17 Ohio C. C. 631 [1898].

¹⁵ *Dougherty v. Miller*, 36 Cal. 83 [1868].

tract as it existed when the assessment lien attached.¹⁶ It has been held, however, that the subsequent subdivision should be regarded, to the extent that the land should be sold to satisfy the assessment in the inverse order of alienation.¹⁷ If the original owner is personally liable for the assessment, and the attempt is made to enforce this liability, the question of the effect of the subsequent subdivision of his land upon the lien of the assessment is immaterial.¹⁸

§ 1060. Assessment both personal liability and lien.

In jurisdictions in which the legislature may make an assessment a personal liability of the owner of the property assessed, the legislature may provide that an assessment shall be both a lien upon the property, and the personal debt of the owner of the property.¹ Under such statutes, a public corporation which seeks to enforce the assessment may, at its option enforce the personal liability or the lien.² If a city or other public corporation is given an alternative method of enforcing an assessment, it must, by formal act of its corporate authorities, indicate for the guidance of its collection officers, which method it chooses to adopt.³ Without such choice on the part of the duly authorized officials of the public corporation, the officer who is merely authorized to make collection, has no power to adopt either method.⁴ If, however, methods of enforcing the assessment are not given in the alternative, the public corporation need not, by ordinance or resolution, rely upon either method specifically.⁵

¹⁶ Dougherty v. Miller, 36 Cal. 83 [1868].

¹⁷ City of Cincinnati v. Wynne, 19 Ohio C. C. 747 [1900]; Michaels v. Keane, 8 Wash. 648, 36 Pac. 681.

¹⁸ Evans v. Sharp, 29 Wis. 564 [1872].

¹ Farwell v. Des Moines Brick Mfg. Company, 97 Ia. 286, 35 L. R. A. 63, 66 N. W. 176 [1896]; City of Muscatine v. The Chicago, Rock Island & Pacific Ry. Co., 79 Ia. 645, 44 N. W. 909 [1890]; City of Burlington v. Quick, 47 Ia. 222 [1877]; Moale v. Mayor and City Council of Baltimore, 61 Md. 224 [1883]; Eschbach v. Pitts, 6 Md. 71 [1854]. See also Leeds v. Defrees, 157 Ind. 392, 61 N. E. 930 [1901]. While a statute making an assessment a personal

debt and a lien was held to be unconstitutional in Motz v. City of Detroit, 18 Mich. 494 [1869]; it was not on that ground but because apportionment was ignored, the owner being made liable for paving that part of the street in front of his land.

² Martin v. Carron, 26 N. J. L. (2 Dutch.) 228 [1857]; (reversed on other grounds in Carron v. Martin, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]).

³ Butler v. Nevin, 88 Ill. 575 [1878].

⁴ Butler v. Nevin, 88 Ill. 575 [1878].

⁵ Bennison v. City of Galveston, 18 Tex. Civ. App. 20, 44 S. W. 613 [1898].

§ 1061. Statute controls as to method of acquiring lien.

The method of acquiring a lien depends entirely upon the provisions of the assessment statute. Under some statutes the levy of the assessment in compliance with the terms of the statute is sufficient to fix the lien of the assessment. Under other statutes, special steps must be taken to fix the lien. In order to acquire a lien, the mandatory provisions of the assessment statute and the provisions inserted for the benefit of the property owner, must be complied with, substantially at least.¹ Substantial compliance is sufficient.² If these requirements have been complied with, the omission of subsequent steps does not affect the validity of the lien.³

§ 1062. Certificate of engineer.

It may be provided by statute that in order to have the assessment become a lien a certificate must be given by the engineer of the public corporation, which must be duly signed and recorded.¹ The certificate of the engineer is not necessary unless required by statute.² Such certificate may be made by the successor of the engineer in whose term the work was completed.³ It cannot be signed by an employee not authorized by statute to execute such certificate.⁴ A lien does not exist under such statutes until the assessment diagram and warrant are recorded.⁵ Omission to record any material part of such certificate,⁶ such as a description of the property assessed contained in a map on the back of the certificate,⁷ invalidates the lien; while an

¹ *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772 [1900]; *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025 [1894]; *Himmelman v. Danos*, 35 Cal. 441 [1868]; *Guerin v. Reese*, 33 Cal. 292 [1867]; *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. The Edward Jones Co.*, 20 Ind. App. 87, 50 N. E. Rep. 319 [1897].

² *Weber v. Schergens*, 59 Mo. 389 [1875].

³ *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901].

⁴ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900]; *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025

[1894]; *Himmelman v. Headley*, 44 Cal. 213 [1872]; *Himmelman v. Danos*, 35 Cal. 441 [1868].

⁵ *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020 [1904]; *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262 [1901].

⁶ *Hornung v. McCarthy*, 126 Cal. 17, 58 Pac. 303 [1899].

⁷ *Frenna v. Sunnyside Land Company*, 124 Cal. 437, 57 Pac. 302 [1899]; *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337 [1895].

⁸ *Himmelman v. Danos*, 35 Cal. 441 [1868].

⁹ *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025 [1894].

¹⁰ *Buckman v. Cuneo*, 103 Cal. 62, 36 Pac. 1025 [1894].

omission to record an immaterial part of the certificate,⁸ such as the words "depth being O. K.," where the exact depth is stated in the recorded certificate,⁹ or the name of the mayor and the designation of his office attached to the warrant,¹⁰ does not render the assessment invalid. A certificate of record may be made necessary by statute,¹¹ and a substantial compliance with the terms of the statute is both sufficient and necessary.¹² The return of the warrant by the contractor may be necessary to the continuance of the lien.¹³

§ 1063. Filing claim.

Under some statutes, as in Pennsylvania, a lien is secured by filing a municipal claim for the cost of the improvement, which consists of a general statement of the work for which the lien is claimed; in form more like a mechanics' lien than anything else in our jurisprudence.¹ The form of the claim is determined

⁸ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900].

⁹ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900].

¹⁰ *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351 [1890].

¹¹ *Himmelman v. Headley*, 44 Cal. 213 [1872]; *Himmelman v. Danos*, 35 Cal. 441 [1868].

¹² *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422 [1900].

¹³ *Guerin v. Reese*, 33 Cal. 292 [1867].

¹ *Beltzhoover Borough v. Heirs of Jacob Beltzhoover*, 173 Pa. St. 213, 33 Atl. 1047 [1896]; *City of Philadelphia to use of McManus v. Unknown Owner*, 149 Pa. St. 522, 24 Atl. 65 [1892]; *City of Scranton v. Arnt*, 148 Pa. St. 210, 23 Atl. 1121 [1892]; *Philadelphia v. MacPherson*, 140 Pa. St. 5, 21 Atl. 227 [1891]; *Philadelphia v. Stevenson*, 132 Pa. St. 103, 19 Atl. 70 [1890]; *Wolf v. City of Philadelphia*, 105 Pa. St. 25 [1884]; *Gans v. City of Philadelphia*, 102 Pa. St. 97 [1883]; *Pittsburg v. Cluley*, 66 Pa. St. (16 P. F. Smith) 449 [1870]; *Philadelphia v. Gratz Land Company*, 38 Pa. St. (2 Wright) 359 [1861]; *Schenley v.*

Commonwealth for the use of the City of Allegheny, 36 Pa. St. (12 Casey) 64 [1859]; *Schenley v. Commonwealth for use of the City of Allegheny*, 36 Pa. St. (12 Casey) 29, 78 Am. Dec. 359 [1859]; *Wilvert v. Sunbury Borough*, 81½ Pa. St. (32 P. F. Smith) 57 [1876]; *Pray v. Northern Liberties*, 31 Pa. St. (7 Casey) 69 [1850]; *Delaney v. Gault*, 30 Pa. St. (6 Casey) 63 [1858]; *Estate of White*, 19 Phil. 106 [1888]; *City v. Wood*, 4 Phil. 156 [1860]; *Commissioners and Inhabitants of the District of Moyamensing to the use of the City of Philadelphia v. Flanigan*, 3 Phil. 458 [1859]; *City of Philadelphia to use v. Kelly*, 2 Penn. Dist. Rep. 143 [1892]; *Jenkintown v. Firmstone*, 2 Penn. Dist. Rep. 124 [1892]; *City v. Crump*, 1 Penn. Dist. Rep. 698 [1890]; *Philadelphia v. Cox*, 1 Penn. Dist. Rep. 280 [1892]; *City of Philadelphia to use v. Nell*, 31 Super. Ct. 78 [1906]; *City of Philadelphia v. Steward*, 31 Pa. Super. Ct. 72 [1906]; *City of Philadelphia v. Sciple*, 31 Pa. Super. Ct. 64 [1906]; *City of Scranton v. Robinson*, 28 Pa. Super. Ct. 55 [1905]; *Erie City v. Willis*, 26 Super. Ct. 459 [1903].

by the mechanics' lien act.² A statute, however, which provides for taking a municipal claim in the same manner as a mechanics' lien is held to lay down a general, and not a specific rule of procedure.³ Notice that the lien will be filed must be given if required by statute.⁴ A municipal claim must show on its face all the facts necessary to give it validity.⁵ If notice to the owner was an essential step in taking the lien, such notice must be averred in the claim,⁶ and a claim which shows notice only to one not the registered owner is insufficient.⁷ A municipal claim must be against the person who appears upon the records as the registered owner of the property.⁸ A claim against a registered owner by name, after his death, is insufficient;⁹ but a claim may be filed against his heirs as such, without giving their individual names.¹⁰ If the owner does not appear of record, it may be filed against the "heirs" of the deceased owner or whoever may be the owner.¹¹ A claim against "unknown owners" is insufficient, if the owner appears of record;¹² but if judgment is recovered on such claim, and it has been revived, and the owner has known that the work was done, and has promised payment after judgment was entered, such judgment will not be stricken off.¹³ The municipal claim need not be dated,¹⁴ nor need it state the time of doing the work.¹⁵ It need not set out the statute under which the claim is filed.¹⁶ The claim must show the work for which the claim is filed.¹⁷ The work done may be described

² Kennedy v. Board of Health, 2 Pa. St. 366 [1845].

³ City of Allentown v. Hower, 93 Pa. St. (12 Norris) 332 [1880]; Pittsburgh v. Cluley, 66 Pa. St. (16 P. F. Smith) 449 [1870].

⁴ Gens v. City of Philadelphia, 102 Pa. St. 97 [1883].

⁵ City of Philadelphia v. Richards, 124 Pa. St. 303, 16 Atl. Rep. 802 [1889].

⁶ City of Philadelphia v. Richards, 124 Pa. St. 303, 16 Atl. Rep. 802 [1889].

⁷ City v. Crump, 1 Penn. Dist. Rep. 698 [1890].

⁸ Wolf v. City of Philadelphia, 105 Pa. St. 25 [1884].

⁹ Estate of White, 19 Phil. 106 [1888]; Freeport Borough v. Robert Miller's Estate, 34 Pa. Super. Ct.

395 [1907]; (claim filed against "the Robert Miller Estate").

¹⁰ Beltzhoover Borough v. Heirs of Jacob Beltzhoover, 173 Pa. St. 213, 33 Atl. 1047 [1896].

¹¹ Northern Liberties v. Coates' Heirs, 15 Pa. St. (3 Harr.) 245 [1850].

¹² Gans v. City of Philadelphia, 102 Pa. St. 97 [1883].

¹³ City of Philadelphia to use of McManus v. Unknown Owner, 149 Pa. St. 22, 24 Atl. 65 [1892].

¹⁴ City of Scranton v. Arndt, 148 Pa. St. 210, 22 Atl. 1121 [1892].

¹⁵ Philadelphia v. Gratz Land Co., 38 Pa. St. (2 Wright) 359 [1861].

¹⁶ Philadelphia v. Stevenson, 132 Pa. St. 103, 19 Atl. 70 [1890].

¹⁷ City of Philadelphia v. Sutter, 30 Pa. St. (6 Casey) 53 [1858].

in general terms.¹⁸ A claim for "grading, paving and setting with curb stones," has been held to be sufficient, though it does not specify whether the work was done to the sidewalk or to the street.¹⁹ A claim for "sixteen feet of iron pipe at seventy-five cents, laid on the north side of Jefferson street in front of said property," was held to show the work with sufficient accuracy.²⁰ However, a claim for "conduit gas" was held to be insufficient, and was stricken off after judgment in *scire facias*.²¹ A claim for making several improvements, some of which are not shown to have been constructed, is good for the work which is shown to have been done.²² If the rights of bona fide grantees have not intervened, a lien may be amended as to the description of the work.²³ A general description of the premises against which the lien is claimed, is sufficient,²⁴ if the premises can be identified by means of the description given.²⁵ Thus, the description of a tract of land as bounded on three sides by well known streets, and on the fourth by a street not yet opened, but which, if opened, would occupy the exact position called for in the description, making the length and breadth of the lot exactly as called for is sufficient.²⁶ The description must be sufficiently accurate to support a levy.²⁷ In the absence of a statute requiring it, a municipal claim need not be registered in the office of the county commissioners.²⁸ If the statute requires a municipal claim to be registered in the mechanics' lien docket, failure so to register it does not make it invalid as between the immediate parties.²⁹ The claim must be filed within the time fixed by stat-

¹⁸ *Pittsburg v. Cluley*, 66 Pa. St. (16 P. F. Smith) 449 [1870].

¹⁹ *Pittsburg v. Cluley*, 66 Pa. St. (16 P. F. Smith) 449 [1870].

²⁰ *City v. Wood*, 4 Phil. 156 [1860]; See also, *City of Allentown v. Hower*, 93 Pa. St. (12 Norris) 332 [1880].

²¹ *Commissioners and Inhabitants of the District of Moyamensing to the use of the City of Philadelphia v. Flanigan*, 3 Phil. 458 [1859].

²² *Wilvert v. Sunbury Borough*, 81½ Pa. St. (32 P. F. Smith) 57 [1876].

²³ *City of Philadelphia to use v. Kelly*, 2 Penn. Dist. Rep. 143 [1892].

²⁴ *Schenley v. Commonwealth for the use of the City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859]; *Jenkintown v. Firmstone*, 2 Penn. Dist. Rep. 124 [1892].

²⁵ *Schenley v. Commonwealth for use of the City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859].

²⁶ *Schenley v. Commonwealth for the use of the City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859].

²⁷ *City of Allentown v. Hower*, 93 Pa. St. (12 Norris) 332 [1880].

²⁸ *Pray v. Northern Liberties*, 31 Pa. St. (7 Casey) 69 [1850].

²⁹ *Erie City v. Willis*, 26 Pa. Super. Ct. 459 [1903].

ute.³⁰ A change of law which, under the facts of the case, would shorten the time for taking the lien, has been held not to apply to an improvement which was nearly completed when the statute was passed.³¹ A municipal claim may be made *prima facie* evidence of its validity.³² If a defective claim is filed it cannot be amended as a matter of right.³³ A change of statute which does not take away the pre-existing rights of either the contractor or the property owner, but provides another way of taking such lien, has been held applicable to prior improvements.³⁴

§ 1064. Filing assessment.

Under some statutes an assessment must be filed in order to constitute a lien.¹ Under such a statute, a lien filed against the estate of a deceased owner, is insufficient.²

§ 1065. Other methods of acquiring lien.

Under some statutes the approval and confirmation of the assessment makes it a lien upon the property assessed.¹ Under other statutes an assessment becomes a lien when the bill of the cost of the improvement is made and filed.² Such bill must be made out by an official authorized by statute to make such bill.³ If the city has the option of certifying a lien to the county audi-

³⁰Scranton City v. Clarke, 34 Pa. Super. Ct. 128 [1907]. (Under this statute in six months from the completion of the work and not from the date of the final assessment).

³¹Tarentum Borough v. Dunlap, 26 Pa. Super. Ct. 281 [1904].

³²Philadelphia v. MacPherson, 140 Pa. St. 5, 21 Atl. 227 [1891].

³³City of Philadelphia v. Richards, 124 Pa. St. 303, 16 Atl. Rep. 802 [1889].

³⁴Scranton v. Arndt, 148 Pa. St. 210, 23 Atl. 1121 [1892]; Schenly v. Commonwealth for use of the City of Allegheny, 36 Pa. St. (12 Casey) 29, 78 Am. Dec. 359 [1859]; Pray v. Northern Liberties, 31 Pa. St. (7 Casey) 69 [1850]; City of Philadelphia v. Steward, 31 Pa. Super. Ct. 72 [1906].

¹City of Hartford v. Mechanics' Savings Bank, 79 Conn. 38, 63 Atl. 658 [1906]; The Norwich Savings

Society v. City of Hartford, 48 Conn. 570 [1881]; Chase v. Arctic Ditchers, 43 Ind. 74 [1873]; Hawthorne v. City of East Portland, 13 Or. 271, 10 Pac. Rep. 342 [1886].

²Hawthorne v. City of East Portland, 13 Or. 271, 10 Pac. Rep. 342 [1886].

³Louisville, New Albany & Chicago Ry. Co. v. State for use of Beekman, 122 Ind. 443, 24 N. E. 350 [1889]; Cook v. State for use of Whitten, 101 Ind. 446 [1884].

⁴People v. Patton, 223 Ill. 379, 79 N. E. 51 [1906]; Ronan v. People ex rel. Shafter, 193 Ill. 631, 61 N. E. 1042 [1901]; Craig v. People ex rel. Gannaway, 193 Ill. 199, 61 N. E. 1072 [1901]; Holland v. The People ex rel. Miller, 189 Ill. 348, 59 N. E. 753 [1901].

⁵People v. Patton, 223 Ill. 379, 79 N. E. 51 [1906].

tor for collection as one of several methods of collection, failure to certify the assessment for collection does not defeat the lien thereof.⁴

§ 1066. Statute controls as to time when lien attaches.

The provisions of the statute which make an assessment a lien, determine at what stage in the proceedings the lien of the assessment attaches.¹ In dealing with such statutes, however, a distinction must be made between the actual enforceable lien which exists when the provisions of the statute making the assessment a lien have been complied with substantially, and the potential lien which, under the theory held in many jurisdictions, comes into existence when the improvement has been commenced on the assessment plan, though it cannot be enforced until the statutory steps necessary thereto have been taken.² Many statutes which provide that an assessment shall be a lien after certain steps are taken, are construed as referring to the actual or enforceable lien only; and, accordingly, if some of these steps are omitted, or are taken in an irregular or defective manner, and the public corporation subsequently levies a re-assessment in the manner authorized by statute, the lien secured by such re-assessment is regarded as dating back to the original improvement.³

§ 1067. When lien attaches—Specific provisions.

Under the provisions of different statutes an assessment becomes a lien when it is placed upon the tax duplicate,¹ when the auditor's statement is made,² when the apportionment war-

⁴ *Talcott Bros. v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899].

¹ *Bauman v. Ross*, 167 U. S. 548, 42 L. 270, 17 S. 966 [1897]; (*reversing District of Columbia v. Armes*, 8 App. D. C. 393 [1896]; *Bauman v. Ross*, 9 App. D. C. 260 [1896]; *Abbott v. Ross*, 9 App. D. C. 239 [1896]); *Cemansky v. Fitch*, 121 Ia. 186, 96 N. W. 754 [1903]; *Clapp v. Minnesota Grass Twine Co.*, 81 Minn. 511, 84 N. W. 344 [1900]; *In the Matter of Walter*, 75 N. Y. 354 [1878]; *De Pevster v. Murphv*, 39 N. Y. Sup. Ct. Rep. 255 [1875]; *Knowles v. Temple*, — Wash. —, 96 Pac. 1 [1908].

² *Hibben v. Smith*, 158 Ind. 206,

62 N. E. 447 [1901]; *In re Commissioners of Elizabeth*, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; *Fountain v. City of Newark*, 57 N. J. Eq. (12 Dick.) 76, 40 Atl. 212 [1893]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Pier v. Fond du Lac County*, 53 Wis. 421, 10 N. W. 686 [1881]. See §§ 971, 1072.

³ *Brackett v. Weiennett*, 115 Ill. 29, 3 N. E. 723 [1886]; *Green v. Tidball*, 26 Wash. 338; 55 L. R. A. 879, 67 Pac. 84 [1901]. See § 971.

¹ *Cattell v. Putnam*, 73 Ohio S. 147, 76 N. E. 390 [1905].

² *Clapp v. Minnesota Grass Twine Company*, 81 Minn. 511, 84 N. W. 344 [1900].

rant is made,³ or delivered to the collector,⁴ or other officer authorized to collect,⁵ when the tax bill is delivered to the proper person,⁶ when the transcript of the proceedings is filed with the county auditor,⁷ and when the title of the assessment is entered of record.⁸ Under other statutes it is provided that an assessment shall date as a lien from the date of letting the contract,⁹ from the date when the improvement was ordered,¹⁰ from the date of recording the notice establishing the improvement¹¹ or from the date of filing the order directing the construction of the improvement.¹² Under some statutes an assessment dates as a lien from the beginning of the work.¹³ In this connection, work means performing labor or furnishing material;¹⁴ and it does not refer to the resolution ordering the doing of the work, or the letting of a contract therefor.¹⁵ Under other statutes a lien of an assessment dates from the filing of the petition for the improvement.¹⁶ Under some statutes an assessment is a lien from the time that such assessment is recorded,¹⁷ from the time that

³ *Voris' Ex'rs v. Gallaher*, 27 Ky. Law Rep. 1001, 87 S. W. 775 [1905].

⁴ *Higgins v. City of Chicago*, 18 Ill. 276 [1857].

⁵ *Knowles v. Temple*, — Wash. —, 96 Pac. 1 [1908].

⁶ *Mercantile Trust Co. v. Nigge-man*, 119 Mo. App. 56, 96 S. W. 293 [1906]; *Adkins v. Case*, 81 Mo. App. 104 [1899].

⁷ *Cemansky v. Fitch*, 121 Ia. 186, 96 N. W. 754 [1903].

⁸ *Chase v. Arctic Ditchers*, 43 Ind. 74 [1873]; *Real Estate Corporation of New York City v. Harper*, 174 N. Y. 123, 66 N. E. 660 [1903].

⁹ *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986 [1895]; *Seherm v. Garrett's Administrator*, 118 Ky. 296, 80 S. W. 1103, 26 Ky. Law Rep. 186 [1904]; *Wilson v. Hall*, 6 Ohio C. C. 570 [1892].

¹⁰ *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447; (affirmed *Hibben v. Smith*, 191 U. S. 310 [1903]); *McColum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 27 N. E. 725 [1890]; *Scott v. State for use of Busenberg*, 89 Ind. 368 [1883]. "The liability to assessment is certainly an incumbrance

upon the abutting estates when the sewer is laid out, although its amount cannot then be ascertained." *Inhabitants of Leominster v. Conant*, 139 Mass. 384, 387, 2 N. E. 690 [1885]; (citing *Carr v. Dooley*, 119 Mass. 294 [1875]).

¹¹ *North River Bank v. State for use of Busenberg*, 91 Ind. 476 [1883].

¹² *Cemansky v. Fitch*, 121 Ia. 186, 96 N. W. 754 [1903].

¹³ *Eagle Manufacturing Co. v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897].

¹⁴ *Eagle Manufacturing Co. v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897].

¹⁵ *Eagle Manufacturing Co. v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897].

¹⁶ *Kennedy v. State ex rel. Dorsett*, 124 Ind. 239, 24 N. E. 748 [1890]; *Chaney v. State ex rel. Ely*, 118 Ind. 494, 21 N. E. 45 [1888]; *Pierse v. Bronnenberg's Estate*, — Ind. App. —, 81 N. E. 739, rehearing denied, 82 N. E. 126 [1907].

¹⁷ *Dann v. Woodruff*, 51 Conn. 203 [1883]; *City Bank of New Orleans*

the assessment is actually made,¹⁸ from the time when the improvement is actually determined upon,¹⁹ from the date of the improvement ordinance,²⁰ from the confirmation of the engineer's report,²¹ from the date of the assessing ordinance,²² or from the date of the confirmation of the assessment.²³ Under some statutes an assessment is a lien from the time when the assessment is due.²⁴ Under some statutes an assessment becomes a lien when the improvement is completed.²⁵ Under some statutes an assessment becomes a lien when the estimate is made,²⁶ and such lien does not relate back to the time that the work was commenced.²⁷ Under some statutes an assessment becomes a lien when the list of the property owners is made out,²⁸ even before the work is begun.²⁹

§ 1068. Priority between lien of assessment and liens of other classes.

The provisions of the statute determine the question of the priority between the lien of an assessment and other liens upon realty, if both liens are created after the enactment of such

v. Huie, 1 Robinson (La.) 236 [1842]; De Peyster v. Murphy, 66 N. Y. 622 [1876]; De Peyster v. Murphy, 39 N. Y. Sup. Ct. Rep. 255 [1875]; In the Matter of Deering, 55 How. 296 [1878].

¹⁸ Lyon v. Alley, 130 U. S. 177, 32 L. 899, 9 S. 480 [1889]; (affirming Alley v. Lyon, 14 D. C. (Mackey) 457 [1885]); Hancock v. Whittemore, 50 Cal. 522 [1875]; Laakman v. Pritchard, 160 Ind. 24, 66 N. E. 153 [1902]; Anderson v. Holland, 40 Mo. 600 [1867]; Craig v. Heis, 30 O. S. 550 [1876]; Moerlein Brewing Co. v. Westmeier, 4 Ohio C. C. 296 [1890].

¹⁹ Lorden v. Coffey, 178 Mass. 489, 60 N. E. 124 [1901]; Smith v. Abington Savings Bank, 171 Mass. 178, 50 N. E. 545 [1898]; Blackie v. Hudson, 117 Mass. 181 [1875].

²⁰ Sanders v. Brown, 65 Ark. 498, 47 S. W. 461 [1898]; Buchanan v. Kansas City, 208 Mo. 674, *sub nomine*, In re Spring Valley Park in Kansas City, 106 S. W. 531 [1907];

Douglas v. City of Cincinnati, 29 O. S. 165 [1876].

²¹ Yoder v. Turner, 8 Ohio N. P. 387 [1901].

²² Whipple v. City of Toledo, 29 Ohio C. C. 42 [1905].

²³ Flint v. Webb, 25 Minn. 93 [1878]; Fisher v. Mayor, Aldermen and Commonalty of the City of New York, 67 N. Y. 73 [1876]. See also, Cook v. State for use of Whitten, 101 Ind. 446 [1884].

²⁴ Tull v. Royston, 30 Kan. 617, 2 Pac. 866 [1883].

²⁵ Heman Construction Co. v. Loevy, 179 Mo. 455, 78 S. W. 613 [1903].

²⁶ Jones v. Schulmeyer, 39 Ind. 119 [1872]; Langedale v. Nicklaus, 38 Ind. 289 [1871].

²⁷ Jones v. Schulmeyer, 39 Ind. 119 [1872].

²⁸ Henderson v. Mayor and Common Council of Baltimore to use of Eschbach, 8 Md. 352 [1855].

²⁹ Henderson v. Mayor and Common Council of Baltimore to use of Eschbach, 8 Md. 352 [1855].

statute.¹ Since an assessment lien may date back to the commencement of the improvement and a mortgagee who takes a mortgage pending an improvement is charged with knowledge that the assessment lien may so date back, such mortgage is subordinate to the assessment.² On the other hand, a mortgage taken after the improvement was begun, by one who had no actual knowledge of such improvement, has been held to have priority over a subsequent lien.³ Under the theory that a potential lien exists from the time that the improvement is begun, a lien upon re-assessment dates back to the original improvement, and antedates an intervening mortgage.⁴ The lien of a defective assessment is inferior to that of a subsequent mortgage, at least in the absence of re-assessment.⁵ If it is so provided by statute, the lien of an assessment may have priority over a lien which is earlier in point of time,⁶ such as a mortgage lien.⁷

¹ Provident Institution for Savings v. Mayor and Aldermen of Jersey City, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1884]; (affirming Provident Institution v. Allen, 37 N. J. Eq. (10 Stew.) 627 [1883]); Mayor, Aldermen and Commonalty of City of New York v. Colgate, 9 N. Y. Sup. Ct. Rep. 1 [1853]; Moerlein Brewing Co. v. Westmeier, 4 Ohio C. C. 296 [1890]; Hagemann's Appeal, 88 Pa. St. (7 Norris) 21 [1878]; Philadelphia to use of Holgate v. Meager, 67 Pa. St. (17 P. F. Smith) 345 [1871].

² In the Matter of Walter, 75 N. Y. 354 [1878].

³ Cook v. State for use of Whitten, 101 Ind. 446 [1884].

⁴ Commissioners of Sinking Fund of Jersey City v. Inhabitants of the Township of Linden in the County of Union, 40 N. J. Eq. (13 Stewart) 27 [1885].

⁵ Lane v. Morrel, 3 Edward's Chan. Rep. 185 [1838].

⁶ Provident Institution for Savings v. Mayor and Aldermen of Jersey City, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1884]; (affirming Provident Institution v. Allen, 37 N. J. Eq. (10 Stew.) 627 [1883]); Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254

[1898]; Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119 [1898]; Stansbury v. White, 121 Cal. 433, 53 Pac. 940 [1898]; People of the State of Illinois v. Weber, 164 Ill. 412, 45 N. E. 723 [1897]; The Wabash Eastern Railway Company of Illinois v. The Commissioners of East Lake Fork Special Drainage District, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891]; Murphy v. Beard, 138 Ind. 560, 38 N. E. 33 [1894]; O'Brien v. Bradley, 28 Ind. App. 487, 61 N. E. 942 [1901]; Dressman v. Simonin, 104 Ky. 693, 47 S. W. 767, 20 Ky. Law Rep. 868 [1898]; Pittsburg's Appeal, 70 Pa. St. (20 P. F. Smith) 142 [1871]; Pennock v. Hoover, 5 Rawle, 391 [1835]; Storrie v. Houston City Street Railway Company, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898]; Krutz v. Gardner, 25 Wash. 396, 65 Pac. 771 [1901]; City of Seattle v. Hill, 14 Wash. 487, 35 L. R. A. 372, 45 Pac. 17 [1896].

⁷ Provident Institution for Savings v. Mayor and Aldermen of Jersey City, 113 U. S. 506, 28 L. 1102, 5 S. 612 [1884]; (affirming Provident Institution v. Allen, 37 N. J. Eq. (10 Stew.) 627 [1883]); Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254

In some cases the right of a mortgagee as against an assessment lien has been discussed but not decided.⁸ A statute may make the lien of an assessment superior to the liens of existing incumbrances, since all property owners hold in subordination to the taxing power.⁹ In the absence of a statute giving an assessment priority over an earlier mortgage lien, an assessment has no such priority.¹⁰ An assessment has been held not to have priority over a mortgage taken in the name of the state to secure trust funds,¹¹ or to a mortgage given to the state to secure a loan of school funds,¹² the statute not referring specifically to the state, and the constitution providing that the school fund should be a "perpetual" fund. If one who has bought land subject to a mortgage, pays such mortgage, he cannot be subrogated to the rights of such mortgagee to protect himself from paying an assessment which was inferior to such mortgage.¹³ In the absence of statutory provision to the contrary an attachment is superior to a judgment rendered subsequently against the owner

[1898]; *Wilson v. California Bank*, 121 Cal. 630, 54 Pac. 119 [1898]; *Stansbury v. White*, 121 Cal. 433, 53 Pac. 940 [1898]; *People v. Weber*, 164 Ill. 412, 45 N. E. 723 [1897]; *Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33 [1894]; *O'Brien v. Bradley*, 28 Ind. App. 487, 61 N. E. 942 [1901]; *Dressman v. Simonin*, 104 Ky. 693, 47 S. W. 767, 20 Ky. Law Rep. 868 [1898]; *Shaler v. McAleese*, — N. J. Eq. —, 68 Atl. 416 [1907]; *Pittsburg's Appeal*, 70 Pa. St. (20 P. F. Smith) 142 [1871]; *Pennock v. Hoover*, 5 Rawle, 391 [1835]; *Storrie v. Houston City Street Railway Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796 [1898]; *Krutz v. Gardner*, 25 Wash. 396, 65 Pac. 771 [1901]; *City of Seattle v. Hill*, 14 Wash. 487, 35 L. R. A. 372, 45 Pac. 17 [1896]. (See also *City of Philadelphia v. Cooke*, 30 Pa. St. (6 Casey) 56 [1858], qualifying *Gormley's Appeal*, 27 Pa. St. (3 Casey) 49 [1858]).

⁸ *Northern Indiana R. R. Co. v. Connelly*, 10 O. S. 160 [1859].

⁹ *The Wabash Eastern Railway Co.*

of *Illinois v. The Commissioners of East Lake Fork Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891].

¹⁰ *Warren v. Hopkins*, 110 Cal. 506, 42 Pac. 986 [1895]; *Pierce v. Aetna Life Insurance Company*, 131 Ind. 284, 31 N. E. 68 [1891]; *State ex rel. Ely v. Aetna Life Insurance Co.*, 117 Ind. 251, 20 N. E. 144 [1888]; *Cook v. State for use of Whitten*, 101 Ind. 446 [1884]; *Deisner v. Simpson*, 72 Ind. 435 [1880]; *Donohue v. Brotherton*, 7 Ohio N. P. 367 [1900]; *Martin v. Greenwood*, 27 Pa. Super. Ct. 245 [1905]; *Appeal of the City of Pittsburg*, 40 Pa. St. (4 Wright) 455 [1861]; (distinguished in *Pittsburg's Appeal*, 70 Pa. St. (20 P. F. Smith) 142 [1871], decided under a different statute.)

¹¹ *State, City of Elizabeth v. The Chancellor*, 51 N. J. L. (22 Vr.) 414, 17 Atl. 942 [1889].

¹² *State v. Kilburn*, — Conn. —, 69 Atl. 1028 [1908].

¹³ *Shirk v. Whitten*, 131 Ind. 455, 31 N. E. 87 [1891].

on an assessment which is not valid as to any one except such owner.¹⁴

§ 1069. Priority between assessment lien and tax lien.

Questions of priority between assessment liens and ordinary taxes are occasionally presented for decision. Under some statutes the lien which is later in time has priority.¹ Under other statutes the earlier lien has priority.² Under other statutes, by express terms, the lien for general taxes is superior to the lien of assessments.³

§ 1070. Priority between different assessment liens.

The priority between different assessment liens for different improvements depends upon the provisions of the statute. Under some statutes the earlier in point of time has priority.¹ Under some statutes the later lien has priority upon the theory that the improvement increases the security for the former liens.²

§ 1071. Priority between assessment and homestead.

An assessment is prior to a homestead right,¹ unless the statute exempts the homestead from sale to satisfy the lien of the as-

¹⁴ Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254 [1898].

¹ Fletcher v. City of Oshkosh, 18 Wis. 228 [1864].

² Berger v. Multnomah County, 45 Or. 402, 78 Pac. 224 [1904].

³ Dougherty v. Henarie, 47 Cal. 9 [1873]; McCollum v. Uhl, 128 Ind. 304, 27 N. E. 152, 27 N. E. 725 [1890]; S. D. Moody & Co. v. Sewerage and Water Board, 117 La. 360, 41 So. 649 [1906]; White v. Thomas, 91 Minn. 395, 98 N. W. 101 [1904]; White v. Knowlton, 84 Minn. 141, 86 N. W. 755 [1901]; City of Ballard v. Ross, 38 Wash. 209, 80 Pac. 439 [1905]; Pennsylvania Company v. City of Tacoma, 36 Wash. 656, 79 Pac. 306 [1905]; City of Ballard v. Way, 34 Wash. 116, 101 Am. St. Rep. 993, 74 Pac. 1067 [1904]; State of Washington on the Relation of Craver v. McConnaughey, 31 Wash. 207, 71 Pac. 770 [1903]; Keene v. City of Seattle, 31 Wash. 202, 71

Pac. 769 [1903]; McMillan v. City of Tacoma, 26 Wash. 358, 67 Pac. 68.

¹ Brady v. Burke, 90 Cal. 1, 27 Pac. 52 [1891]; Des Moines Brick Manufacturing Co. v. Smith, 108 Ia. 307, 79 N. W. 77 [1899]; Philadelphia to use of Holgate v. Meager, 67 Pa. St. (17 P. F. Smith) 345 [1871].

² "The theory of the law is that every improvement of this character, to the extent of the improvement, enhances the value of the property. So every improvement made increases the security for the payment of assessments previously made." . . . "It follows, therefore, that the last assessment for such improvement must take precedence, as a lien, over those previously made." Burke v. Lukens, 12 Ind. App. 648, 651, 54 Am. St. Rep. 539, 40 N. E. 641 [1895].

¹ People of the State of Illinois v. Weber, 164 Ill. 412, 45 N. E. 723 [1897].

assessment.² In the latter case, the assessment cannot, of course, be enforced as against homestead rights.

§ 1072. Priority as between assessment and subsequent grantee or vendee.

A grantee who acquires an interest in the property after the improvement has been made, and after a defective assessment has been levied, takes an interest which is subordinate to the lien for a subsequent re-assessment for such improvement.¹ If a city has constructed an improvement and has a right to levy an assessment and before such assessment is levied the land is sold, the grantee takes in subordination to the lien of the assessment.² This is true, even if the assessment does not become a lien until after the conveyance.³ If the assessment has become a lien before the conveyance, the grantee clearly takes in subordination thereto.⁴ An assessment if valid is binding on a subsequent grantee.⁵ In order to enforce such assessment against him a warrant must issue against him and not against the prior owner of the property, even though he may be the record owner thereof.⁶ The fact that the public corporation which has levied the assessment has bought the property which is assessed does not destroy the lien.⁷ Where property has been conveyed in separate parcels after an assessment has become a lien, it has been held that it should be subjected to a lien in inverse order of alienation.⁸ This result has been reached, even if a part of the land has been sold under a general warranty, and some under warranty except as to assess-

² See § 607.

¹ *City of Seattle v. Kelleher*, 195 U. S. 351, 25 S. 44 [1904]; *Carter v. Cemansky*, 126 Ia. 506, 102 N. W. 438 [1905]; In Report of Commissioners of Elizabeth, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; *State ex rel. Doyle v. Mayor and Common Council of Newark*, 34 N. J. L. (5 Vr.) 236 [1870]; *Butler v. City of Toledo*, 5 O. S. 225 [1855]; *Pier v. Fond du Lac County*, 53 Wis. 421, 10 N. W. 686 [1881].

² *Douglas v. City of Cincinnati*, 29 O. S. 165 [1876]; *Green v. Tidball*, 26 Wash. 338, 55 L. R. A. 879, 67 Pac. 84 [1901]; *Pier v. Fond du Lac*

County, 53 Wis. 421, 10 N. W. 686 [1881].

³ *Scherm v. Garrett's Administrator*, 118 Ky. 296, 80 S. W. 1103, 26 Ky. Law Rep. 186 [1904].

⁴ *Lounsbury v. Potter*, 37 N. Y. Sup. Ct. Rep. 57 [1874]; *Craig v. Heis*, 30 O. S. 550 [1876].

⁵ *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836 [1898].

⁶ *Voris Ex'rs v. Gallaher*, 87 S. W. 775, 27 Ky. Law Rep. 1001 [1905].

⁷ *City of Indianapolis v. City Bond Co.*, — Ind. App. —. 84 N. E. 20 [1908].

⁸ *Michaels v. Keane*, 8 Wash. 648, 36 Pac. 681 [1894].

ments.⁹ If different portions of an entire tract, subject to assessment, have been conveyed, the earlier conveyance containing warranties, and the later conveyances conveying subject to the unpaid portion of the assessment, the land is liable for the entire assessment.¹⁰ In the absence of covenants it has been held that as between the vendees of different portions of an entire tract subject to assessment, the assessment should be apportioned according to the area.¹¹ If suit is brought against some of the purchasers of parcels of the original tract and they could have brought in the remaining purchasers, they cannot subsequently take advantage of the fact that during the pendency of such suit the other purchasers have been protected by the period of limitations.¹² A grantee who purchases while assessment proceedings are pending, but before the assessment has become a technical lien, is bound by such assessment if the proceedings are regular.¹³ If, by statute, an assessment is not a lien until the contract is let, one who purchases after the improvement is ordered, but before the assessment is let, cannot claim protection as a *bona fide* grantee, even if otherwise he would have been entitled to such protection.¹⁴ As has been said before,¹⁵ the condition of the property at the time of the improvement ordinance determines its liability to assessment, even if the assessment does not become a lien until later.¹⁶ If the assessment is levied against those who owned the land when the proceedings were instituted, such assessment is not invalid because changes of ownership might have occurred, if it is not in fact shown that such changes did not occur.¹⁷ If an assessment is invalid, a subsequent grantee may attack it in the absence of covenants in the conveyance to him whereby he is estopped from so doing.¹⁸ If an assessment is absolutely void, and the public corporation

⁹ Michaels v. Keane, 8 Wash. 648, 36 Pac. 681 [1894].

¹⁰ City of Cincinnati v. Wynne, 19 Ohio C. C. 747 [1900].

¹¹ Moxley v. Lawler, — Ky. —, 97 S. W. 365 [1906].

¹² Moxley v. Lawler, — Ky. —, 97 S. W. 365 [1906].

¹³ Chaney v. State ex rel. Ely, 118 Ind. 494, 21 N. E. 45 [1888]; City of Seattle v. Hill, 23 Wash. 92, 62 Pac. 446 [1900].

¹⁴ Scherm v. Garrett's Administra-

tor, 118 Ky. 296, 80 S. W. 1103, 26 Ky. Law Rep. 186 [1904].

¹⁵ See § 635.

¹⁶ Douglas v. City of Cincinnati, 29 O. S. 165 [1876].

¹⁷ City of Covington v. Dressman, 69 Ky. (6 Bush.) 210 [1869].

¹⁸ Batty v. City of Hastings, 63 Neb. 26, 88 N. W. 139; Lasbury v. McCague, 56 Neb. 220, 76 N. W. 862 [1898]. See also, Hille v. Neale, 32 Ind. App. 341, 69 N. E. 713 [1904].

cannot levy a re-assessment, the remote grantees or the original owner are not bound to bring suit to set aside such assessment.¹⁹ If an invalid assessment has been levied for an improvement which the public corporation is authorized to make at the expense of the property owners, and a re-assessment is subsequently levied therefor, a grantee who takes between the original assessment and the re-assessment, takes subject to such re-assessment.²⁰ A grantee of public lands which are not liable to assessment while in the hands of the state, cannot be charged by an assessment which it has been attempted to levy while the land belonged to the public.²¹ If, however, the state has certain improvements constructed upon public land, and then sells or leases such land subject to the charge for the cost of such improvement, the vendee or lessee cannot prevent the enforcement of such charges.²² One who purchases realty subject to an assessment is a "party aggrieved" and may sue to set such assessment aside.²³ If the public corporation has failed to put the assessment on record, as it is required to do by statute,²⁴ or if it has given an authorized certificate that the property is free from liens,²⁵ the public corporation may be estopped as against a grantee from claiming that the assessment is a lien upon the property. If an assessment is satisfied of record, a subsequent grantee takes free from the lien thereof.²⁶ If proper notice is given of the existence of the assessment, a subsequent grantee takes subordinate thereto.²⁷ An assessment is not a lien as against the interest of a subse-

¹⁹ *Carter v. Cemansky*, 126 Ia. 506, 102 N. W. 438 [1905].

²⁰ *City of Seattle v. Kelleher*, 195 U. S. 351, 49 L. 232, 25 S. 44 [1904]; *Cadmus v. Fagan*, 47 N. J. L. (18 Vr.) 549, 4 Atl. 323 [1885]; *State ex rel. Doyle v. Mayor and Common Council of Newark*, 34 N. J. L. (5 Vr.) 236 [1870]; *In re Report of Commissioners of Elizabeth*, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; *Butler v. City of Toledo*, 5 O. S. 225 [1855].

²¹ *Nevada National Bank of San Francisco v. Poso Irrigation District*, 140 Cal. 344, 73 Pac. 1056 [1903].

²² *Seattle Dock Co. v. Seattle and Lake Washington Waterway Co.*, 195 U. S. 624, 25 S. 789 (affirming *Seat-*

tle & Lake Washington Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 843 [1904]); *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882].

²³ *In the Matter of the Petition of Pennie to Vacate an Assessment*, 108 N. Y. 364, 15 N. E. 611 [1888]; *In re Gantz to Vacate an Assessment*, 85 N. Y. 536 [1881].

²⁴ *Elder v. Fox*, 18 Colo. App. 263, 71 Pac. 398 [1903].

²⁵ *City of Elizabeth v. Shirley*, 35 N. J. Eq. (8 Stewart) 515 [1882].

²⁶ *City of Philadelphia v. Matchett*, 116 Pa. St. 103, 8 Atl. 854 [1887].

²⁷ *City of Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446 [1900].

quent grantee or vendee in the absence of some statutory provision therefor.²⁸ Under a contract for the sale of land free from any incumbrances, the vendee cannot be compelled to accept the title if an assessment appears of record as a lien upon the property.²⁹ If the owner of realty agrees to convey it free and clear from all incumbrances, a local assessment for a prior improvement constitutes an incumbrance within the meaning of such contract, since the improvement has conferred the benefit upon the property for which it is presumed the vendee pays the vendor, and accordingly the vendee should not be held to pay the public corporation again for the same benefit as between himself and the vendee.³⁰ An assessment which is made after the contract is entered into is not an incumbrance within the meaning of such provision.³¹ If the improvement is constructed after the contract of sale is made, the vendee receives a benefit for which he has probably not paid vendor, and, accordingly, as between the vendor and vendee, it seems that the vendee should pay for such benefit. Considerable difficulty exists in cases in which the contract of sale was made while the improvement proceedings were pending, but before the assessment had become a technical lien upon the property sold. The chief difficulty of cases of this sort is in determining at what moment the proposed improvement actually benefits the property, since the principle which most courts attempt to apply is, that the benefits conferred before the contract of sale are to be paid for by the vendor, and those conferred afterwards by the vendee.³² It has been held that the vendor is not liable

²⁸ "In the absence of express statutory authority, delinquent water rentals cannot be made a lien or incumbrance upon property as against a subsequent owner or occupant who did not contract said charges or make default in their payment." *Linne v. Bredes*, 43 Wash. 540, 6 L. R. A. (N. S.) 707, 86 Pac. 858 [1906]; (citing *Sheffield Water Works v. Wilkinson*, 4 C. P. D. 410; *Turner v. Revere Water Co.*, 171 Mass. 329, 68 Am. St. Rep. 432, 40 L. R. A. 657, 50 N. E. 634; *Leighton v. Ricker*, 173 Mass. 564, 54 N. E. 254; *Dayton v. Quigley*, 29 N. J. Eq. (2 Stewart) 77).

²⁹ *Dyker Meadow Land & Improvement Co. v. Cook*, 159 N. Y. 6, 53 N. E. 690 [1889].

³⁰ *Cumberland v. Kearns*, 18 Ont. 151 [1889]; *Bank of Montreal v. Fox*, 6 Practice Rep. (Ont.) 217 [1875]; *Williams v. Monk*, 179 Mass. 22, 60 N. E. 394 [1901]; *Molt v. Baumann*, 65 N. Y. App. Div. 445 [1901]; *Wood v. Squires*, 1 Hun (N. Y.) 481 [1874].

³¹ *Carey v. Gundelfinger*, 12 Ind. App. 645, 40 N. E. 1112.

³² *Armstrong v. Auger*, 21 Ont. 98 [1891]; *In re Graydon and Hammill*, 20 Ont. 199 [1890].

if the assessment is not a lien at the time of the contract.³³ The time of incurring expense, and not the time the assessment becomes a technical lien, has been suggested as the proper test; the vendor being required to pay the assessment if the expense is incurred before the contract of sale.³⁴ If the improvement is begun and the work done after the contract of sale, the vendor is not liable to the vendee.³⁵ A. leased to B., and subsequently agreed to sell to B., the lease to remain in force until its termination. After the contract of sale and before the termination of the lease the lessor remained liable for taxes and assessments, except those which were specially assumed by the lessee in his contract of purchase.³⁶ Under a contract of sale which provides that the property shall be free from any incumbrance, the vendor cannot compel the vendee to accept property subject to assessment unless such assessment appears upon its face to be void.³⁷ If, however, such assessment has been held to be invalid as to other property, the vendee cannot refuse to accept the title.³⁸ If an assessment which has been paid before the deed is delivered is set aside and a re-assessment is ordered, the grantee is not entitled to recover the prior assessment which has been paid in by the former owner, since the fund was not paid in by such grantee.³⁹ If property is conveyed by deed which contains a covenant against incumbrances, an assessment is an incumbrance within the meaning of such covenant.⁴⁰ A covenant against in-

³³ *Everett v. Marston*, 186 Mo. 587, 85 S. W. 540.

³⁴ *Armstrong v. Auger*, 21 Ont. 98 [1891]; *In re Graydon and Hammill*, 20 Ont. 199 [1890]; *City of Covington v. Boyle*, 69 Ky. (6 Bush.) 204 [1869].

³⁵ *Gotthelf v. Stranahan*, 138 N. Y. 345, 20 L. R. A. 455, 34 N. E. 286 [1893].

³⁶ *Clinton v. Shugart*, 126 Iowa, 179, 101 N. W. 785 [1904]. See also *McNutt v. Brooks*, 42 Ill. App. 554 [1891].

³⁷ *Dyker Meadow Land & Improvement Co. v. Cook*, 159 N. Y. 6, 53 N. E. 690 [1899].

³⁸ *Chase v. Chase*, 95 N. Y. 373

[1884]. (While it is of course possible that a different result as to the validity of the assessment might be reached in the case at bar, the court applied the doctrine of *stare decisis*, and held that the invalidity of such assessment must be regarded as conclusively established.)

³⁹ *Day v. The Town of New Lots*, 107 N. Y. 148, 13 N. E. 915 [1887]. (The question of the right of the grantee to have such amount applied on the re-assessment was not considered in this case as it was not presented by the pleadings.)

⁴⁰ *Green v. Tidball*, 26 Wash. 338, 55 L. R. A. 879, 67 Pac. 84 [1901].

cumbrances,⁴¹ or against lawful claims,⁴² has been held not to include charges for improvements which are not liens upon the realty at the time of the conveyance.⁴³ A contract and conveyance of property as free from all incumbrances were made, and by agreement the vendee retained money sufficient to pay the lien of an apparently valid assessment. Subsequently such assessment was held to be invalid, and thereafter a re-assessment was levied for the same improvement in an amount greater than the original assessment. It was held that the vendee must pay to the vendor the amount retained by him for such assessment.⁴⁴ In other cases an assessment has been held to be an incumbrance within the meaning of such covenants before it becomes a technical lien upon the realty.⁴⁵ Thus, a contract was made on November 5th, and an assessment was confirmed on November 7th, the deed was given pursuant to the contract on December 5th, and the title of the assessment was not entered in the title book of assessments until December 24th, at which time, by the terms of the statute, the assessment became a lien. It was held that such assessment was included within the terms of such covenant, and that the grantor was liable therefor.⁴⁶ The right to levy an assessment for an improvement which has been constructed is regarded as an incumbrance within the meaning of such a covenant, even before the assessment has been levied.⁴⁷ An assessment is a lien from the date of the ordinance which provides therefor within the meaning of such covenant, even though it is

⁴¹ *Cemansky v. Fitch*, 121 Ia. 186, 96 N. W. 754 [1903]; *Eagle Manufacturing Co. v. City of Davenport*, 101 Ia. 493, 38 L. R. A. 480, 70 N. W. 707 [1897]; *Tull v. Royston*, 30 Kan. 617, 2 Pac. 866 [1883]; *Real Estate Corporation of New York City v. Harper*, 174 N. Y. 123, 66 N. E. 660 [1903]; (distinguishing *De Peyster v. Murphy*, 66 N. Y. 622 [1876]; as decided under a different statute); *Harper v. Dowdney*, 113 N. Y. 644, 21 N. E. 63 [1889]; *Cattell v. Putman*, 73 O. S. 147, 76 N. E. 390 [1905].

⁴² *Cemansky v. Fitch*, 121 Ia. 186, 96 N. W. 754 [1903].

⁴³ *Tull v. Royston*, 30 Kan. 617, 2 Pac. 866 [1883]; *Knowles v. Temple*, — Wash. —, 96 Pac. 1 [1908].

(Resolution of intention September 5, 1906; work begun November 7, 1906; owner conveyed with covenant of warranty December 27, 1906; improvement completed February 12, 1907; roll confirmed February 28, 1907; roll placed in hands of treasurer March 1, 1901; at which last date by statute the assessment became a lien).

⁴⁴ *Lounsbury v. Potter*, 37 N. Y. Sup. Ct. Rep. 57 [1874].

⁴⁵ *De Peyster v. Murphy*, 66 N. Y. 622 [1876]; *Green v. Tidball*, 26 Wash. 338, 55 L. R. A. 879, 67 Pac. 84 [1901].

⁴⁶ *De Peyster v. Murphy*, 66 N. Y. 622 [1876].

⁴⁷ *Green v. Tidball*, 26 Wash. 338, 55 L. R. A. 879, 67 Pac. 84 [1901].

payable in installments in the future.⁴⁸ Under a statute providing for an assessment for widening a street, the assessment is held to be an incumbrance from the time of the order for widening such street, even though a grantor who conveys after such order has only constructive notice of such improvement.⁴⁹ If an assessment is invalid, and grantee pays such assessment, he cannot recover under such covenant from the grantor.⁵⁰ An invalid assessment is not an incumbrance, even if the grantor has paid some installments thereof before making such conveyance.⁵¹ If A. conveys to B. by a deed containing a covenant against incumbrances, and B. conveys to C., subject to an assessment which was a lien when A. conveyed to B., such conveyance from B. to C. breaks the continuity of the covenant and extinguishes its benefits, and C. or his grantees cannot maintain an action against A. upon A.'s covenant.⁵² A covenant in a deed "against all claims whatsoever" includes a prior assessment.⁵³ A covenant against "lawful claims" is held not to include an assessment which had not become a statutory lien at the date of the conveyance, although the improvement had then been undertaken.⁵⁴ If A. conveys a part of a tract to B. with covenant against incumbrances, and subsequently such entire tract is sold to satisfy the lien of a prior assessment, the court which distributes the fund may determine how much of such assessment as between the grantee and the grantor, should be paid by the grantor.⁵⁵ A covenant of warranty or a covenant against all incumbrances "except taxes" is held to be a covenant against assessments,⁵⁶ on the theory that such exception refers to the general annual taxes.⁵⁷ In an action upon a covenant of seizin, or against incumbrances, the existence of a valid

⁴⁸ *Sanders v. Brown*, 65 Ark. 498, 47 S. W. 461 [1898]; *Clapp v. Minnesota Grass Twine Co.*, 81 Minn. 511, 84 N. W. 344 [1900].

⁴⁹ *Blackie v. Hudson*, 117 Mass. 181 [1875].

⁵⁰ *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891]; *Kennedy v. Newman*, 3 N. Y. Sup. Ct. Rep. 187 [1848]; *Kaiser v. Weise*, 85 Pa. St. 366 [1877].

⁵¹ *McLaughlin v. Miller*, 124 N. Y. 510, 26 N. E. 1104 [1891].

⁵² *Geiszler v. DeGraaf*, 166 N. Y. 339, 82 Am. St. Rep. 659, 59 N. E. 993 [1901].

⁵³ *Craig v. Heis*, 30 O. S. 550 [1876].

⁵⁴ *Cemansky v. Fitch*, 121 Iowa 186, 96 N. W. 754 [1903].

⁵⁵ *Barron v. City of Lexington*, (Ky.) 105 S. W. 395 [1907].

⁵⁶ *De Clercq v. Barber Asphalt Paving Co.*, 66 Ill. App. 596 [1896]; *Smith v. Abington Savings Bank*, 165 Mass. 285, 42 N. E. 1133 [1896]; *Yoder v. Turner*, 8 Ohio N. P. 387 [1901].

⁵⁷ *Smith v. Abington Savings Bank*, 165 Mass. 285, 42 N. E. 1133 [1896].

assessment must be proved in the same way in which it must in that jurisdiction be proved in an action to enforce the assessment.⁵⁸ In some jurisdictions the validity of the assessment will be presumed if it is shown that the improvement is made according to law.⁵⁹ In other jurisdictions there will be no presumption as to the validity of the assessment, and the record of the assessment proceedings will not be regarded as evidence of the facts recited therein.⁶⁰ The minutes of the council are competent evidence to show that such body adopted the improvement ordinance.⁶¹ Oral evidence is not admissible to contradict a covenant of warranty and to show that the party who executed such covenant agreed to discharge a given incumbrance.⁶² If a fund is to be distributed to pay a mortgage, a judgment, an assessment, subordinate to the prior liens, and an assessment not subordinate to the prior liens, the fund should be applied first to the mortgage and the judgment.⁶³

§ 1073. Liens upon special classes of property—Enforcement of assessment against United States property.

Difficult cases arise where it is sought to enforce an assessment against property which belongs to the state, or the United States, or to a public corporation, or in which the public has some interest. Considerations of public policy seem to forbid the sale of such property to satisfy the lien, if a lien exists in such cases. On the other hand, if such property is included within the general terms of the statute authorizing assessments, and is not made exempt, the courts have no power to declare exempt, property which the legislature has declared shall be assessed. The adjustment of these different considerations is a matter of some difficulty. If the property belongs to the United States, it cannot be made subject to a lien by the action of the state.¹ Not only is it impossible to enforce a lien against it while it is in the hands of the United

⁵⁸ Kennedy v. Newman, 3 N. Y. Sup. Ct. Rep. 187 [1848]. See also Dyker Meadow Land & Improvement Co. v. Cook, 159 N. Y. 6, 53 N. E. 690 [1899].

⁵⁹ Smith v. Abington Savings Bank, 171 Mass. 178, 50 N. E. 545 [1898].

⁶⁰ Kennedy v. Newman, 3 N. Y. Sup. Ct. Rep. 187 [1848].

⁶¹ Kennedy v. Newman, 3 N. Y. Sup. Ct. Rep. 187 [1848].

⁶² Jones v. Schulmeyer, 39 Ind. 119 [1872].

⁶³ Oil City Building & Loan Association v. Shanfelter, 29 Pa. Super. Ct. 251 [1905].

¹ Nevada National Bank of San Francisco v. Poso Irrigation District, 140 Cal. 344, 73 Pac. 1056 [1903].

States,² but no lien can be created; and, accordingly, if such property is subsequently conveyed to a private individual, no lien can be enforced against him in the absence of the assent of the United States to the creation of such lien while the property was in its hands.³ It would be, of course, impossible to enforce any personal liability against the United States.

§ 1074. Enforcement of assessment^{*} against property of state.

If the property which it is sought to assess belongs to the state, a lien cannot be enforced against it, in the absence of the assent of the state,¹ nor can payment be compelled by mandamus proceedings.² The state cannot, of course, be compelled by an ordinary action at law to pay the assessment as a personal debt, even if a private owner would be liable.³ If, however, the state assents to the creation of a lien upon its property and provides a method of payment therefor, such method may be adopted by the public corporation.⁴ Thus, a state may provide for the improvement of property, and its sale to private individuals, subject to the lien of the assessment for such improvements.⁵ In the absence of such assent, on the part of the state, property belonging to the state must be regarded as practically exempt from assessment, since a valid assessment can hardly be said to exist where there is absolutely no means of enforcing it. The only remedy, if remedy it can be called, in such cases, is to request the legislature to provide for the payment of the share of the assessment which would have been imposed upon the property of the state had it been in the hands of private individuals. This doctrine

² Nevada National Bank of San Francisco v. Poso Irrigation District, 140 Cal. 344, 73 Pac. 1056 [1903].

³ Nevada National Bank of San Francisco v. Poso Irrigation District, 140 Cal. 344, 73 Pac. 1056 [1903].

¹ *In re* Petition City of Mt. Vernon, to Assess Cost of Local Improvements, etc., 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533 [1894]; Williams v. Little White Lick Gravel Road Company, Wilson's Sup. Ct. Rep. (Ind.) 7 [1871].

² *In re* Petition City of Mt. Vernon to Assess Cost of Local Improvements, etc., 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533 [1894].

³ Polk County Savings Bank v. State of Iowa, 69 Ia. 24, 28 N. W. 416 [1886].

⁴ Seattle Dock Co. v. Seattle & Lake Washington Waterway Company, 195 U. S. 624, 25 S. 789; (affirming without report Seattle & Lake Washington Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 845 [1904]).

⁵ Seattle Dock Co. v. Seattle & Lake Washington Waterway Company, 195 U. S. 624, 25 S. 789 (affirming without report, Seattle & Lake Washington Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 845 [1904]).

does not apply to land held by an officer of the state, such as the chancellor,⁶ in trust for private individuals; but such property is subject to assessment and to the enforcement thereof as any other property.

§ 1075. Property of public corporation.

Property belonging to a public corporation, and used for public purposes,¹ such as property belonging to a city,² or a township,³ may be subject to assessment.⁴ It has been held that property belonging to a city, and used for public purposes, cannot be sold to satisfy an assessment.⁵ The remedy is to render a general judgment against the city for the amount of the assessment;⁶ and this procedure is held to be valid even in jurisdictions in which a personal judgment can not be rendered against a private land owner, in cases where his land is subject to a lien of an assessment.⁷ Property owned by a county, and held for public purposes, cannot be sold to satisfy the lien of an assessment.⁸ Payment of such assessment is to be enforced by proceedings in mandamus, to compel the officers of a county to pay the amount of the assessment out of the county funds;⁹ or by the rendition and enforcement of a general judgment against the county to be paid as are other judgments against the county.¹⁰

⁶Chancellor of State v. City of Elizabeth, 66 N. J. L. 688, 52 Atl. 1130 [1901]; (affirming, Chancellor of State v. City of Elizabeth, 65 N. J. L. (36 Vr.) 483, 47 Atl. 455 [1900]).

¹Commissioners of Highways v. Drainage District of Ford County, 207 Ill. 17, 69 N. E. 576 [1904]; Taylor v. The People ex rel., 66 Ill. 322; Zumbro v. Parnin, 141 Ind. 430, 40 N. E. 1085 [1895].

²New Orleans v. Warner, 175 U. S. 120, 44 L. 96, 20 S. 44 [1899]; (modified on rehearing, 176 U. S. 92, 44 L. 385, 20 S. 280); Bennett v. Siebert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071 [1894].

³Zumbro v. Parnin, 141 Ind. 430, 40 N. E. 1085 [1895].

⁴See § 582 *et seq.*

⁵Such as property between a street and a lot in which the lot owner has an easement of access to the street.

Town of Woodruff Place v. Raschig, 147 Ind. 517, 46 N. E. 990 [1896].

⁶Barber Asphalt Pav. Co. v. City of St. Joseph, 183 Mo. 451, 82 S. W. 64 [1904].

⁷Barber Asphalt Pav. Co. v. City of St. Joseph, 183 Mo. 451, 82 S. W. 64 [1904].

⁸Lowe v. Board of Commissioners of Howard Co., 94 Ind. 553 [1883]. (A public square.)

⁹County of McLean v. City of Bloomington, 106 Ill. 209 [1883]; Edwards & Walsh Construction Co. v. Jasper County, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]. It is said that a judgment at law must be obtained before mandamus can be maintained. County of McLean v. City of Bloomington, 106 Ill. 209 [1883].

¹⁰Board of Commissioners of Franklin County v. City of Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396,

§ 1076. Highways.

An assessment levied on account of a benefit to a highway is not a lien upon the highway, but it is a debt of the township.¹ Such assessment may be enforced by proceedings in mandamus.² It is a harmless error to award execution if the highway district has no property liable to execution.³ An action of debt may be maintained against a road district under other statutes.⁴

§ 1077. School property.

In some jurisdictions it is said that property used for school purposes can not be subject to an assessment,¹ at least for street purposes,² nor can a judgment be rendered against the board of education for payment of the assessment out of its contingent fund.³ In other jurisdictions it is said that school property is not exempt, though it has been questioned whether the power to sell it exists.⁴ Property which belongs to a school district, but is not used exclusively for school purposes, is said to be subject to sale to satisfy the lien of an assessment.⁵ In other jurisdictions it is said that property belonging to public school boards cannot be sold to satisfy the lien of a street assessment;⁶ but while such property may not be sold, the school board may be compelled to pay the amount of the assessment out of its funds.⁷

31 Pac. 788 [1892]. *Contra*, City of Clinton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893].

¹ Pleasant Township v. Cook, 160 Ind. 533, 67 N. E. 262 [1902]; State ex rel. Horrall v. Thompson, 109 Ind. 533, 10 N. E. 305 [1886].

² Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District, 127 Ill. 581, 21 N. E. 206 [1890]; State ex rel. Horrall v. Thompson, 109 Ind. 533, 10 N. E. 305 [1886].

³ Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District, 127 Ill. 581, 21 N. E. 206 [1890].

⁴ Commissioners of Big Lake Special Drainage Dist. v. Commission-

ers of Highways of Sand Ridge, 199 Ill. 132, 64 N. E. 1094 [1902].

⁵ City of Toledo v. Board of Education, 48 Ohio St. 83, 26 N. E. 403 [1891].

⁶ City of Toledo v. Board of Education, 48 Ohio St. 83, 26 N. E. 403 [1891].

⁷ City of Toledo v. Board of Education, 48 Ohio St. 83, 26 N. E. 403 [1891].

⁸ City of Sioux City v. Independent School District, 55 Iowa, 150, 7 N. W. 488 [1880].

⁹ School District of Fort Smith v. Board of Improvement, 65 Ark. 343, 46 S. W. 418 [1898].

¹⁰ City of Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625 [1896].

¹¹ City of Chicago in Trust for Use of Schools v. City of Chicago, 207 Ill. 37, 69 N. E. 580 [1904].

§ 1078. Railroads.

In some jurisdictions railroad property, if used for railroad purposes, is not liable to an assessment for street improvements,¹ and improvements of a similar character, upon the theory that such improvements cannot confer any benefit upon the land which is used for such purpose. Under other statutes, property of a railroad company, even if used for railroad purposes, is liable to assessment.² Under some statutes, it is said that a railroad can not be sold to satisfy the lien of an assessment, even if such assessment is specifically made a lien by statute.³ At any rate, property which is needed to operate the railroad, cannot be sold;⁴ though it has been said that any property belonging to the railroad, except the right of way and terminal property, may be sold.⁵ In some jurisdictions the power of selling a railroad to satisfy the lien of an assessment has been asserted in general terms,⁶ and the power of selling the right of way for assessments may be exercised, if conferred by statute.⁷ Where the property of a railroad used for railroad purposes cannot be sold to satisfy the lien of an assessment, a personal judgment may be entered against the railroad for the amount of the assessment,⁸ even in jurisdic-

¹ *City of Erie v. Piece of Land Fronting on State Street*, 175 Pa. St. 523, 34 Atl. 808 [1896]; *Allegheny City v. West Pennsylvania Railroad Co.*, 138 Pa. St. 375, 21 Atl. 763 [1890]; *Chicago, Milwaukee and St. Paul R. R. Co. v. Milwaukee*, 89 Wis. 506, 28 L. R. A. 249, 62 N. W. 417 [1895].

² See § 594 *et seq.*

³ *Louisville, New Albany & Chicago Ry. Co. v. State for Use of Beekman*, 122 Ind. 443, 24 N. E. 350 [1889]; *McCutcheon v. Pacific Railroad Company*, 72 Mo. App. 271 [1897].

⁴ *The Lake Shore & Michigan Southern R. R. Co. v. City of Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767 [1894]; *New York & Harlem R. R. Co. v. Board of Trustees of the Town of Morrisania*, 7 Hun (N. Y. 652 [1876].

⁵ *Minneapolis & St. Louis Ry. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103 [1903].

⁶ *Northern Indiana R. R. Company v. Connelly*, 10 O. S. 160 [1859].

⁷ *Chicago & Northwestern Railway Co. v. Village of Elmhurst*, 165 Ill. 148, 46 N. E. 437 [1897]; *The Wabash Eastern Railway Company of Illinois v. The Commissioners of East Lake Rock Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891].

⁸ *Pittsburgh, C. C. & St. L. Ry. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906]; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454 [1901]; *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Hays*, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597 [1896]; *Lake Erie and Western Ry. Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. 864 [1893]; *Atchison, Topeka & Santa Fe Ry. Co. v. Peterson*, 5 Kans. App. 103, 48 Pac. 877 [1897]; *Missouri, Kansas and Texas Railway Co. v. Cambern*, 66 Kan. 365, 71 Pac. 809 [1903].

tions in which assessments cannot be personal debts against private property owners. It has been said that an assessment may be enforced against a railroad, both by sale and by personal judgment.⁹ Personal judgment cannot be rendered against the lessee of a railway company which has agreed to pay all assessments.¹⁰

§ 1079. Homesteads.

Under some statutes a homestead is subject to a lien for an assessment, as is other property.¹ In other jurisdictions a homestead is not subject to sale to satisfy the lien of an assessment;² though such assessments are enforced personally against the property owner.³

§ 1080. Other special interests.

Property of a street railroad,¹ or of a cemetery association,² is subject to sale to satisfy the lien of an assessment. Property which is in the hands of an assignee for the benefit of creditors is subject to the lien of an assessment, and such property may be sold to satisfy such lien.³

§ 1081. Change of statute as affecting liens and personal liability.

After an improvement has been completed, and the rights of the parties have become fixed, the legislature cannot take away an existing lien upon the property assessed, which exists in favor of the contractor, and is to be enforced for his benefit.¹ If the improvement has been constructed under a statute which gives to the contractor the right to proceed against the property assessed, he cannot be deprived of his lien by subsequent legislation, even

⁹ Lake Erie & Western Ry Co. v. Bowker, 9 Ind. App. 428, 36 N. E. 864 [1893].

¹⁰ Chicago, Rock Island & Pacific R. Co. v. City of Ottumwa, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900].

¹ Perine v. Forbush, 97 Cal. 305, 32 Pac. 226 [1893].

² Lovenberg v. City of Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897]; *contra*, Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874 [1904]. See §§ 607, 1071.

³ Storrie v. Cortes, 90 Tex. 283, 35 L. R. A. 666, 38 S. W. 154 [1896];

Lovenberg v. City of Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024 [1897].

¹ City of Galveston v. Guaranty Trust Company of New York, 107 Fed. 325, 46 C. C. A. 319 [1901]; Little v. City of Chicago, 46 Ill. App. 534 [1892].

² The Bloomington Cemetery Association v. The People of the State of Illinois, 139 Ill. 16, 28 N. E. 1076 [1893].

³ Baker v. French, 18 Ohio C. C. 420 [1899].

¹ Palmer v. Stumph, 29 Ind. 329 [1868].

if he is given the right of enforcing a personal liability against the owner of the property.² If the contractor looks to the public corporation for compensation, it has been held that the legislature may take away the right of levying assessments for this improvement, and may cast the entire burden thereof upon the public corporation.³ A lien cannot be given as against the property owner by a statute passed after the improvement is constructed.⁴ If a statute is passed after a suit is brought to enforce an invalid assessment which was not a lien when the suit was brought, such statute is held not to make such assessment a lien.⁵ If the improvement is constructed under statutes which merely give a lien upon the property benefited, the legislature cannot by subsequent statute impose a personal liability upon the property owner for such pre-existing improvement,⁶ even where it seems to be held that the legislature has power to impose a personal liability for improvements constructed after the statute is passed. This rule has been applied where a personal liability is sought to be enforced against a drainage district under a statute passed after the original liability was incurred.⁷ Thus, where an improvement was constructed under a statute providing for a payment by assessments upon the property within the district, and by subsequent statute, passed after the improvement was constructed, all the property of the district, whether real, personal, or mixed, which had been acquired by the contributions of the land owners within the district, was pledged for the cost of the improvement, it was held that such subsequent statute was invalid as impairing the obligation of the contract into which the property owners entered when they formed the district under the law as it then stood.⁸

² *Firth v. Broadhead*, 7 Mo. App. 563 [1879].

³ *O'Neill v. City of Hoboken*, 72 N. J. L. (43 Vr.) 67, 60 Atl. 50 [1905]; *Rader v. Township Committee of Union*, 39 N. J. L. (10 Vr.) 509; (affirmed 41 N. J. L. (12 Vr.) 617).

⁴ *State, Waln, Pros. v. Common Council of Beverly*, 53 N. J. L. (24 Vr.) 560, 22 Atl. 340 [1891].

⁵ *Reis v. Graff*, 51 Cal. 86 [1875].

⁶ *City of Grand Rapids v. Lake*

Shore and M. S. Ry. Co., 130 Mich. 238, 97 Am. St. Rep. 473, 89 N. W. 932; *Mogg v. Hall*, 83 Mich. 576, 47 N. W. 553.

⁷ *Merchants' National Bank of San Diego v. Escondido Irrigation District*, 144 Cal. 329, 77 Pac. 937 [1904].

⁸ *Merchants' National Bank of San Diego v. Escondido Irrigation District*, 144 Cal. 329, 77 Pac. 937 [1904].

§ 1082. Loss of lien.

The lien of an assessment may be lost by the failure of the county auditor to enter delinquent taxes and assessments upon the tax duplicate.¹ Under an ordinance which provides that the lien for water furnished for use upon certain property shall be lost, if the water is not turned off thirty days prior to the expiration of the collection period, a vendee who subsequently purchased such property from which the water has not been shut off, cannot be required to pay prior assessments.²

§ 1083. Invalid assessment not discharge.

The fact that the public corporation has levied an invalid assessment does not of itself discharge or merge the lien existing by virtue of the construction of the improvement; but under statutes authorizing a re-assessment, a subsequent valid assessment may be levied and enforced.¹ Under such statutes, the lien of the re-assessment may date back to the original improvement and thus exclude subsequent purchasers and lien holders.²

§ 1084. Assignment for benefit of creditors.

An assignment for the benefit of creditors does not extinguish the lien of an assessment or prevent its enforcement.¹

¹ *Fitzgerald v. City of Sioux City*, 125 Iowa, 396, 101 N. W. 268 [1904].

² *City of Chicago v. Northwestern Mutual Life Insurance Co.*, 218 Ill. 40, 1 L. R. A. (N. S.) 770, 75 N. E. 803 [1905].

¹ *Davidson v. New Orleans*, 96 U. S. 97, 24 L. 616 [1877]; *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447; (affirmed, *Hibben v. Smith*, 191 U. S. 310 [1903]); *Fountain v. Mayor and Common Council of the City of New-ark*, 57 N. J. Eq. (12 Dick.) 76, 40 Atl. 212 [1898]; *In re Commissioners of Elizabeth*, 49 N. J. L. (20 Vr.) 488, 10 Atl. 363 [1887]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432

[1898]; *Pier v. Fond du Lac County*, 53 Wis. 421, 10 N. W. 686 [1881]. See also *Blount v. City of Janesville*, 31 Wis. 648 [1872].

² "The fact that the assessment is invalid does not remove the lien or encumbrance upon his land. The proper officers could, by proceedings in due form, correct the errors and re-assess the same amount upon the land and if it was not paid, sell the land." *Coburn v. Litchfield*, 132 Mass. 449, 451 [1882]; (quoted in *Smith v. Abington Savings Bank*, 171 Mass. 178, 186, 50 N. E. 545).

¹ *Baker v. French*, 18 Ohio C. C 420 [1890].

CHAPTER XXI.

PAYMENT AND DELINQUENCY OF ASSESSMENTS.

§ 1085. Payment in installments.

A public corporation which levies an assessment, may require that the entire assessment be paid at once, and in one payment, in the absence of a statute making it mandatory that the public corporation allow payment of such assessments in installments.¹ While the right of a city to make an assessment payable in installments has been recognized without any specific discussion of the statutory authority of the public corporation to make such division into installments,² is held very generally that a public corporation cannot make an assessment payable in installments unless there is a specific statutory authority therefor.³ At any rate, it is held that in the absence of a statute giving specific authority therefor, the city cannot provide for dividing an assessment into installments payable at different times in the future and including interest upon such installments as a part of the assessment.⁴ It seems to be assumed that if interest is not included

¹ *People ex rel. Little v. Clayton*, 115 Ill. 150, 4 N. E. 193 [1886]; *Talcott Brothers v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899]; *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905]; *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900].

² *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889].

³ *Andrews v. People ex rel. Kochersperger*, 173 Ill. 123, 50 N. E. 335 [1898]; (distinguished in *Mason v. City of Chicago*, 178 Ill. 499, 53 N. E. 354 [1899]); *City of Charleston v. Cadle*, 166 Ill. 487, 46 N. E. 1120 [1897]; *White v. Town of West Chicago*, 164 Ill. 196, 45 N. E. 495 [1896]; *Farrell v. Town of West*

Chicago, 162 Ill. 280, 44 N. E. 527 [1896]; *Connor v. Town of West Chicago*, 162 Ill. 287, 44 N. E. 1118 [1896]; *Culver v. People ex rel. Kochersperger*, 161 Ill. 89, 43 N. E. 812 [1896]; *Merriam v. People ex rel. Kochersperger*, 160 Ill. 555, 43 N. E. 705 [1896]; *Corliss v. Village of Highland Park*, 132 Mich. 152, 93 N. W. 254; (affirmed on rehearing, 93 N. W. 610, 95 N. W. 416 [1903].

⁴ *Andrews v. People ex rel. Kochersperger*, 173 Ill. 123, 50 N. E. 335 [1898]; *City of Charleston v. Cadle*, 166 Ill. 487, 46 N. E. 1120 [1897]; *Culver v. People ex rel. Kochersperger*, 161 Ill. 89, 43 N. E. 812 [1896]; *Merriam v. People ex rel. Kocher-*

the city may pay the contractors and levy the assessment in installments.⁵ The reason given for this decision is that the property owner is not prejudiced thereby but that his burden is rather lessened. A statute which authorizes assessments for certain improvements in accordance with the provisions of a specific section of another statute adopts such section as it then stands, and does not adopt subsequent amendments permitting the division of the assessment into installments.⁶ If an irrigation district is authorized to levy assessments sufficient to raise the annual interest on outstanding bonds, together with a sum sufficient to redeem the bonds as they mature, it is not necessary that an assessment be levied annually; but, on the other hand, one assessment may be levied sufficient to pay the interest and principal of the bonds, and this may be divided into annual installments.⁷ If it is provided by statute that a public corporation may make an assessment payable in installments, such statutes are held to be valid, and an assessment may be so made payable.⁸ This is

sperger, 160 Ill. 555, 43 N. E. 705 [1896]; Corliss v. Village of Highland Park, 132 Mich. 152, 93 N. W. 254; (affirmed on rehearing 93 N. W. 610, 95 N. W. 416 [1903]).

⁵ City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342 [1889].

⁶ City of Charleston v. Cadle, 166 Ill. 487, 46 N. E. 120 [1897].

⁷ Nevada National Bank v. Board of Supervisors of Kern County, 5 Cal. App. 638, 91 Pac. 122 [1907].

⁸ Sanders v. Brown, 65 Ark. 498, 47 S. W. 461 [1898]; Chase v. Trout, 146 Cal. 350, 80 Pac. 81 [1905]; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896]; In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; City of Denver v. Campbell, 33 Colo. 162, 80 Pac. 142 [1905]; McGilvery v. City of Lewiston, 13 Idaho 338, 90 Pac. 348 [1907]; Hulbert v. City of Chicago, 217 Ill. 286, 75 N. E. 486 [1905]; City of Chicago v. People ex rel. Union Trust Co., 215 Ill. 235, 74 N. E. 137 [1905]; Harman v. People ex rel. Munsterman, 214 Ill.

454, 73 N. E. 760 [1905]; Sumner v. Village of Milford, 214 Ill. 388, 73 N. E. 742 [1905]; Village of Wilmette v. People ex rel. Farm Land Mortgage, etc., Co., 214 Ill. 107, 73 N. E. 327 [1905]; Hulbert v. City of Chicago, 213 Ill. 452, 72 N. E. 1097 [1905]; Downey v. People ex rel. Raymond, 205 Ill. 230, 68 N. E. 807 [1903]; Glover v. People ex rel. Raymond, 194 Ill. 22, 61 N. E. 1047 [1901]; Village of Hinsdale v. Shannon, 182 Ill. 312, 52 N. E. 327 [1899]; Mason v. City of Chicago, 178 Ill. 499, 53 N. E. 354 [1899]; Danforth v. Village of Hinsdale, 177 Ill. 579, 52 N. E. 877 [1899]; Andrews v. People ex rel. Kochersperger, 164 Ill. 581, 45 N. E. 965 [1897]; McChesney v. City of Chicago, 159 Ill. 223, 42 N. E. 894 [1896]; Davis v. City of Litchfield, 155 Ill. 384, 40 N. E. Rep. 354 [1895]; English v. City of Danville, 150 Ill. 92, 36 N. E. 994 [1894]; Lightner v. City of Peoria, 150 Ill. 80, 37 N. E. 69 [1894]; Florer v. McAfee, 135 Ind. 540, 35 N. E. 277 [1893]; Hackett v. State for Use of Martindale, 113 Ind. 532, 15 N. E. 799 [1887]; District of Clifton,

true, especially if the property owner is permitted to pay the subsequent installments at once, and thus save the interest thereon.⁹ If an assessment is made payable in installments, it has been held that the property owner has an implied right to pay the entire assessment at once in the absence of some express provision in the ordinance forbidding such payment.¹⁰ If the statute specifically so provides, interest may be charged upon such installments and such interest may be made a part of the assessment,¹¹ at least as long as the property owner has the right to stop interest by paying the assessment or any installment thereof.¹² The legislature has power to fix the rate which such installments shall bear.¹³ A statutory provision fixing the rate of interest upon installments due in the future is not a statute "regulating the rate of interest on money" within the meaning of a constitutional provision which forbids any local or special statute upon that subject.¹⁴ Whether a state statute which provides for making assessments payable in installments, deferred payments to bear interest from the time when the assessment is made, is valid, is a question which has been brought before the Supreme Court of the United States, but

Campbell County v. Schneider, 106 Ky. 605, 51 S. W. 13 [1899]; *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904]; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629 [1898]; *Burness v. Ballenger*, 76 Mo. App. 58 [1898]; *Poillon, Pros. v. Brunner*, 66 N. J. L. (37 Vr.) 116, 48 Atl. 541 [1901]; *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900]; (reversing, *Conde v. Schenectady*, 29 App. Div. 604, 51 N. Y. S. 854); *Guest v. City of Brooklyn*, 69 N. Y. 506 [1877]; *In re Hagemeyer*, 99 N. Y. S. 369, 13 App. Div. 472 [1906]; *City of Rochester v. Rochester Railway Co.*, 96 N. Y. S. 152, 109 App. Div. 638 [1905]; *In the Matter of Rust to Reduce an Assessment*, 24 Hun (N. Y.) 229 [1881]; *Makley v. Whitmore*, 61 O. S. 587, 56 N. E. 461 [1899]; *Pike v. Cummings*, 36 O. S. 213 [1880]; *Mall v. City of Portland*, 35 Ore. 89, 56 Pac. 654 [1899]; *Lister v. City of Tacoma*, 44 Wash. 222, 87 Pac. 126 [1906]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898].

⁹ *Gage v. City of Chicago*, 216 Ill. 107, 74 N. E. 726 [1905]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902].

¹⁰ *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]. See also *Blackwell v. Village of Coeur D'Alene*, 13 Idaho 357, 90 Pac. 353 [1907].

¹¹ *Hulbert v. City of Chicago*, 217 Ill. 286, 75 N. E. 486 [1905]; *Gage v. City of Chicago*, 216 Ill. 107, 74 N. E. 726 [1905]; *Village of Western Springs v. Hill*, 177 Ill. 634, 52 N. E. 959 [1899]; *People of the State of Illinois v. Weber*, 164 Ill. 412, 45 N. E. 723 [1897]; *McChesney v. People ex rel. Johnson*, 99 Ill. 216 [1881]; *Steele v. Oviatt*, 24 O. S. 248 [1873]; *City of Salem v. Mulford*, 22 Ohio C. C. 397 [1899].

¹² *Gage v. City of Chicago*, 216 Ill. 107, 74 N. E. 726 [1905].

¹³ *Hulbert v. City of Chicago*, 217 Ill. 286, 75 N. E. 486 [1905]; *Gage v. City of Chicago*, 216 Ill. 107, 74 N. E. 726 [1905].

¹⁴ *McChesney v. People ex rel. Johnson*, 99 Ill. 216 [1881].

upon which the Supreme Court refused to pass, on the ground that the question, while raised in the pleadings, had not been brought before the trial court, or the state Supreme Court, from which latter court error was prosecuted to the Supreme Court of the United States.¹⁵ Assessments may be made payable in installments to redeem bonds which have been issued;¹⁶ and statutes which provide therefor are valid, even if the interest rate is fixed and the public corporation may therefore be precluded from obtaining the lowest possible rate of interest.¹⁷ Under statutory authority, assessments may be made payable in installments, even though bonds have not been issued.¹⁸ Under a statute providing for levying and collecting assessments to redeem the installment of bonds next thereafter maturing, funds raised by an assessment cannot be applied to the payment of bonds which had matured before the assessment was levied,¹⁹ even though such prior bonds remained in part unpaid by reason of failure fully to collect assessments which were levied to meet the payment of such bonds.²⁰ In the absence of a statute specifically providing therefor, failure to pay an installment does not make future installments due.²¹ If the realty is sold to enforce a mortgage, installments which are not yet due cannot be paid out of the proceeds of the sale.²² By express statutory provision, however, failure to pay an installment may make future installments fall due at once.²³ Under a provision that, in case of default in one installment, the future installments shall immediately become due and payable, the period of limitation is not shortened by default in the earlier installments.²⁴ Under a statute providing that de-

¹⁵ *Hulbert v. City of Chicago*, 202 U. S. 275, 26 S. 617 [1906].

¹⁶ *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *In the Matter of the Bonds of the Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 28 Pac. 675 [1891]; *Florer v. McAfee*, 135 Ind. 540, 35 N. E. 277 [1893].

¹⁷ *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097 [1905].

¹⁸ *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898].

¹⁹ *Baker v. Meacham*, 18 Wash. 319, 51 Pac. 404 [1897].

²⁰ *Baker v. Meacham*, 18 Wash. 319, 51 Pac. 404 [1897].

²¹ *Burness v. Ballinger*, 76 Mo. App. 58 [1898]; *City of Rochester v. Rochester Railway Co.*, 96 N. Y. S. 152, 109 App. Div. 638 [1905].

²² *People ex rel. Day v. Bergen*, 6 Hun (N. Y.) 267 [1875]; *Makley v. Whitmore*, 61 O. S. 587, 56 N. E. 461 [1899]. *Contra*, that the present value of the future installments may be ordered to be paid out of the proceeds of the sale. *Moerlein Brewing Co. v. Westmeier*, 4 Ohio C. C. 296 [1890].

²³ *Jaicks v. Merrill*, 201 Mo. 91, 98 S. W. 753 [1906].

²⁴ *Gilsonite Construction Co. v. Arkansas McAlester Coal Co.*, 205

fault in paying one installment shall make the future installments due and payable, it has been held that if default is made in paying an installment, and such installment is paid subsequently before suit is brought to collect the remaining installments, such payment does not obviate the defect of the default and the remaining installments may be collected;²⁵ though the opposite view has been entertained.²⁶ A statutory provision that indivisible property cannot be sold until all the liens thereon mature does not apply to street assessments which have been made payable in installments.²⁷ If the officers authorized to fix the time of paying the installments have so fixed it, a subordinate officer cannot change the time at which such installments are to be paid;²⁸ even if the time for paying such installments is so fixed that, in some cases, the bonds to redeem which the assessments are levied, will become due before the installments of the assessments are payable.²⁹ Provision may be made for making the assessment payable at once, but giving to the property owner the right to pay the assessment in installments, if he waives all irregularities or defects in the proceeding and agrees to pay the assessment.³⁰ If the property owner elects to pay in installments, the holder of a certificate payable out of such assessment is charged with notice of such election.³¹ Under some statutes the right to divide an assessment into installments is restricted to assessments for improvements which exceed a certain amount in

Mo. 49, 103 S. W. 93 [1907]. See also *Swamp Land District No. 307 v. Glide*, 112 Cal. 85, 44 Pac. 451 [1896].

²⁵ *Marion Bond Co. v. Blakely*, 30 Ind. App. 374, 65 N. E. 291, 66 N. E. 71 [1902].

²⁶ *Reclamation District No. 536 v. Hall*, 131 Cal. 662, 63 Pac. 1000 [1901].

²⁷ *District of Clifton Campbell Co. v. Schneider*, 106 Ky. 605, 51 S. W. 13 [1899].

²⁸ *Cordes v. Brooks*, 18 Ohio C. C. 801 [1895].

²⁹ *Cordes v. Brooks*, 18 Ohio C. C. 801 [1895].

³⁰ *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905]; *Pittsburgh, C. C. & St. L. Ry. Co. v. Ta-*

ber, 168 Ind. 419, 77 N. E. 741 [1906]; *Highlands v. Dallas*, 165 Ind. 710, 75 N. E. 824 [1905]; *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903]; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; *Wayne County Savings Bank v. Gas City Land Company*, 156 Ind. 662, 59 N. E. 1048 [1900]; *Edward v. Jones Co. v. Perry*, 26 Ind. App. 554, 57 N. E. 583 [1900]; *Sisson v. Board of Supervisors of Buena Vista County*, 128 Iowa, 442, 70 L. R. A. 440, 104 N. W. 454 [1905]; *Talcott Brothers v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899].

³¹ *Talcott Brothers v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899].

value,³² or the option to a property owner to pay in installments may be given only if the assessment exceeds a certain amount on each lot.³³ Under a statute providing for a division of an assessment into installments, the installments must be equal.³⁴ It may be provided that the assessment shall be divided into a certain number of installments, that the first installment shall include all fractional amounts so as to leave the remaining installments equal in amount and multiples of one hundred dollars.³⁵ Under such statutes the first installment may exceed considerably in amount the total assessment divided by the number of installments to be paid.³⁶ If the assessment is properly divided into installments, but the amount of the different installments is changed subsequently by reason of dismissing the proceedings as to part of the property and the installments are then not multiples of one hundred dollars, the assessment is, nevertheless, valid and a new division into installments is not necessary.³⁷ Under a statute which provides that assessments "may" be made to run twenty years, the public corporation may make the assessments run for a shorter period, if it sees fit.³⁸ If the statute provides specifically that the assessment shall be divided into a certain number of installments, it is reversible error to divide it into a smaller number of installments.³⁹ A statute changing the number of installments into which an assessment is to be divided does not apply to a prior assessment.⁴⁰ The right to determine whether an assessment shall be payable in installments or not, may be given in the first instance to those who petition for an improvement,⁴¹ and if they do not exercise such right, to the city council.⁴² A city which has the power, by statute, to make the assessment payable in installments, may do so by amending the orig-

³² *Cummings v. City of Chicago*, 144 Ill. 563, 33 N. E. 354 [1893].

³³ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

³⁴ *McGilvery v. City of Lewiston*, 13 Idaho, 338, 90 Pac. 348 [1907].

³⁵ *Village of Hinsdale v. Shannon*, 182 Ill. 312, 52 N. E. 327 [1899]; *Danforth v. Village of Hinsdale*, 177 Ill. 579, 52 N. E. 877 [1899]; *Parker v. Village of LaGrange*, 171 Ill. 344, 49 N. E. 550 [1898].

³⁶ *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311 [1897].

³⁷ *Gross v. Village of Grossdale*, 176 Ill. 572, 52 N. E. 370 [1898].

³⁸ *People's National Bank of Brattleboro, Vermont, v. Ayer*, 24 Ind. App. 212, 56 N. E. 267 [1899].

³⁹ *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898].

⁴⁰ *Merriam v. People ex rel. Kochersperger*, 160 Ill. 555, 43 N. E. 705 [1896].

⁴¹ *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900].

⁴² *Conde v. City of Schenectady*, 164 N. Y. 258, 58 N. E. 130 [1900].

inal ordinance.⁴³ If the total amount of the assessment is not thereby increased, a re-assessment is not necessary.⁴⁴ A statute which provides that special assessments shall not exceed in any one year five per cent. of the assessed value of the property, cannot be evaded by levying an assessment in excess of five per cent. and making it payable in installments.⁴⁵ Irregularity or error in making an assessment payable in installments, may be cured by a judgment of confirmation which remains unreversed,⁴⁶ or by a judgment declaring the validity of prior installments of such assessment,⁴⁷ in which case the objection cannot be raised at the application for judgment for subsequent installments. If a reduction is to be made,⁴⁸ or an overpayment to be credited⁴⁹ upon an assessment payable in installments, it should be upon the part of the assessment remaining unpaid,⁵⁰ and not proportionately, but in the order in which the assessments mature.⁵¹ If a contract has been let upon the understanding that the contractors are to take assessments payable in annual installments running for ten years, but by a clerical mistake the ordinance provides for installments running for five years, such mistake may be corrected subsequently by an amendment of such ordinance.⁵² Under a statute authorizing an administrative officer to fix the time for paying installments, the installments not to exceed twenty per cent. of the entire amount per month, it is not necessary that the times of payment be one month apart, as long as not more than twenty per cent. of the assessment is collected

⁴³ *Trimble v. City of Chicago*, 168 Ill. 567, 48 N. E. 416 [1897].

⁴⁴ *Trimble v. City of Chicago*, 168 Ill. 567, 48 N. E. 416 [1897].

⁴⁵ *Corliss v. Village of Highland Park*, 146 Mich. 597, 110 N. W. 45 [1906].

⁴⁶ *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]. See also *Glover v. People ex rel. Raymond*, 194 Ill. 22, 61 N. E. 1047 [1901].

⁴⁷ Voluntary payment of an installment by a property owner or his agent is, under Sec. 66 of the Local Improvement Acts of 1897 and 1901, an assent to the confirmation of the assessment roll and a waiver of the right to object to a judgment of sale for subsequent installments, except

as to the legality of the pending proceeding. *Downey v. People ex rel. Raymond*, 205 Ill. 230, 68 N. E. 807 [1903]; *Gross v. People ex rel. Raymond*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901]; *Guest v. City of Brooklyn*, 69 N. Y. 506 [1877].

⁴⁸ In the Matter of Rust to Reduce an Assessment, 24 Hun (N. Y.) 229 [1881].

⁴⁹ *Pike v. Cummings*, 36 O. S. 213 [1880].

⁵⁰ In the Matter of Rust to Reduce an Assessment, 24 Hun (N. Y.) 229 [1881].

⁵¹ *Pike v. Cummings*, 36 O. S. 213 [1880].

⁵² *Lister v. City of Tacoma*, 44 Wash. 222, 87 Pac. 126 [1906].

in each calendar month.⁵³ The fact that an assessment has been divided into several amounts has been held not to invalidate it where the aggregate of such amounts does not exceed the amount properly to be assessed upon the property.⁵⁴

§ 1086. Medium of payment.

The legislature may fix the medium of payment of an assessment, and the United States legal tender act has no application,¹ since the state may determine the medium in which its own taxes are to be paid to it. Accordingly, a legislature may make an assessment payable in gold coin.² In the absence of statute a city cannot make an assessment payable in gold coin.³ In the absence of a statute specifically authorizing it, a contract for a public improvement is payable in any legal tender, and the public authorities have no authority to award a contract payable in gold coin.⁴ Such provision is, however, merely void and not illegal. The remaining terms of such contract are valid and a general money judgment for the amount due under such contract is proper.⁵ In some statutes warrants may be used to pay assessments. Under such a statute, the holder of a warrant larger than the amount of the assessment which he wishes to pay, has no right to have the amount of the assessment endorsed on the warrant. He can only use the warrant as a means of payment, if he delivers it up to be canceled.⁶ If the drainage commissioners, the land owners and the holders of a part of the bonds of a drainage district have agreed that coupons from such bonds should be used in paying assessments, the county treas-

⁵³ *Hackett v. State for Use of Martindale*, 113 Ind. 532, 15 N. E. 799 [1887].

⁵⁴ *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408 [1906].

¹ *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming, *Reclamation District No. 108 v. Hagar*, 4 Fed. 366 [1880]).

² *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming, *Reclamation Dist. No. 108 v. Hagar*, 4 Fed. 366 [1880]); *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884]; *People of the State of*

California v. Hagar, 52 Cal. 171 [1877]; *Nicholson Pavement Co. v. Painter*, 35 Cal. 699 [1868]; *Beaudry v. Valdez*, 32 Cal. 269 [1867].

³ *N. P. Perine Contracting and Paving Co. v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894].

⁴ *N. P. Perine Contracting and Paving Company v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894].

⁵ *N. P. Perine Contracting and Paving Company v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894].

⁶ *Swamp Land District No. 307 v. Gwynn*, 70 Cal. 566, 12 Pac. 462 [1886].

urer is not bound to accept such coupons after the district has refused to accept them from him.⁷ Payment may be received by check.⁸ In such case, the assessment is not paid until the check is paid, and such payment then relates back to the time when the check was delivered in payment of the assessment.⁹ If, in the time intervening between the delivery of the check and its presentation for payment, the assessment falls due, no delinquency exists.¹⁰

§ 1087. Payment as discharge.

Payment of an assessment discharges the lien thereof.¹ This is especially clear where a payment is made by the owner of the property assessed.² Accordingly, if provision is made for re-assessment of unpaid assessments, payment prevents the levy of the re-assessment.³ In other jurisdictions, however, payment is held not to destroy the right to levy a re-assessment, although the amount paid in must be credited on the re-assessment.⁴ A person who owns two or more distinct tracts, is not obliged to pay the assessments on one tract, in order to be permitted by the treasurer to pay the general taxes on the other tract.⁵ In some jurisdictions payment by mistake extinguishes the assessment.⁶

§ 1088. Payment by third person.

Questions of greater difficulty arise where an assessment has been paid by a third person. Payment by a third person discharges the lien of the assessment.¹ This effect has been held to

¹ *Bailey v. People of the State of Illinois*, 158 Ill. 52, 41 N. E. 784 [1895].

² *Indiana Bond Co. v. Bruce*, 13 Ind. App. 550, 41 N. E. 958 [1895].

³ *Indiana Bond Co. v. Bruce*, 13 Ind. App. 550, 41 N. E. 958 [1895].

⁴ *Indiana Bond Co. v. Bruce*, 13 Ind. App. 550, 41 N. E. 958 [1895].

⁵ *State, Norris, Pros. v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889].

⁶ *Blackwell v. Village of Coeur D'Alene*, 13 Idaho, 357, 90 Pac. 353 [1907].

⁸ *State, Norris, Pros. v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889]; *State, Van*

Horne, Pros. v. Town of Bergen, 30 N. J. L. (1 Vr.) 407 [1863].

⁴ *Philadelphia and Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Kersten v. City of Milwaukee*, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 948, 1103 [1900].

⁵ *Hutchinson v. City of Rochester*, 92 Hun (N. Y.) 393, 36 N. Y. S. 766 [1895].

⁶ *Hudson v. People ex rel. McKee*, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964 [1900]; *Mason v. City of Chicago*, 48 Ill. 420 [1868].

¹ *Hudson v. People ex rel. McKee*, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964 [1900]; *Mason v. City of Chicago*, 48 Ill. 420 [1868].

follow even where the property owner or his agent made the payment by mistake, believing that the lot still belonged to his principal.² The fact that the money paid by the third person has been repaid voluntarily to him by the public corporation does not re-instate the lien of the assessment.³ Under some statutes, however, it has been held that if third persons have paid an assessment, the city may maintain an action to enforce the assessment for the use of the persons who have thus paid it.⁴ This cannot be done, however, if the original sale was had after the expiration of the time fixed by statute.⁵ An over-payment by one property owner does not enure to the benefit of other property owners so as to entitle them to have such over-payment applied in reduction of their assessments.⁶ A party who bids in land at a foreclosure sale, expecting that the purchase money will be applied to the payment of an existing assessment, cannot recover the amount of such assessment where the assessment is subsequently declared to be invalid, and a re-assessment is levied which he is obliged to pay.⁷ In some jurisdictions, if a sale for an assessment is defective, and the purchase money is returned to the purchaser, such sale has no effect upon the existence of the lien of the assessment, and does not discharge it.⁸ In some jurisdictions, if the sale is defective and passes no title, the city cannot refund the purchase price to the purchaser at an assessment sale, and the city cannot levy a re-assessment, and re-sell for the benefit of the purchaser at the void sale,⁹ since the property may sell for an amount greater than the purchase price at the prior sale. Under such statute the city should conduct the second sale merely for the amount for which it sold at the first sale.

² *Hudson v. People ex rel. McKee*, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964 [1900]; *Mason v. City of Chicago*, 48 Ill. 420 [1868]; *Delaney v. Gault*, 30 Pa. St. 63 [1858].

³ *Hudson v. People ex rel. McKee*, 188 Ill. 103, 80 Am. St. Rep. 166, 58 N. E. 964; *Delaney v. Gault*, 30 Pa. St. 63 [1858].

⁴ *State of Maryland ex rel. Henderson v. Taylor*, 59 Md. 338 [1882].

⁵ *State of Maryland ex rel. Henderson v. Taylor*, 59 Md. 338 [1882].

⁶ *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421 [1901].

⁷ *Day v. Town of New Lots*, 107 N. Y. 148, 13 N. E. 915 [1887]. (See also *Horn v. Town of New Lots*, 83 N. Y. 100, 38 Am. Rep. 402 [1880]).

⁸ *Mayor, Aldermen, etc., of New York v. Colgate*, 12 N. Y. 140 [1854].

⁹ *Gaston v. City of Portland*, 48 Or. 82, 84 Pac. 1040 [1906].

§ 1089. Payment by city.

If the city is personally liable to the contractor for the cost of the improvement, payment by the city to the contractor does not discharge the lien of the assessments against the property owners;¹ but after such payment, the city may enforce the assessment for its own benefit.² The fact that the city borrows money in order to pay the contractor, to whom the city is personally liable, does not relieve the property owners.³

§ 1090. Payment by set-off.

In proceedings in eminent domain, the amount for which the property is assessed may be deducted from the amount of damages to be paid by the property owner.¹ If a city has agreed to deduct the amount of an assessment upon the part of a lot which has not been taken for widening a street from the amount to be paid to the owner for the amount so taken, and such lot is subsequently sold to a third person, and the city does not deduct the assessment but pays the entire amount to the original owner, the assessment cannot subsequently be enforced against the part which is not taken.²

§ 1091. To whom payment can be made.

Payment must be made to the person indicated by statute. If payment is to be made to the holder of a certificate, the party claiming payment must show that payment was made before the certificate was assigned to another person.¹ If the statute provides that payment should be made to the treasurer, and that the treasurer is to pay the funds over to the bondholders, failure of the treasurer to pay the funds over to the bondholders does not authorize the bondholders to enforce the assessment against the property owners who have paid the amount of the assessment to the treasurer.² Under some statutes an assessment may be discharged by paying the amount into court.³

¹Hammond v. People for Use, etc., 169 Ill. 545, 48 N. E. 573 [1897]; City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342 [1889].

²City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342 [1889].

³*In re Beechwood Ave.*, Appeal of O'Mara, 194 Pa. St. 86, 45 Atl. 127 [1899].

¹Fisher v. Mayor, etc., of the City

of New York, 3 Hun (N. Y.) 648. See § 62 *et seq.*

²Little v. City of Rochester, 87 Hun, 493, 34 N. Y. S. 1010 [1895].

¹Farmer's Bank v. Orr, 25 Ind. App. 71, 55 N. E. 35 [1900].

²Jassen v. Pierce, 25 Ind. App. 222, 57 N. E. 941 [1900].

³Philadelphia v. Merz, 28 Pa. Super. Ct. 227 [1905].

§ 1092. Effect of satisfaction of record.

Deeds given by the state, which recite that the grantees have paid a certain amount "in full of all state and county taxes due thereon to the present date," do not show that the assessment thereon has been paid.¹ Marking an assessment as "paid" does not discharge the lien of the assessment if it has not, in fact, been paid, as long as the rights of third persons have not intervened.² Under some statutes, however, it seems to be held that no action can be maintained on an assessment which has been marked paid on the record.³ This question has been raised, but decided no further than to hold that equity will not interfere by injunction, and that the parties will be left to their rights at law.⁴ Third persons who have bought the property in reliance upon the fact that the assessment is satisfied of record, cannot be held therefor,⁵ even if they hold no evidence of payment and the statute provides that no permit for the use of the improvement can be issued unless the applicant produces evidence that the assessment has been paid.⁶ Payment of an overdue installment does not prevent the public corporation from treating the entire assessment as due by reason of such delinquency.⁷

§ 1093. Payment of part of assessment.

If a lot has been assessed as an entirety, and the owners of one-half of such lot pay one-half of the assessment, such payment should be credited upon the assessment, but it cannot release any part of the lot from the lien for the unpaid balance of the assessment.¹ If the assessment is apportioned according to frontage, and the amount owned by each property owner under such circumstances can be ascertained, the property owner

¹ *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 41 L. 590, 17 S. 230 [1897].

² *People ex rel. McCrea v. Palmer*, 2 Bradwell (Ill.) 295 [1878].

³ *Adams v. Lewellen*, 117 Mo. App. 319, 93 S. W. 874 [1906].

⁴ *Philadelphia Mortgage and Trust Co. v. City of Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442, 57 L. R. A. 150, 88 N. W. 523 [1901].

⁵ *City of Philadelphia v. Matchett*, 116 Pa. St. 103, 8 Atl. 854 [1887].

⁶ *City of Philadelphia v. Matchett*, 116 Pa. St. 103, 8 Atl. 854 [1887]. (In this case, the improvement consisted of laying water pipes.)

⁷ *Marion Bond Co. v. Blakely*, 30 Ind. App. 374, 65 N. E. 291, 66 N. E. 71 [1902].

¹ *Williams v. Bergin*, 127 Cal. 578, 60 Pac. 164 [1900].

who has not paid his assessment cannot complain if the amount thereof is enforced against his land.²

§ 1094. Application of over-payments.

If over-payments upon the assessments have been made, the party who has made such over-payments is entitled to have them applied to the payment of installments to become due in the future.¹ If over-payment of a tax by one property owner is credited upon his assessment, other property owners cannot object that the assessment is not equal and uniform.²

§ 1095. Application of proceeds of assessment.

Funds collected by the levy of an assessment should be applied to the purpose to which the statute requires them to be applied.¹ If a fund is raised by an assessment to pay improvement certificates, the treasurer is trustee for the holders of such certificates.² If an assessment is levied to pay a contractor, he is held not to be the real party in interest in such fund.³

§ 1096. Presumption of payment.

If an assessment is unpaid for twenty years, a presumption of payment is said to arise.¹ In such case the property owner should plead payment, and should not plead the statute of limitations.² Under some statutes, the presumption of payment may be rebutted by proof of actual payment of part of the assess-

² *McSherry v. Wood*, 102 Cal. 647, 36 Pac. 1010 [1894].

¹ *Fall Creek and Warren Township Gravel Road Co. v. Wallace*, 30 Ind. 435 [1872]; In the Matter of Rust to Reduce an Assessment, 24 Hun (N. Y.) 229 [1881]; *City of Cincinnati v. James*, 55 O. S. 180, 44 N. E. 925 [1896]. *Contra*, *Manns v. City of Cincinnati*, 10 Ohio C. C. 549 [1895]. (However, this case was determined finally on the ground that the property owner was estopped from claiming that any overpayment had been made, as he could not deny that he had the assessable frontage for which he had signed the petition. *City of Cincinnati v. Manns*, 54 O. S. 257,

43 N. E. 687 [1896]. See also § 1085, notes 49-51.

² *Franklin v. Hancock*, 204 Pa. 110, 53 Atl. 644 [1902].

¹ *Baker v. Meacham*, 18 Wash. 319, 51 Pac. 404 [1897].

² *State ex rel. Donnelly v. Hobe*, 106 Wis. 411, 82 N. W. 336 [1900].

³ *Hutchinson v. Pittsburg*, 72 Pa. St. (22 P. F. Smith) 320 [1872].

¹ *Fisher v. Mayor, Aldermen and Commonalty of the City of New York*, 67 N. Y. 73 [1876]; *Fisher v. Mayor, etc., of the City of New York*, 3 Hun (N. Y.) 648 [1875].

² *Fisher v. Mayor, etc., of the City of New York*, 3 Hun (N. Y.) 648 [1875].

ment within twenty years, or by a written acknowledgment of indebtedness, but not by proof that the assessment has not, in fact, been paid.³ A presumption of payment arises from the fact that an assessment is marked "paid" on the record.⁴

§ 1097. Commutation of payment.

Statutes are passed occasionally for commuting the payment of assessments.¹ Questions of this sort have been discussed in connection with the law of re-assessments.²

§ 1098. Effect of payment as to right in improvement.

It has been said that a party who pays an assessment for the construction of an improvement does not thereby acquire any special or peculiar interest in such improvement, over and above that which he would have had as a member of the general public, or as the owner of adjoining property, had the improvement been paid by general taxation.¹ Whether property owners who have paid legal assessments for a public improvement have any special right or interest in the improvement by reason of such payment, is a question upon which there has been, however, a conflict of judicial opinion, especially in *obiter*, and it has been said in some cases that the property owner who pays an assessment does thereby acquire some special right in the improvement which is thus paid for.²

§ 1099. Payment as affecting property rights.

The fact that the property owners whose lands abut upon a street which is marked as a street on a defective plat, have voluntarily paid assessments on their property, may justify a finding that the dedication has been accepted by the public cor-

³ *Fisher v. Mayor, Aldermen and Commonalty of the City of New York*, 67 N. Y. 73 [1876].

⁴ In the *Matter of Striker's Petition to Have State Assessment Vacated*, 10 Hun (N. Y.) 308 [1877].

¹ *Gilfeather v. Grout*, 91 N. Y. S. 533, 101 App. Div. 150 [1905].

² See § 968.

³ *Chicago v. Union Building Association*, 102 Ill. 379, 40 Am. Rep.

598 [1882]. Special interest denied *Stout v. Noblesville and Eagletown Gravel Road Co.*, 83 Ind. 466 [1882]. Special interest assumed not to exist, *Shurtleff v. City of Chicago*, 190 Ill. 473, 60 N. E. 870 [1901].

² *Peyser v. New York Elevated Railroad Co.*, 12 Abb. N. C. 276 [1883]; *Gilman v. City of Milwaukee*, 55 Wis. 328, 13 N. W. 266 [1882].

poration.¹ The fact that the city attempts to appropriate land by eminent domain, and to assess benefits and damages on the theory that it is private property, is not conclusive, but is admissible to show that the city had not accepted the dedication of such property as a street.² The fact that the city accepts taxes upon a tract of land which is unopened and unimproved, does not estop the city from claiming subsequently that part of the land included in such tract had been dedicated as a street.³ The fact that the city has levied an assessment for the construction of a sewer does not ratify the improper laying out of such sewer.⁴ Payment of a drain assessment by private owners, together with its use as a public drain for fifteen years, is sufficient to show that it is recognized by public officials as a public drain.⁵ Payment of assessments upon property may be presumptive evidence that the party making such payments owns such property.⁶ A release of damages in case a sewer connection should be defective, is binding, even if the assessment is invalid because the connection is defective,⁷ and the voluntary payment of such assessment does not avoid the effect of such release.⁸

§ 1100. Payment as estoppel.

The voluntary payment of installments of an assessment does not, in the absence of statute, estop the property owner from denying the validity of the assessment.¹ The receipt of a payment upon an assessment has been held to estop the city from subsequently denying the validity of the assessment,² although in other jurisdictions the receipt of such payment does not operate as an estoppel of the public corporation.³ Deduction of

¹ *Nichols v. New England Furniture Co.*, 100 Mich. 230, 59 N. W. 155 [1894].

² *German Bank v. Brose*, 32 Ind. App. 77, 69 N. E. 300 [1903].

³ *Reynolds v. Newton*, 14 Ohio C. C. 433 [1893].

⁴ *Kidson v. City of Bangor*, 99 Me. 139, 58 Atl. 900 [1904].

⁵ *Zabel v. Harshman Drain Commissioners*, 68 Mich. 273, 42 N. W. 44 [1888].

⁶ *The City of Chicago v. Middlebrooke*, 143 Ill. 265, 32 N. E. 457 [1893].

⁷ *Second Universalist Society in Providence v. City of Providence*, 6 R. I. 235 [1859].

⁸ *Second Universalist Society in Providence*, 6 R. I. 235 [1859].

¹ *Wakeley v. City of Omaha*, 58 Neb. 245, 78 N. W. 511 [1899].

² *Pittsburg v. Logan*, 165 Pa. St. 516, 30 Atl. 1017 [1895].

³ *City of Chicago v. Walsh*, 203 Ill. 318, 67 N. E. 774 [1903]; *Freeport Street Railway Co. v. City of Freeport*, 151 Ill. 451, 38 N. E. 137 [1894].

damages from benefits in a proceeding for assessing the two together, is not in effect such a payment by the property owner as to operate as an estoppel.⁴

§ 1101. When assessment becomes due.

An assessment cannot be collected until it becomes due.¹ The date at which an assessment becomes due depends upon the provisions of the statute, or upon the determination of the public corporation levying the assessment, if the statute in force provides that such corporation may fix the time at which the assessment shall become due.² Under the provisions of various statutes an assessment may be due when the improvement is completed,³ when the improvement is accepted,⁴ when placed upon the tax duplicate,⁵ when the certificate is issued therefor,⁶ when the warrant for the collection of the assessment issues,⁷ and when the first tax becomes due after the work is completed.⁸ If the statute provides that an assessment must be paid within thirty days after notice is given upon the issuing of a warrant to pay such assessments, the assessment is not due until such period of thirty days has expired.⁹ If, however, the assessment is due, at a period fixed by statute, and a notice is to be given for paying such assessment, the assessment becomes due at the time fixed by statute, and the return of the assessment as delinquent should be made in accordance with the provisions of the statute.¹⁰

¹ *Keifer v. The City of Bridgeport*, 68 Conn. 401, 36 Atl. 801 [1896].

² *Bowman v. People ex rel. Baker*, 137 Ill. 436, 27 N. E. 598 [1892].

³ *City of Galveston v. Guaranty Trust Company of New York*, 107 Fed. 325, 46 C. C. A. 319 [1901]; *Gage v. People ex rel.*, 205 Ill. 547, 69 N. E. 80 [1903]; *Craig v. People ex rel. Gannaway*, 193 Ill. 199, 61 N. E. 1072 [1901]; *Bowman v. People ex rel. Baker*, 137 Ill. 436, 27 N. E. 598 [1892]; *White v. McGrew*, 129 Ind. 83, 28 N. E. 322 [1891]; *Cullen v. Strauz*, 124 Ind. 340, 24 N. E. 883 [1890]; *Richcreek v. Moorman*, 14 Ind. App. 370, 42 N. E. 943 [1895]; *People ex rel. Day v. Bergen*, 6 Hun (N. Y.) 267 [1875]; *Makley v. Whitmore*, 61 O. S. 587, 56 N. E. 461 [1899].

⁴ *City of Galveston v. Guaranty Trust Company of New York*, 107 Fed. 325, 46 C. C. A. 319 [1901].

⁵ *White v. McGrew*, 129 Ind. 83, 28 N. E. 322 [1891].

⁶ *People ex rel. Day v. Bergen*, 6 Hun (N. Y.) 267 [1875].

⁷ *Cullen v. Strauz*, 124 Ind. 340, 24 N. E. 883 [1890].

⁸ *Gage v. People ex rel.*, 205 Ill. 547, 69 N. E. 80 [1903].

⁹ *Richcreek v. Moorman*, 14 Ind. App. 370, 42 N. E. 943 [1895].

¹⁰ *Bowman v. The People ex rel. Baker*, 137 Ill. 436, 27 N. E. 598 [1892].

¹¹ *People ex rel. Little v. Clayton*, 115 Ill. 150, 4 N. E. 193 [1886]. (In this case the statute provided that the return of delinquent assessments should be made to the county

Assessments which are not due cannot be paid out of the proceeds of a judicial sale, even though they are a lien upon the property which is sold, in the absence of a statute authorizing such payment.¹¹ Under a statute providing that no sale of indivisible property can be made until all liens mature thereon, the fact that installments of a street assessment lien are not yet due does not prevent the sale of such property.¹² If the statute so authorizes, installments of an assessment may be collected before the funds produced thereby are needed for the construction of the improvement.¹³ If, through a mistake, the city provides by its assessing ordinance that the assessment shall be paid before the assessing ordinance is passed, such defect has been held to be within a curative provision which prevents mere irregularities or formalities from invalidating the assessment.¹⁴ If an appeal from an assessment is properly taken, it suspends the right of action upon the assessment until the appeal is determined.¹⁵ Under a special contract between the city and the property owner, provision may be made as to the time at which the assessment is to be paid, and such provision must control.¹⁶

§ 1102. When assessment becomes delinquent.

An assessment cannot be enforced by sale of the property assessed until the assessment becomes delinquent,¹ and under some statutes an assessment does not become delinquent so that the property upon which it is a lien may be sold for the payment thereof until after it becomes due.² Thus, it may become delinquent at a certain specified date after it is due and unpaid.³

collector on or before the 10th day March next after the same should have become payable. This did not mean the 10th day of March next after the day named in the notice, as the right of the property owner to notice is merely to notice for the statutory period before his land is sold.)

¹¹ *Makley v. Whitmore*, 61 O. S. 587, 56 N. E. 461 [1899]. (The statute in this case authorizes such payment only of taxes and assessments which fall due within one year after the last day of September prior to the sale. The attempt was made to pay installments which were to fall due in the future out of the proceeds of a judicial sale.)

¹² *District of Clifton Campbell County v. Schneider*, 106 Ky. 605, 51 S. W. 13 [1899].

¹³ *Florer v. McAfee*, 135 Ind. 540, 35 N. E. 277 [1893].

¹⁴ *Bolton v. City of Cleveland*, 35 O. S. 319 [1880].

¹⁵ *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287 [1895].

¹⁶ *City to Use of Lancaster v. Armstrong*, 56 Mo. 298 [1874].

¹ *Craig v. People ex rel. Gannaway*, 193 Ill. 199, 61 N. E. 1072 [1901].

² *Craig v. People ex rel. Gannaway*, 193 Ill. 199, 61 N. E. 1072 [1901].

³ *Cullen v. Strauz*, 124 Ind. 340, 24 N. E. 883 [1890]. (Due when certificate issues: delinquent on the

Under other statutes, an assessment is not delinquent until warrants therefor are returned unpaid, and a report of the uncollected assessments is made in writing to the general officer of the county who is authorized to apply for judgment.⁴ If a notice is to be given which requires property owners to pay within thirty days, an assessment is not delinquent until such thirty-day period has elapsed.⁵ Judgment of sale cannot be had, if the assessment is not, in fact, delinquent.⁶ It may be provided that judgment cannot be rendered unless the assessment was delinquent on April 1st of the year in which the application for judgment is made.⁷

§ 1103. Interest determined by statute.

In the absence of a statutory provision therefor, an assessment does not bear interest.¹ Interest cannot be imposed by an ordinance in the absence of statutory authority therefor.² A statutory provision that taxes should bear interest does not authorize interest on assessments.³ If interest is specifically provided for by statute, such interest must be allowed.⁴ The legislature has power to fix the rate of interest to be paid upon bonds, the proceeds of which are used to pay the cost of the improvement, and for which an assessment is to be levied subsequently.⁵ It has

first day of November thereafter.) See also to the same effect *White v. McGrew*, 129 Ind. 83, 28 N. E. 322 [1891].

⁴ *Craig v. People ex rel. Gannaway*, 193 Ill. 199, 61 N. E. 1072 [1901].

⁵ *Bowman v. People ex rel. Baker*, 137 Ill. 436, 27 N. E. 598 [1892].

⁶ *Bowman v. People ex rel. Baker*, 137 Ill. 436, 27 N. E. 598 [1892].

⁷ *Bowman v. People ex rel. Baker*, 137 Ill. 436, 27 N. E. 598 [1892].

¹ *People v. Hagar*, 52 Cal. 171 [1877]; *Sargent and Co. v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. Rep. 1028 [1895]; *United States ex rel. Thompson v. District of Columbia*, 1 Mackey (D. C.) 463. See also *Cratty v. City of Chicago*, 217 Ill. 453, 75 N. E. 343 [1906].

² *Sargent and Co. v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. Rep. 1028 [1895].

³ *Sargent and Co. v. Tuttle*, 67 Conn. 162, 32 L. R. A. 822, 34 Atl. 1028.

⁴ *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301; *Dougherty v. Henarie*, 47 Cal. 9 [1873]; *Bacon v. Savannah*, 105 Ga. 62, 31 S. E. 127; *Gage v. People*, 219 Ill. 634, 76 N. E. 834 [1906]; *McChesney v. People*, 99 Ill. 216; *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401; *Brookbank v. City of Jeffersonville*, 41 Ind. 406; *Palmer v. Nolting*, 13 Ind. App. 581, 41 N. E. 1045; *Power v. City of Detroit*, 139 Mich. 30, 102 N. W. 288 [1905]; *City of St. Louis to use of Cornelli v. Armstrong*, 38 Mo. 167 [1866]; *Eyerman v. Provenchere*, 15 Mo. App. 256 [1884]; *Lovell v. St. Paul*, 10 Minn. 290 [1865]; *Wilvert v. Sunbury Borough*, 81½ Pa. St. (32 P. F. Smith) 57.

⁵ *Germond v. City of Tacoma*, 6 Wash. 365, 33 Pac. 961 [1893].

been held that, if, under such statute, the city issues bonds at a lower rate of interest than that fixed by statute, the property owner cannot complain thereof.⁶ The legislature may give to a public corporation power to fix the rate of interest upon an assessment.⁷ It may be provided by statute that a higher rate of interest may be recovered if a city enforces an assessment than if the contractor enforces it.⁸ It may be provided by statute that a higher rate of interest shall be allowed if certificates have been issued to the contractor for the cost of the improvement.⁹ A certificate issued against a street railway company bears such higher rate of interest, although its property is not capable of the accuracy of description prescribed by statute.¹⁰ Assessments against a public corporation for the benefit of the public, bear interest, under some statutes, as do assessments against private property owners;¹¹ though under other statutes a different result has been reached.¹² Under a statute providing for interest, interest may be allowed upon an assessment made after the passage of such statute, although the contract was let before its passage.¹³ If an assessment is made under a statute providing for interest on the installments from the date of their maturity, but such assessment is set aside, and a new division into installments is made after the passage of a statute authorizing interest from the time of confirmation, such installments may bear interest from the time of confirmation.¹⁴ A change of statute reducing the rate of interest has been held not to apply to an assessment already levied and subsequently held by the courts to be valid.¹⁵ A statute providing that costs, interest, and penalties for taxes levied for certain years should be remitted, does not provide for remitting interest upon assessments.¹⁶

⁶ *Frantz, Jr. v. Jacob*, 88 Ky. 525, 11 S. W. 654 [1889].

⁷ *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915.

⁸ *Des Moines Brick Manufacturing Co. v. Smith*, 108 Ia. 307, 79 N. W. 77.

⁹ *Storrie v. Houston City Street Ry. Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796.

¹⁰ *Storrie v. Houston City Street Ry. Company*, 92 Tex. 129, 44 L. R. A. 716, 46 S. W. 796.

¹¹ *City of Chicago v. People*, 215

Ill. 235, 74 N. E. 137 [1905]; (affirming, 116 Ill. App. 564 [1904]).

¹² *Edwards & Walsh Construction Co. v. Jasper County*, 117 Iowa 365, 90 N. W. 1006.

¹³ *Dougherty v. Henarie*, 47 Cal. 9 [1873].

¹⁴ *People v. Weber*, 164 Ill. 412, 45 N. E. 723.

¹⁵ *Camp v. Neuscheler*, 67 N. J. L. (38 Vr.) 21, 50 Atl. 597 [1901].

¹⁶ *Seattle v. Whittlesey*, 17 Wash. 292, 49 Pac. 489.

§ 1104. Interest upon installments.

In the absence of a statutory provision therefor, installments due in the future do not bear interest until they mature.¹ Under a statute authorizing the issuing of an execution to collect the assessment, it has been said that the assessment should bear interest at least from the date the execution was issued.² It may be provided that interest shall run from the time of publishing or posting a notice,³ or from the time of making a demand for payment.⁴ Accordingly, if it is shown that demand was made during a certain month, but the exact day is not shown, interest runs from the last day of such month.⁵ The legislature may provide for charging interest upon installments to come due in the future, from the time that the assessment is made.⁶ Under a statute authorizing the levy of an annual installment with interest, the interest referred to is the interest on that installment, and not upon all the installments to become due in the future.⁷ Under a statute which provides for interest upon assessments which are payable in installments, interest cannot be given where the assessment is payable in one payment.⁸ Such provision may, however, be disregarded and the rest of the assessment may thus be upheld.⁹

§ 1105. Interest on defective assessments.

If the proceedings are irregular and defective, interest does not run,¹ and no penalty can be collected,² at least under a stat-

¹ *Mall v. City of Portland*, 35 Ore. 89, 56 Pac. 654; *Connor v. Paris*, 87 Texas 32, 27 S. W. 88.

² *Bacon v. Savannah*, 105 Ga. 62, 31 S. E. 127.

³ *Lovell v. St. Paul*, 10 Minn. 290 [1865].

⁴ *Perkinson v. Schnaake*, 108 Mo. App. 255, 83 S. W. 301 [1904].

⁵ *Perkinson v. Schnaake*, 108 Mo. App. 255, 83 S. W. 301 [1904].

⁶ *Hulbert v. City of Chicago*, 217 Ill. 286, 75 N. E. 486 [1905]; *Gage v. City of Chicago*, 216 Ill. 107, 74 N. E. 726 [1905]; *City of Chicago v. People ex rel. Union Trust Company*, 215 Ill. 174, 74 N. E. 137 [1905]; *Fricksen v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]. Question raised but not

decided in *Hulbert v. City of Chicago*, 202 U. S. 275 [1906]; (affirming *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097 [1905]); as one not presented to the trial court or to the Supreme Court of the State nor passed upon by that court.

⁷ *In re Hagemeyer*, 99 N. Y. S. 369 [1906].

⁸ *Conway v. City of Chicago*, 219 Ill. 295, 76 N. E. 384 [1905]; *McChesney v. City of Chicago*, 213 Ill. 592, 73 N. E. 368 [1905].

⁹ *Conway v. City of Chicago*, 219 Ill. 295, 76 N. E. 384 [1905].

¹ *Tuttle v. Polk & Hubble*, 84 Ia. 12, 50 N. W. 38; *City of Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446 [1900].

² *City of Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446 [1900].

ute providing for interest and penalties "if the assessment proceedings shall appear to be regular."³ If an assessment as levied originally includes improper items, it has been held that the property owner is not liable for interest until the improper items are eliminated.⁴ However, the fact that small sums were erroneously charged upon some of the property has been held not to invalidate the assessment, if no tender of the amount actually due has been made.⁵ Under other statutes providing for interest in case of a delinquency at a rate higher than the legal rate, a special tax bill which is irregular is held to bear only the legal rate and not the higher rate.⁶ Under other statutes, if an assessment is defective, but the court is authorized to fix the amount properly assessable, the court may include interest upon such amount from the time fixed by the ordinance for paying the assessment.⁷

§ 1106. From what time interest runs.

Interest cannot run until the assessment is made.¹ Interest begins to run from the time specified by statute. This may be according to the terms of the statute from the end of the thirty-day period of credit given by statute,² after thirty days from confirmation,³ or after thirty days from the date of issuing the tax bill.⁴ Under a statute providing that an assessment is not due, and does not become a lien until the title thereof is entered in a specified record, interest runs from the time such title is entered, and not from the date of confirmation.⁵ A property owner cannot complain if in a judgment of confirmation, interest is

³ *City of Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446 [1900].

⁴ *Gosnell v. City of Louisville*, 104 Ky. 201, 46 S. W. 722, 20 Ky. Law Rep. 519; (assessment here included charge for repairs in the future.)

⁵ *Tuttle v. Polk & Hubble*, 92 Ia. 433, 60 N. W. 733; (distinguishing *City of Muscatine v. Chicago, Rock Island & Pacific Railway Co.*, 88 Ia. 291, 55 N. W. 100).

⁶ *City of St. Joseph ex rel. Gibson v. Forsee*, 110 Mo. App. 237, 84 S. W. 1138 [1905].

⁷ *Fricke v. City of Cincinnati*, 1 Ohio N. P. 98.

¹ *City of Muscatine v. Chicago, Rock Island & Pacific Railway Co.*, 88 Ia. 291, 55 N. W. 100; (distinguished in *Tuttle v. Polk & Hubble*, 92 Ia. 433, 60 N. W. 733).

² *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301.

³ *Village of Western Springs v. Hill*, 177 Ill. 634, 52 N. E. 959.

⁴ *City of St. Louis to Use of Cornell v. Armstrong*, 38 Mo. 167 [1866].

⁵ *In re Deering*, 55 How. 296.

allowed from a time later than that provided for in the original ordinance.⁶

§ 1107. Interest on judgments.

A judgment rendered upon an assessment bears interest at the rate prescribed by statute for judgments generally,¹ unless a higher rate of interest for such judgments is prescribed specifically.² Such interest runs from the time of the rendition of such judgment.³

§ 1108. Costs.

The costs of collecting an assessment may be recovered in addition to the amount of the assessment and interest, if the statute provides therefor.¹ Only the costs provided by statute, however, can be recovered.² A city cannot, under guise of imposing costs, impose a commission of ten per cent. for collection, as this is, in effect, a penalty.³ A judgment of sale should not include fees and costs which accrue subsequent to the advertisement.⁴ If an assessment includes improper items,⁵ or is improperly apportioned,⁶ the property owner cannot be held liable for costs until the assessment is corrected. The costs made in attempting to enforce a void assessment cannot be included in a re-assessment.⁷ Costs are a charge against the property assessed, and are not a personal debt;⁸ at least in jurisdictions in which

⁶ Halsey v. Town of Lake View, 188 Ill. 540, 59 N. E. 234; Bradford v. City of Pontiac, 165 Ill. 612, 46 N. E. 794.

¹ Himmelmann v. Oliver, 34 Cal. 246 [1867]; City of St. Louis to Use v. Allen, 53 Mo. 44 [1873].

² Barber Asphalt Pav. Co. v. City of St. Joseph, 183 Mo. 451, 82 S. W. 64 [1904].

³ Himmelman v. Oliver, 34 Cal. 246 [1867].

⁴ Gage v. People, 225 Ill. 144, 80 N. E. 90 [1907]; Hammond v. People for Use, 178 Ill. 254, 52 N. E. 1030; McChesney v. People ex rel. Kochersperger, 171 Ill. 267, 49 N. E. 491; Edwards & Walsh Construction Co. v. Jasper County, 117 Iowa 365, 90 N. W. 1006; Bradley v. Pittsburg, 130 Pa. St. 475, 18 Atl. 730. As to costs where the proceeds of the sale

are insufficient to pay all liens prior to that on which the land is sold, see Bryant's Appeal, 104 Pa. St. 372.

² Powers v. Barr, 24 Barb. (N. Y.) 142; Patterson v. Calhoun Circuit Judge, 144 Mich. 416, 108 N. W. 351 [1906].

³ Northern Liberties v. St. John's Church, 15 Pa. St. 104.

⁴ Gage v. People ex rel., 205 Ill. 547, 69 N. E. 80.

⁵ Gosnell v. City of Louisville, 104 Ky. 201, 46 S. W. 722, 20 Ky. Law Rep. 519.

⁶ City of Louisville v. Selvage, 106 Ky. 730, 51 S. W. 447, 52 S. W. 809 [1899].

⁷ Tuttle v. Polk & Hubble, 84 Ia. 12, 50 N. W. 38.

⁸ Dablar v. Village of Warren, 174 Ill. 92, 50 N. E. 1048.

an assessment is not a personal debt of the property owner. If the property owner claims that the costs are excessive, he may have them re-taxed in the court in which the judgment was rendered.⁹ It is not necessary to institute a separate proceeding in equity for this purpose.¹⁰ A statute which provides that costs shall not be awarded against assessors whose proceedings may be reviewed by statute, refers to costs made in the trial court, and not to costs made in proceedings in error.¹¹ The costs of an appeal should not all be taxed against the petitioners, if they have succeeded on many of the issues.¹²

§ 1109. Penalties.

If the statute so provides, a penalty may be charged for failure to pay an assessment when due;¹ although no penalty can be charged unless there is a statutory provision therefor.² Penalties may be charged upon delinquent assessments in the same manner as upon delinquent taxes, under statutory provision therefor.³ Under a statute providing that a specific penalty shall attach in case of the delinquency of assessments, such penalty is mandatory, and must be imposed by the court.⁴ A penalty fixed at a certain per cent. must be computed upon the amount of the assessment, and not upon the amount of the assessment plus an attorney's fee which is, by statute, twenty-five per cent. of the amount of the judgment.⁵ A statute imposing a penalty in case the city enforces the assessment, does not impose a penalty if the assessment is enforced by the contractor for whose benefit

⁹ Mayor of New York v. Cornell, 9 Hun, 215 [1876].

¹⁰ Mayor of New York v. Cornell, 9 Hun, 215 [1876].

¹¹ People ex rel. Smith v. The Commissioners of Taxes of New York, 101 N. Y. 651, 4 N. E. 752.

¹² Zigler v. Menges, 121 Ind. 99, 16 Am. St. Rep. 357, 22 N. E. 782.

¹ English v. Territory, — Ariz. —, 90 Pac. 601 [1907]; Overstreet v. Levee District No. 1 of Conway County, 80 Ark. 462, 97 S. W. 676 [1906]; Fanning v. Leviston, 93 Cal. 186, 28 Pac. 943 [1892]; State v. Norton, 63 Minn. 497, 58 Am. St. Rep. 549, 63 N. W. 935; Chapman v. Sollars, 38 O. S. 378 [1882]; Baker

v. French, 18 Ohio C. C. 420; City of Toledo v. Platt, 2 Ohio N. P. 304; Beltzhoover Borough v. Maple, 130 Pa. St. 335, 18 Atl. 650.

² Bucknall v. Story, 36 Cal. 67 [1868]; Weber v. San Francisco, 1 Cal. 455 [1851]; The Northern Liberties v. St. Johns Church, 13 Pa. St. 104.

³ State v. Norton, 63 Minn. 497, 58 Am. St. Rep. 549, 63 N. W. 935.

⁴ Overstreet v. Levee District No. 1 of Conway County, 80 Ark. 462, 97 S. W. 676 [1906].

⁵ English v. Territory, — Ariz. —, 90 Pac. 601 [1907]; (modifying on rehearing 89 Pac. 501).

the tax certificates are issued.⁶ Power may be assumed by a public corporation to fix penalties in case of delinquency in paying assessments, under a constitutional provision allowing cities to frame their own charters.⁷ However, a grant of power to a public corporation to impose penalties if taxes are not paid when due, does not authorize it to fix penalties in case assessments are not paid when due.⁸ A city cannot impose a penalty by ordinance unless it possesses such power by statute.⁹ If a high rate of interest, in the nature of a penalty, is to run from demand, demand on the executor is insufficient if such assessment was not a personal debt of the decedent, and the extra rate of interest runs, accordingly, only from the time the suit was brought.¹⁰ A penalty cannot be imposed if the assessment is defective.¹¹ If the assessment is reduced in amount, as being in excess of the proportion of the value of the property which is fixed by statute as the maximum limit of the assessment, a penalty cannot be recovered.¹²

§ 1110. Attorney's fees.

Under statutes providing therefor, attorney's fees may be recovered in a suit to enforce an assessment.¹ Such charge is said to be in the nature of a penalty for the non-payment of the tax.² Attorney's fees may be given by an act passed after the assessment is levied.³ A statute authorizing the collection of assessments "in the same manner as is provided by law for the collection of state and county taxes," authorizes such attorney's

⁶ *Edwards & Walsh Construction Co. v. Jasper County*, 117 Iowa 365, 90 N. W. 1006; *Des Moines Brick Manufacturing Co. v. Smith*, 108 Ia. 307, 79 N. W. 77.

⁷ *Seaboard National Bank v. Woesten*, 176 Mo. 49, 75 S. W. 464; *Eyerman v. Blaksley*, 78 Mo. 145.

⁸ *Ankeny v. Hennigsen*, 54 Ia. 29, 6 N. W. 65.

⁹ *Weber v. San Francisco*, 1 Cal. 455 [1851]; *Sargent & Co. v. Tuttle*, 67 Conn. 162, 13 L. R. A. 822, 34 Atl. Rep. 1028 [1895]; *The Northern Liberties v. St. John's Church*, 13 Pa. St. 104.

¹⁰ *Barber Asphalt Paving Co. v. Peck*, 186 Mo. 506, 85 S. W. 387 [1905].

¹¹ *City of St. Joseph ex rel. Gibson v. Forsee*, 110 Mo. App. 237, 84 S. W. 1138 [1905].

¹² *Cincinnati v. Jung*, 7 Ohio N. P. 665.

¹ *English v. Territory*, — Ariz. —, 90 Pac. 601 [1907]; *People v. Hagar*, 52 Cal. 171 [1877]; *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150 [1903, 1904]; *Dowell v. Talbot Paving Co.*, 138 Ind. 675, 38 N. E. 389; *Palmer v. Nolting*, 13 Ind. App. 581, 41 N. E. 1045.

² *Brown v. Central Bermudez Co.*, 162 Ind. 452, 69 N. E. 150 [1903-1904].

³ *Dowell v. Talbot Paving Co.*, 138 Ind. 675, 38 N. E. 389.

fee as is provided for in general taxation.⁴ Under some statutes, the amount awarded for attorney's fees is a lien upon the property assessed,⁵ while under other statutes it is a personal judgment, as where an assessment is enforced against a railroad whose property cannot be sold for the assessment.⁶ Only one attorney's fee can be awarded in a suit, even if several causes of action are joined.⁷ If separate suits are proper and necessary, an attorney's fee may be awarded in each suit.⁸ Thus, if a lien can be enforced against land lying back from the street improved only if the sale of the property lying upon the street improved does not raise a fund sufficient to pay the costs of the improvement, an attorney's fee may be allowed in a subsequent suit to enforce the lien upon such back-lying property.⁹

§ 1111. Commissions.

The provisions of the statute determine what commissions are to be paid for the collection of assessments. A statute providing for a certain percentage for collecting taxes, has been held to give a right to the same percentage for collecting assessments.¹ A county treasurer who collects assessments which have been placed upon the tax duplicate to be collected as other taxes is entitled to the compensation allowed by law, as "further compensation" for services in collecting the assessment, though not as "fees" in the technical meaning of the term.² A decree determining as between the city and the property owners, that certain commissions are to be included in the assessments, does not, as between the city and the officers claiming such commissions, establish their right thereto.³

⁴ *People v. Hagar*, 52 Cal. 171 [1877].

⁵ *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262.

⁶ *Pittsburg Ry. Co. v. Fish*, 158 Ind. 525, 63 N. E. 454. See also *Pittsburgh, C. C. & St. L. Ry. Co. v. Taber*, 168 Ind. 419, 77 N. E. 741 [1906].

⁷ *Husges v. Alsip*, 112 Cal. 587, 44 Pac. 1027.

⁸ *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter*, 38 Ind. App. 226, 76 N. E. 179 [1905];

(overruling petition for rehearing in 74 N. E. 260).

⁹ *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Porter*, 38 Ind. App. 226, 76 N. E. 179 [1905]; (overruling petition for rehearing in 74 N. E. 260).

¹ *Hagerstown v. Startzman*, 93 Md. 606, 49 Atl. 838.

² *Board of Commissioners v. Vurpillot*, 22 Ind. App. 422, 53 N. E. 1049.

³ *People v. Starkweather*, 42 N. Y. Sup. Ct. Rep. 325.

CHAPTER XXII.

COLLECTION AND ENFORCEMENT OF ASSESSMENT.

§ 1112. Power of legislature over method of collection.

As long as the constitutional rights of the property owners, which have already been discussed,¹ are not violated, the legislature has practically unlimited power in determining the methods by which an assessment shall be collected.² There being no common law of assessments, the method of collecting an assessment is purely statutory,³ and the method of collection provided by the legislature is exclusive.⁴ In the absence of a statute authorizing certain methods of collection, a city ordinance providing a method of collection is invalid.⁵

§ 1113. Change of statute as to collection.

Statutes changing the method of collecting assessments have created a number of problems for determination by the courts. A statute with reference to the collection of assessments applies clearly to assessments levied after its passage.¹ Greater difficulty is presented when it is sought to apply such statute to assessments already levied. If the statute has been changed, and the new statute contains a clause providing that pending proceedings shall be controlled by the pre-existing statute, no serious question arises, since the assessments already made are to be

¹ See Chapter V.

² *Samuels v. Drainage Commissioners*, 125 Ill. 536, 17 N. E. 829; *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Broadway Baptist Church v. McAtee*, 8 Bush. (Ky.) 508, 8 Am. Rep. 480 [1871].

³ *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595 [1867]; *Todd v. Macfarland*, 20 App. D. C. 176; *Potwin v. Johnson*, 108 Ill. 70; *Crowell v. Jaqua*, 114 Ind. 246, 15 N. E. 242;

City of Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112.

⁴ *Lantz v. Fishburn*, — Cal. App. —, 91 Pac. 816 [1906]; *Gauen v. The Drainage District*, 131 Ill. 446, 23 N. E. 633; *McKeesport v. Fiddler*, 147 Pa. St. 532, 23 Atl. 799; *Butler v. Nevin*, 68 Ill. 575.

⁵ *Allen v. Galveston*, 51 Tex. 302.

¹ *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295.

collected under the old statute.² Under a saving clause which provides that the laws in force when the new statute took effect should apply to proceedings for the confirmation of special assessments which were pending at that time in any court of the state, it has been held that where a judgment of confirmation had been rendered before such date, but was reversed subsequently, further proceedings were controlled by the old statute.³ Unless it appears to be the legislative intent to have the statute apply to prior assessments, it is said that a change of statute is effective only from its passage,⁴ and that it cannot apply to pending suits,⁵ or to pending improvements.⁶ As long as the substantial rights of the property owner and the contractor are not violated, a subsequent statute may control, as to the collection of an assessment already levied, if the legislative intent to make such statute apply to prior assessments is evident.⁷ Thus, a statute providing for a compulsory arbitration as to prior assessments, is operative as a means of collecting them.⁸ A statute retroactive

² *Geiger v. Bradley*, 117 Ind. 120, 19 N. E. 760; *Dunkle v. Herron*, 115 Ind. 470, 18 N. E. 12; *Robinson v. Rippey*, 111 Ind. 112, 12 N. E. 141; *Ellison v. Branstrator*, 34 Ind. App. 410, 73 N. E. 146 [1905]; *Crawford v. Hedrick*, 9 Ind. App. 356, 36 N. E. 771; *Corry v. Gaynor*, 22 O. S. 584.

³ *Gage v. People*, 225 Ill. 144, 80 N. E. 90 [1907].

⁴ *Dyer v. Barstow*, 53 Cal. 81 [1878]; *People ex rel. v. Kinsman*, 51 Cal. 92 [1875]; *Mathews v. Wagner*, — Wash. —, 94 Pac. 759 [1908].

⁵ *Dyer v. Barstow*, 53 Cal. 81 [1878]; *People ex rel. v. O'Neil*, 51 Cal. 91 [1875].

⁶ *Culver v. People ex rel. Kochersperger*, 161 Ill. 89, 43 N. E. 812; (followed in *Farrell v. Town of West Chicago*, 162 Ill. 280, 44 N. E. 527); *Merriam v. People ex rel. Kochersperger*, 160 Ill. 555, 43 N. E. 705; *Phillips v. Jollisaint*, 7 Ind. App. 458, 34 N. E. 653; *People v. Brooklyn*, 23 Barb. 180; *City of Scranton v. Stokes*, 28 Pa. Super. Ct. 434 [1905].

⁷ *Crowell v. Jaqua*, 114 Ind. 246, 15 N. E. 242; *Marion Road Co. v. McClure*, 66 Ind. 468; *State ex rel. The Monroe Gravel Road Co. v. Stout*, 61 Ind. 143; *Flournoy v. City of Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *In re Commissioners of Elizabeth*, 49 N. J. L. (20 Vr.) 488 [1887]; *State, Waln, Pros. v. Common Council of Beverly*, 53 N. J. L. (24 Vr.) 560, 22 Atl. 340 [1891]; *Jones v. Landis Township*, 50 N. J. L. (21 Vr.) 374, 13 Atl. 251; *State ex rel. Rader v. Township of Union*, 44 N. J. L. (15 Vr.) 259; *Baldwin v. Newark*, 38 N. J. L. (9 Vr.) 158; *Walter v. Town of Union*, 33 N. J. L. (4 Vr.) 350; *State, Bonney, Pros. v. Reed*, 31 N. J. L. (2 Vr.) 133; *State, New Jersey Railroad & Transportation Co., Pros. v. Newark*, 27 N. J. L. (3 Dutch.) 185; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Scranton v. Arndt*, 148 Pa. St. 210, 23 Atl. 1121.

⁸ *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 35 L. 446, 11 S. 790; (affirming, *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1886]; which

in terms, which requires the board of local improvements to certify the cost of an improvement within thirty days after the final completion and acceptance thereof, will be construed as not applicable to improvements which were completed and accepted more than thirty days before the time at which such section became applicable, since it was impossible to comply with the new statute as to such improvements.⁹ A change of statute which preserves a lien which otherwise would be lost, is held to be valid.¹⁰ A statute cannot be changed so as to deprive a contractor of a right to enforce a lien which was given to him by the law under which the improvement was constructed.¹¹ If a tax bill is issued under a statute making the period of limitations five years, and the statute is subsequently changed so as to make the period of limitations two years, the tax bill is held to be barred two years from the time that the subsequent statute goes into effect.¹² A statute cannot make valid a title under a prior void tax sale.¹³ A subsequent city ordinance cannot apply to prior assessments.¹⁴ Thus, where an improvement was made under an ordinance which provided for the collection of tax bills by a suit at law, a subsequent ordinance authorizing a levy and sale of the property without a suit at law was held to be invalid.¹⁵

§ 1114. Construction of statutes with reference to collection.

Statutes which, though passed at the same session of the legislature, are evidently applicable to subject matter of different kinds, are not to be construed together.¹ A general provision in an assessment statute is controlled by specific provisions applicable to specific cases.² Thus, a provision in general terms for

was affirmed in *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379 [1887]).

⁹ *Gage v. People*, 219 Ill. 369, 76 N. E. 498 [1905].

¹⁰ *City of Philadelphia v. Hay*, 20 Pa. Super. Ct. 480 [1902].

¹¹ *Creighton v. Pragg*, 21 Cal. 115 [1862]; *Palmer v. City of Danville*, 166 Ill. 42, 46 N. E. 629.

¹² *Siebert v. Copp*, 62 Mo. 182 [1876]; *Stadler v. Strong*, 3 Mo. App. 568. See, however, *Swamp Land District No. 307 v. Glide*, 112 Cal. 85, 44 Pac. 451; in which the

period of limitations fixed by the original statute was held to control.

¹³ *Hopkins v. Mason*, 61 Barb. 469; *Zeigler v. Flack*; 54 N. Y. Sup. Ct. Rep. 69; *Lennon v. Mayor of New York*, 5 Daly 347.

¹⁴ *City of St. Louis v. Stoddard*, 15 Mo. App. 173.

¹⁵ *Fowler v. City of St. Joseph*, 37 Mo. 228.

¹ *Gauen v. The Drainage District*, 131 Ill. 446, 23 N. E. 633.

² *State ex rel. Donnelly v. Hobe*, 106 Wis. 411, 82 N. W. 336.

the collection of special assessments, is controlled by specific provisions which show the legislative intent that the assessment lien shall be the private property of the person entitled to the proceeds of such assessment, and that the city shall collect it merely as his agent. Accordingly, the proceeds of the assessment do not become public property in the proper sense of the term.³ A prior statute is not repealed by a later one which applies to different public corporations.⁴

§ 1115. Provisions concerning collection of taxes not applicable to assessments.

Provisions with reference to the collection of general taxes are not applicable to the collection of local assessments in the absence of some statutory provision making them so applicable.¹ Provisions with reference to general taxation, conferring power to sell land,² or providing a period of limitations,³ or providing for refunding money on void sales,⁴ are not applicable to special assessments.

§ 1116. Adoption of provisions concerning collection of taxes.

Under many statutes, however, provisions with reference to the collection of general taxes are expressly made applicable to local assessments.¹ The context may, indeed, show that the

²State ex rel. Donnelly v. Hobe, 106 Wis. 411, 82 N. W. 336.

⁴Town of Rayne v. Harrel, 119 La. 652, 44 So. 330 [1907].

¹City of Highlands v. Johnson, 24 Colo. 371, 51 Pac. 1004; Mix v. Ross, 57 Ill. 121; Gould v. The Mayor and City Council of Baltimore, 59 Md. 378 [1883]; McCutcheon v. Pacific R. R. Co., 72 Mo. App. 271 [1897]; State ex rel. Ransom v. Irey, 42 Neb. 186, 60 N. W. 601; Allen v. Galveston, 51 Tex. 302; Heller v. City of Milwaukee, 96 Wis. 134, 70 N. W. 1111.

²State ex rel. Ransom v. Irey, 42 Neb. 186, 60 N. W. 601; Allen v. Galveston, 51 Tex. 302.

³Gould v. The Mayor and City Council of Baltimore, 59 Md. 378 [1883].

⁴Heller v. City of Milwaukee, 96 Wis. 134, 70 N. W. 1111.

¹People v. Hagar, 52 Cal. 171 [1877]; Cummings v. People ex rel. Hanberg, 213 Ill. 443, 72 N. E. 1094 [1904]; Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535 [1903]; Morrison v. Hershire, 32 Ia. 271; Sanger v. Rice, 43 Kan. 580, 23 Pac. 633 [1890]; Smith v. Petree, 79 S. W. 251, 25 Ky. Law Rep. 2014 [1904]; Murphy v. Clinton, 182 Mass. 198, 65 N. E. 34; Hagerstown v. Startzman, 93 Md. 606, 49 Atl. 838; Hilton v. Dumphey, 113 Mich. 241, 71 N. W. 527; Fajder v. Village of Aitkin, 87 Minn. 445, 92 N. W. 332, 934 [1902]; Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248; Sheboygan County v. City of Sheboygan, 54 Wis. 415, 11 N. W. 598 [1882]; Pratt v. City of Milwaukee, 93 Wis. 658, 68 N. W. 392.

word "taxes" in a statute concerning collection includes local assessments.² Under such statutes, provisions in statutes on the subject of general taxation, with reference to the right to file objections,³ and the adjustment of accounts between the city and the county treasurer,⁴ with reference to commissions to be paid for collections,⁵ provisions concerning the lien of the tax,⁶ the sale to satisfy the tax,⁷ the tax certificate to be given upon such sale,⁸ and the rights of the vendee to a re-payment if the sale proves void,⁹ are all made applicable to the collection of local assessments. A statute authorizing sale for local assessments "in the same manner as the comptroller of the state is authorized to sell land for the non-payment of assessment for taxes," does not adopt a provision for making a tax deed *prima facie* evidence of its regularity.¹⁰ Under some statutes, a provision authorizing the purchase of property by the state at a tax sale, is held to be applicable to a sale for a local assessment,¹¹ while under other statutes it is held not to be applicable.¹² A statute providing that local assessments should be collected in the same manner as taxes does not make the statutory provision as to penalties for non-payment in case of taxes applicable to local assessments.¹³ If, by statute, a sewer assessment is to be collected as taxes are collected, and the town treasurer is required by statute to collect taxes, a demand for a sewer assessment is not a warrant within the meaning of a statute which requires the constable to serve warrants and, accordingly, the town treasurer has no authority to pay the constable out of the town treasury for serving such demands.¹⁴

² *Gauen v. Drainage District*, 131 Ill. 446, 23 N. E. 633.

³ *Fajder v. Village of Aitkin*, 87 Minn. 445, 92 N. W. 332, 934 [1902].

⁴ *Sheboygan County v. City of Sheboygan*, 54 Wis. 415, 11 N. W. 598 [1882].

⁵ *People v. Hagar*, 52 Cal. 171 [1877]; *Hagerstown v. Startzman*, 93 Md. 606, 49 Atl. 838.

⁶ *Skelton v. Sharp*, 161 Ind. 383, 67 N. E. 535 [1903].

⁷ *Morrison v. Hershire*, 32 Ia. 271; *Sanger v. Rice*, 43 Kan. 580, 23 Pac. 633 [1890]; *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248,

⁸ *Pratt v. City of Milwaukee*, 93 Wis. 658, 68 N. W. 392.

⁹ *Smith v. Petree*, 79 S. W. 251, 25 Ky. Law Rep. 2014 [1904].

¹⁰ *Dederer v. Voorhies*, 81 N. Y. 154.

¹¹ *Hilton v. Dumphrey*, 113 Mich. 241, 71 N. W. 527.

¹² *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920.

¹³ *Ankeny v. Hennigsen*, 54 Ia. 29, 6 N. W. 65.

¹⁴ *Murphy v. Clinton*, 182 Mass. 198, 65 N. E. 34.

§ 1117. Necessity of uniform methods of collection.

The statutes must provide for substantially similar methods of collecting local assessments as to property which is similarly situated,¹ and a change of statute which authorizes a method of collection of unpaid assessments substantially different from the method of collecting those which have already been paid, has been held to be invalid.² If the property is of a substantially different nature from ordinary property, assessments may be collected therefrom in a substantially different manner.³ Thus, the statute may provide a different method for collecting an assessment from a street railway from that which is provided for collecting assessments from private owners of abutting property.⁴

§ 1118. Collection dependent on validity of assessment.

The right to collect an assessment depends upon the validity of the assessment, and if the assessment is void for failure to comply with the provisions of the statute, the assessment cannot be collected.¹ The validity of the assessment has already been discussed in various connections and from various standpoints.

§ 1119. Who may collect assessment.

The assessment is to be collected by the officer designated by statute.¹ Accordingly, the treasurer² may collect the assessment if authorized by statute. Under a statute which provides that a judgment for a drainage assessment shall be collected as other judgments in the same court, a master in chancery may be directed to sell land upon a decree for the foreclosure of the lien of a drainage assessment.³ The election by the city to have the county treasurer collect the assessment by the sale of the property does not prevent holders of assessment certificates from intervening in an action to enjoin the collection of an assessment and there seeking enforcement of their liens.⁴

¹McComb v. Bell, 2 Minn. 295 [1858].

²McComb v. Bell, 2 Minn. 295 [1858].

³Chicago, etc., R. R. Co. v. City of Chicago, 158 Ill. 64, 41 N. E. 877.

⁴Chicago, etc., R. R. Co. v. City of Chicago, 158 Ill. 64, 41 N. E. 877. See §§ 60, 599 *et seq.*

¹Lammers v. Balfie, 41 Ind. 218; Town of Albuquerque v. Ziegler, 5 N. M. 674, 27 Pac. 315.

¹City of Highlands v. Johnson, 24 Colo. 371, 51 Pac. 1004; Cummings v. People, 213 Ill. 443, 72 N. E. 1094 [1904]; Murphy v. Clinton, 182 Mass. 196, 65 N. E. 34.

²City of Highlands v. Johnson, 24 Colo. 371, 51 Pac. 1004; (without the intervention of the assessor.)

³Samuels v. Drainage Commissioners, 125 Ill. 536, 17 N. E. 829.

⁴Smith v. City of Des Moines, 106 Ia. 590, 76 N. W. 836.

§ 1120. Diversity of statutory provisions concerning collection.

Since the method of collecting the assessment is statutory, we find the greatest diversity in the methods adopted by different states; in the methods adopted by the same state at different times; and even in the methods adopted by the same state at the same time for the collection of different kinds of assessments. Steps insisted on under some statutes, are entirely omitted in others. Where the same steps are required the order may be materially different. We must, accordingly, consider the various steps required by the different legislatures, without attempting to take them up in order, since there is no uniformity as to the order in which they are required. The result will necessarily be the grouping together of a number of different steps, only a few of which are necessary under any one statute.

§ 1121. Public corporation must order collection.

The public corporation by which the assessment is levied, must in some form order the collection thereof,¹ and, if it is given discretion as to the method of collecting the assessment, it must exercise such discretion.² If holders of bonds are authorized to foreclose the lien of an assessment, a resolution of the council authorizing such suit is not necessary.³

§ 1122. Power of city to provide means of collection.

Under a statute providing that the city may collect assessments under such regulations as may be prescribed by ordinance, a city may, by ordinance, provide for suit in a court of competent jurisdiction to collect the assessment.¹ An ordinance providing for the collection of an assessment in the same way in which a mortgage is foreclosed, gives to the property owner a right to be heard, and constitutes due process of law, even if no provision has been made for a hearing at any prior stage of the assessment.² Power to collect an assessment as may be provided by the ordinance of the city, has been held not to include power to sell and convey in case of non-payment of the assess-

¹ Holbrook v. Dickinson, 46 Ill. 285; City of Indianapolis v. Imberry, 17 Ind. 175.

² Holbrook v. Dickinson, 46 Ill. 285.

³ Scott v. Hayes, 162 Ind. 548, 70 N. F. 879.

¹ Garvin v. Daussman, 114 Ind. 429,

5 Am. St. Rep. 637, 16 N. E. 826; Dubuque v. Harrison, 34 Ia. 163; Mayor of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43 [1894].

² Garvin v. Daussman, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826.

ment.³ In other jurisdictions, however, such a grant of power has been held to authorize an ordinance for the sale of the property assessed.⁴ If no specific means of collecting an assessment has been provided for by statute, it has been held that the city may provide for collecting the tax by instituting judicial proceedings,⁵ but that the power of collecting by summary sale does not exist.⁶ A city may be given power to choose between collecting an assessment by a suit at law and certifying the taxes to the county auditor for summary collection.⁷ Under such statutes, assessments may be certified to the auditor, although the ordinance choosing such method is not passed until after the work has been done.⁸ Such method of collection may be adopted, even if a property owner has paid his assessment and then has brought suit to recover the amount thus paid.⁹ The fact that the city has elected to have the assessment collected by a sale made by the county treasurer, does not prevent the holder of a certificate from intervening in an action to enjoin the collection of the assessment, and there seeking to enforce the lien.¹⁰ A contractor may be given the choice between collecting assessments by precept and by foreclosure of the lien and sale of the property.¹¹

§ 1123. Power to collect assessments under the police power.

A city which possesses authority to order certain improvements under the police power may apparently compel the property owners who are bound by law to construct such improvements to pay the cost thereof without specific statutory authority to compel such payment. An ordinance which provides for the construction of an improvement, which the owner is bound by law to construct,¹ such as a sidewalk,² and for the collection

³ *Marion v. Moody's Executors*, 25 Ia. 163.

⁴ *Lowden v. City of Cincinnati*, 2 Disney (Ohio) 203 [1858].

⁵ *Merriam v. Moody's Executors*, 25 Ia. 163.

⁶ *Merriam v. Moody's Executors*, 25 Ia. 163.

⁷ *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836; *Shaw v. Des Moines County*, 74 Ia. 679, 39 N. W. 101.

⁸ *Shaw v. Des Moines County*, 74 Ia. 679, 39 N. W. 101.

⁹ *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895.

¹⁰ *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836.

¹¹ *Martin v. Wills*, 158 Ind. 153, 60 N. E. 1021.

¹ *Mayor of Franklin v. Maberry*, 6 Humph. (Tenn.) 368, 44 Am. Dec. 315.

² *Mayor of Franklin v. Mabery*, 6 Humph. (Tenn.) 368, 44 Am. Dec. 315.

of the amount thereof, has been upheld as an exercise of police power.

§ 1124. Provisions in franchise concerning collection.

Grants of franchises may contain provisions with reference to the collection of assessments, and such provisions, if otherwise valid, control. If a street railway company accepts a franchise granted by statutory authority, and such franchise ordinance contains the provision that assessment against a street railway shall be collected in the same manner as other street assessments, assessments against the railway may be collected in the manner prescribed by law at the time of the improvement for collecting street assessments.¹

§ 1125. Putting assessment on tax duplicate.

It is frequently provided that the assessment must be placed upon the tax list. An error not misleading the property owner is immaterial.¹ Thus, if a sidewalk assessment is put under a column headed "delinquent road tax," such error does not invalidate the assessment or prevent its collection.² Under statutory authority the public corporation may certify the assessment to some official authorized to collect taxes, for collection by the summary methods employed in collecting taxes.³ Under some statutes, the auditor or some other administrative official must put the assessment upon the tax duplicate.⁴ Such officer is ordinarily given a wide discretion as to the method of putting the assessment upon the tax duplicate,⁵ and he may put them in a separate volume;⁶ but he cannot pass upon the validity of the assessment,⁷ nor can he determine whether it shall be placed upon the duplicate or not.⁸ The assessment must be so placed on the assessment roll as to identify the improvement for which

¹ *Schmidt v. Market Street and Willow Glenn R. R. Co.*, 90 Cal. 37, 27 Pac. 61 [1891].

² *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892].

³ *Scott County v. Hinds*, 50 Minn. 204, 52 N. W. 523 [1892].

⁴ *Shaw v. Des Moines County*, 74 Ia. 679, 39 N. W. 101.

⁵ *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401; *Shaw v. Des Moines County*, 74 Ia. 679, 39 N. W. 101.

⁶ *Center and Warren Gravel Road Co. v. Black*, 32 Ind. 468.

⁷ *Center and Warren Gravel Road Co. v. Black*, 32 Ind. 468.

⁸ *Smythe v. State ex rel. Braun*, 158 Ind. 332, 62 N. E. 449; *Ludlow v. Union Township Gravel Road Co.*, 77 Ind. 409.

⁹ *Smythe v. State ex rel. Braun*, 158 Ind. 332, 62 N. E. 449; *Ludlow v. Union Township Gravel Road Co.*, 77 Ind. 409.

it is levied, so that each fund may be kept separate and orders drawn against the different funds may be paid each out of the proper fund.⁹ The assessment is usually to be spread upon the tax duplicate by putting it in a proper column opposite the land on which it is made.¹⁰ The assessment need not be placed upon the tax duplicate unless it is so provided by statute.¹¹ Furthermore, unless so provided by statute, it cannot be placed upon the tax duplicate.¹² A public corporation may have an election, either to collect the assessments by suit, or to certify them to the auditor to be placed upon the tax duplicate for collection as ordinary taxes.¹³ Election to certify the assessments to the county auditor is said to deprive the public corporation of the right to sue in its own name.¹⁴ After an assessment has been certified to the county auditor, the city levying such assessment cannot enforce it.¹⁵

§ 1126. Return and publication of delinquent assessments.

Under many statutes the list of delinquent assessments must be returned by the proper officer.¹ Under a statute requiring the list of delinquent assessments to be filed as part of the records of the county court, filing such list in the office of the county clerk, who is, *ex officio*, clerk of the county court, is said to be insufficient, since his duties are not by any means confined to acting as clerk of such court, and it is not necessarily filed with him in his capacity as clerk of the court.² The return of the assessment as delinquent must be made in substantial compliance with the statute. If the statute requires the certificate of the county clerk to the delinquent tax list to be made on the day advertised for the sale, a certificate made on some other day is

⁹ *Dunning v. Calkins*, 51 Mich. 556, 17 N. W. 54 [1883].

¹⁰ *Blake v. The People*, 109 Ill. 504.

¹¹ *City of Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112.

¹² *Horn v. City of Columbus*, 1 Ohio C. C. 337.

¹³ *City of Fremont v. Hayes*, 4 Ohio N. P. 379. See § 1122, note 7.

¹⁴ *City of Fremont v. Hayes*, 4 Ohio N. P. 379.

¹⁵ *Central Ohio Ry. Co. v. Bellaire*, 67 O. S. 297.

¹ *Wiemers v. People*, 225 Ill. 82, 80

N. E. 68 [1907]; *Marshall v. People*, 219 Ill. 99, 76 N. E. 70 [1905]; *Nowlin v. People*, 216 Ill. 543, 75 N. E. 209 [1905].

² *Drennen v. People*, 222 Ill. 592, 78 N. E. 937 [1906]; *Nowlin v. People*, 216 Ill. 543, 75 N. E. 209 [1905]; *Glos v. Hanford*, 212 Ill. 261, 72 N. E. 439 [1904]; *Glos v. Woodward*, 202 Ill. 484, 67 N. E. 3 [1903]; *McChesney v. People ex rel. Kochersperger*, 174 Ill. 46, 50 N. E. 1110 [1898].

defective, and the sale is invalid.³ The return must be made in compliance with the provisions of the statute,⁴ and cannot be made in compliance with the provisions of an ordinance if the city is not authorized by statute to prescribe the method of making such return. A return which is in compliance with the statute, but not with the city ordinance, is sufficient, at least if the city does not object thereto.⁵ A return under oath, showing that the list is a true and correct record of delinquent lands, on which the collector has been unable to collect the assessment, printer's fees, and other costs, as required by law, for the year set forth, and that such special assessment remained due and unpaid as the affiant verily believes, is sufficient, since, if no taxes are due, it is not necessary to state that the application is for the sale of land for taxes and assessments.⁶ The return is to be made by the officers specified by statute.⁷ A statute providing that the application for judgment upon delinquent assessments in each year shall include only such assessments as shall have been returned as delinquent to the county collector "on or before the first day of April," refers to the date of the delinquency, and not to the date of the return.⁸ Immaterial deviations from the method of making the return prescribed by statute do not invalidate further proceedings, but may be corrected by amendment.⁹ Thus, failure to state in the return when the assessment was due,¹⁰ or failure to attach a copy of the improvement ordinance to the report of unpaid assessments to be made by the city clerk to the county treasurer,¹¹ may be corrected by amendment. A statute requiring a delinquent list to be filed five days before the term of court at which application is to be made for judgment upon such assessments, has been held to be directory only,

³ *Glos v. Hanford*, 212 Ill. 261, 72 N. E. 439; *Glos v. Gleason*, 209 Ill. 517, 70 N. E. 1045 [1904]; *Kepley v. Fouke*, 187 Ill. 162, 58 N. E. 303 [1900]; *Kepley v. Scully*, 185 Ill. 52, 57 N. E. 187 [1900].

⁴ *Smith v. The People ex rel.*, 75 Ill. 36.

⁵ *City of Ottawa v. Macy*, 20 Ill. 413.

⁶ *The Chicago and Northwestern Railroad Company v. The People ex rel. Miller, Collector*, 83 Ill. 467.

⁷ *Smith v. People ex rel. Huck*, 87 Ill. 74.

⁸ *Steidl v. People ex rel. Alexan-*

der, 173 Ill. 29, 50 N. E. 129. See also *The People ex rel. Huck v. Pierce*, 90 Ill. 85.

⁹ *People v. Prust*, 219 Ill. 116, 76 N. E. 68 [1905]; *Harris v. People*, 218 Ill. 439, 75 N. E. 1012 [1905]; *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367; *Walker v. People ex rel. Kochersperger*, 166 Ill. 96, 46 N. E. 761; *Leindecker v. The People ex rel. Johnson*, 98 Ill. 21.

¹⁰ *People v. Prust*, 219 Ill. 116, 76 N. E. 68 [1905].

¹¹ *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367.

and not mandatory.¹² Under a statute requiring a certified statement as to delinquents, it has been held that the filing of such statement is not jurisdictional, and that judgment for delinquent taxes may be entered, although such statement is not filed.¹³ A report of unpaid assessments which is materially deficient in its description of the property assessed, is insufficient.¹⁴ The return of an assessment as delinquent when it is not, in fact, delinquent does not authorize an application for a judgment of sale.¹⁵ Provision is frequently made for publishing delinquent assessments. The list of delinquent assessments thus published is, under some statutes, the equivalent of a declaration or a petition in a suit to collect the assessment,¹⁶ and the notice thereof is the equivalent of legal process.¹⁷

§ 1127. Collection by execution.

Under some statutes provision is made for issuing an execution to enforce the payment of an assessment.¹ Under such statutes it is provided that the property owner may file an affidavit denying that the whole or any part of the amount for which execution is issued is due.² If, under such statute, a property owner files an affidavit denying that anything is due upon the assessment, he is thereby entitled to a trial upon all questions of law and upon questions of fact involved in the controversy.³

§ 1128. Collection by warrant.

Under some statutes a warrant for the collection of assessments must be issued, either as authority for the collection of the assessment or as a step in proceedings which result ultimately in its collection.¹ Such warrant is not necessary in the absence of a statute providing therefor.²

¹² *Leindecker v. The People ex rel. Johnson*, 90 Ill. 21. See also *Harris v. People*, 218 Ill. 439, 75 N. E. 1012 [1905].

¹³ *City of Duluth v. Miles*, 73 Minn. 509, 76 N. W. 259.

¹⁴ *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367.

¹⁵ *Bowman v. People ex rel. Baker*, 137 Ill. 436, 27 N. E. 598.

¹⁶ *Smythe v. People*, 219 Ill. 76, 76 N. E. 82 [1905].

¹⁷ *Smythe v. People*, 219 Ill. 76, 76 N. E. 82 [1905].

¹ *Bacon v. City of Savannah*, 86 Ga. 301, 12 S. E. 580.

² *Bacon v. City of Savannah*, 86 Ga. 301, 12 S. E. 580.

³ *Bacon v. City of Savannah*, 86 Ga. 301, 12 S. E. 580.

¹ *Doremus v. People ex rel. Kochersperger*, 173 Ill. 63, 50 N. E. 686. Making out an apportionment warrant is not the levy of a tax and may be performed by an executive board. *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964.

² *City of Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004.

§ 1129. Parties to warrant.

A warrant must be issued to the officer indicated by statute.¹ It must be issued and signed by the officer prescribed by statute.² Under a statute authorizing the appointment of an acting mayor in case of the absence or ineligibility of the mayor, a warrant signed by one of the supervisors as "acting mayor," is not insufficient in the absence of evidence showing that he was not, in fact, the acting mayor.³ If the warrant is signed by the officers prescribed by statute, it is sufficient, although the word "countersigned" precedes one of the signatures.⁴ If the warrant is issued in compliance with the statute, the signature is a ministerial duty.⁵ The fact that a mayor has, before his election, taken an assignment of a contract for improving a street as security for a debt due to him from the contractor, does not make invalid a warrant signed by him.⁶ In case of the wrongful refusal of an officer to sign a warrant which is properly issued, mandamus will issue to compel him to sign it.⁷

§ 1130. Contents of warrant.

A warrant must contain the statements of fact prescribed by statute. If the statute so provides, it must state when the assessment has been confirmed, the names of the persons assessed, the owners and occupants who have neglected to make payment, the amount of the assessment, and the description of the premises assessed.¹ If the statute prescribes the form of the warrant, and its date, and authentication, the date is an essential part of the warrant, and must include the month and the day of the month as well as the year.² A warrant which gives the year, but not the month, or day, is insufficient, even if the county auditor, when countersigning the warrant, writes under his signature the date on which he signs it.³ A warrant is not rendered invalid by

¹ *Doremus v. People ex rel. Kochersperger*, 173 Ill. 63, 50 N. E. 686.

² *City Street Improvement Co. v. Rontet*, 140 Cal. 55, 73 Pac. 729; *Beaudry v. Valdez*, 32 Cal. 269 [1867].

³ *City Street Improvement Co. v. Rontet*, 140 Cal. 55, 73 Pac. 729.

⁴ *Scammon v. City of Chicago*, 42 Ill. 192; *Skinner v. Chicago*, 42 Ill. 52; *Gurnee v. City of Chicago*, 40 Ill. 165.

⁵ *Beaudry v. Valdez*, 32 Cal. 269 [1867].

⁶ *Beaudry v. Valdez*, 32 Cal. 269 [1867].

⁷ *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766 [1888].

¹ *Gilbert v. Havemeyer*, 4 N. Y. Sup. Ct. Rep. 506.

² *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. Rep. 599 [1893].

³ *Shipman v. Forbes*, 97 Cal. 572, 32 Pac. Rep. 599 [1893].

the fact that the collector places upon it a memorandum in red ink, showing that after the assessment was confirmed the property has been sold to a designated purchaser.⁴ A warrant which authorizes the collector to collect the assessment "according to law," and does not direct the disposition to be made of the money when received, has been held to be sufficient;⁵ though it was said that it was hard to imagine a form "more brief and laconic," and that the form was not to be commended.⁶ A warrant issued against a prior owner of the property, a conveyance from whom appears upon the record, is insufficient.⁷ A mistake in the warrant, manifest upon its fact and not misleading the land owner, does not invalidate subsequent proceedings.⁸

§ 1131. Return of warrant.

The return of the warrant is to be made and signed by the person designated by statute.¹ If the warrant issues to a contractor, the return showing a demand may be made by the person who acted on his behalf in making the demand and who signs it on behalf of the contractor.² If the statute provides the time within which a warrant must be returned to preserve a lien upon the property assessed, return must be made within the time specified.³ Under some statutes the return of the warrant must be recorded, and the record signed by a designated officer, such as the superintendent of streets.⁴ Failure to comply with this statute prevents the holder of the warrant from enforcing his lien.⁵ If the warrant is properly signed by the designated officers, the omission of the name of one of them from the record of the warrant is held not to invalidate the lien.⁶ If no report of unpaid special tax warrants has been made as prescribed by statute, but only vague and unintelligible memoranda have been

¹ *Noonan v. People*, 221 Ill. 567, 77 N. E. 930 [1906].

² *Leominster v. Conant*, 139 Mass. 384, 2 N. E. 390.

³ *Leominster v. Conant*, 139 Mass. 384, 2 N. E. 390.

⁴ *Voris' Ex'rs v. Gallaher*, 27 Ky. Law Rep. 1001, 87 S. W. 775 [1905].

⁵ *Young v. People ex rel. Kern*, 155 Ill. 247, 40 N. E. 604.

⁶ *San Francisco Paving Co. v. Egan*, 146 Cal. 635, 80 Pac. 1076 [1905].

² *San Francisco Paving Company v. Egan*, 146 Cal. 635, 80 Pac. 1076 [1905].

³ *City Street Improvement Co. v. Emmons*, 138 Cal. 297, 71 Pac. 332.

⁴ *Witter v. Bachman*, 117 Cal. 318, 49 Pac. 202.

⁵ *Witter v. Bachman*, 117 Cal. 318, 49 Pac. 202.

⁶ *Gillis v. Cleveland*, 87 Cal. 214, 25 Pac. 351 [1890].

made, the report required by statute cannot be made for the first time at the hearing under guise of an amended report.⁷

§ 1132. Certificate of assessment roll.

Under some statutes, it is provided that the assessment roll shall be certified by some designated official.¹ Under such statute the court is not obliged to make an order that such certificate be made, since the duty is imposed by the statute.² It is not necessary that all the roll be certified to the collector at once, but it is sufficient if so much thereof as is covered by the judgment already rendered be certified.³ A statutory provision fixing the time within which such certificate shall be filed, has been held not to be mandatory, and a delay in certifying the roll does not invalidate further proceedings.⁴ A statute requiring the clerk of court to certify the assessment roll and judgment and issue the warrant directly to the collector instead of to the city clerk, repeals by implication a statutory provision requiring the warrant to contain a copy of the roll and judgment.⁵

§ 1133. Nature of tax bill.

Under some statutes it is provided that a tax bill should issue, which is to be enforced against the property assessed.¹ Such tax bill is not a negotiable instrument, and a *bona fide* holder thereof has no better right than the party to whom it was issued originally.² A tax bill is invalid if the assessment upon which it was issued is invalid; as where the work is not completed within the time limited, and the assessment is thereby invalidated;³ or where the estimate of the engineer is not endorsed thereon, as required by statute.*

⁷ Biggins' Estate v. People ex rel. Tetherington, 193 Ill. 601, 61 N. E. 1124.

² Zeigler v. People ex rel. Kern, 156 Ill. 133, 40 N. E. 607.

³ Zeigler v. People ex rel. Kern, 156 Ill. 133, 40 N. E. 607.

⁵ Doremus v. People ex rel. Kochersperger, 173 Ill. 63, 50 N. E. 686; McChesney v. People ex rel. Kochersperger, 171 Ill. 267, 49 N. E. 491.

⁴ Gage v. People, 221 Ill. 527, 77 N. E. 927 [1906].

⁵ Doremus v. People ex rel. Kochersperger, 173 Ill. 63, 50 N. E. 686.

¹ City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506 [1907]; Riley v. Stewardt, 50 Mo. App. 594 [1892].

² Richter v. Merrill, 84 Mo. App. 150 [1900].

³ Richter v. Merrill, 84 Mo. App. 150 [1900].

⁴ Perkinson v. McGrath, 9 Mo. App. 26.

§ 1134. Who may issue tax bill.

If the statute provides that the power of issuing special tax bills be exercised by city council by ordinance, a resolution is insufficient.¹ If tax bills are to be issued by the mayor and the council, tax bills passed on the action of the council alone, without the co-operation of the mayor, are invalid.² An officer may certify to new tax bills after his term of office has expired, if the bills issued by him during his term of office were defective in form.³ If the statute provides that the president of the board of public improvements shall sign tax bills, such bills are invalid if signed by a president *pro tem*.⁴ In the absence of a statute authorizing it, a deputy cannot sign tax bills which, by the terms of the statute, are to be signed by his superior officer.⁵ If the statute authorizes the deputy to sign the name of his principal, a tax bill is invalid if signed by the deputy by his own name.⁶ Under a statute authorizing a deputy to sign a tax bill, one who is acting as a *de facto* deputy may sign, although he has not been appointed in writing as required by statute.⁷ Tax bills are not invalid, if made out by one not authorized to sign such bills, if they are approved and signed by proper authority.⁸ If provision is made by statute for superseding an officer, such officer may act in signing tax bills in the absence of any showing that he has, in fact, been superseded.⁹

§ 1135. Prima facie validity of bill or certificate.

By statute a tax bill may be made *prima facie* evidence of the validity and regularity of the proceedings which led up to its issue.¹ The same effect may be given by statute to a street im-

¹ City of Nevada to use of Gilfillan v. Eddy, 123 Mo. 546, 27 S. W. 471; City of Westport v. Whiting, 62 Mo. App. 647 [1895].

² Sexton v. Beach, 50 Mo. 488 [1872].

³ Stadler v. Roth, 59 Mo. 400 [1875]; Kiley v. Cranor, 51 Mo. 541 [1873].

⁴ Stifel v. Southern Cooperage Co., 38 Mo. App. 340 [1889].

⁵ Menefee v. Bell, 62 Mo. App. 659 [1895].

⁶ Homan v. McLaren, 28 Mo. App. 654 [1888]; Eyerman v. Payne, 28 Mo. App. 72

⁷ Kiley v. Forsee, 57 Mo. 391 [1874].

⁸ Heman v. Farish, 97 Mo. App. 393, 71 S. W. 382 [1902].

⁹ Wand v. Green, 7 Mo. App. 82 [1879].

¹ Jaicks v. Merrill, 201 Mo. 91, 98 S. W. 753 [1906]; Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014 [1895]; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683 [1889]; City of St. Louis v. Excelsior Brewing Co., 96 Mo. 677, 10 S. W. 477 [1888]; Haerele v. Mallinckrodt, 46 Mo. 577 [1870]; City of St. Louis to use of Creamer v. Bernoudy, 43 Mo. 552;

provement certificate.² If a tax bill is not issued against the real owner, it is not *prima facie* evidence against him.³ A tax bill which does not show for what improvement or on what authority it issued is not *prima facie* evidence of its own validity.⁴

§ 1136. Time and method of issuing tax bill.

Delay in issuing tax bills on account of protracted litigation as to the validity of the original bills does not render subsequent bills invalid when issued promptly after the original bills were held to be invalid.¹ If the statute provides for issuing tax bills when the work is completed, it has been held that such bills are not invalid, if issued when the work was completed substantially, if the work was, in fact, completed entirely soon after the bills were issued.² The bills must be delivered in the manner prescribed by statute.³ A statute providing that tax bills should be registered, has been held to be directory merely.⁴ If the statute requires the engineer to give a receipt to the contractor for the tax bills, it will be assumed, in the absence of a showing to the contrary, that such a receipt was given as provided by statute.⁵

§ 1137. Contents.

The contents of the tax bills depend on the terms of the statute providing therefor. In the absence of some statutory requirement, it is not necessary that the tax bills should show every stage in the levy of the assessment.¹ Tax bills need not show the

St. Louis to use *v. Armstrong*, 38 Mo. 29 [1866]; *St. Louis to use v. Coons*, 37 Mo. 44 [1865]; *City of St. Louis to use of Creamer v. Oeters*, 36 Mo. 456; *City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead*, 123 Mo. App. 602, 100 S. W. 506 [1907]; *Heman v. Farish*, 97 Mo. App. 393, 71 S. W. 382 [1902]; *City of Carthage v. Badgley*, 73 Mo. App. 123 [1897]; *Farrell v. Rummelkamp*, 64 Mo. App. 425 [1895]; *Gallagher v. Bartlett* 64 Mo. App. 258 [1896]; *Schultze v. De Menil*, 4 Mo. App. 595; *Wand v. Green*, 7 Mo. App. 82.

²*Taylor v. Boyd*, 63 Tex. 533.

³*City of St. Joseph ex rel. Swenson v. Forsee*, 110 Mo. App. 127, 84 S. W. 98 [1904].

⁴*City of Linneus v. Locke*, 25 Mo. App. 407 [1887].

⁵*Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56; *Dollar Savings Bank v. Ridge*, 79 Mo. App. 25 [1898].

²*Kiley v. Cranor*, 51 Mo. 541 [1873]; *Weber v. Schergens*, 59 Mo. 384 [1875].

³*Mercantile Trust Co. v. Nigge-man*, 119 Mo. App. 56, 96 S. W. 293 [1906].

⁴*Field v. Barber Asphalt Paving Company*, 117 Fed. 925 [1902].

⁵*Keith v. Bingham*, 130 Mo. 300, 13 S. W. 683 [1889].

¹*Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683 [1889]; *Dickey v. Porter*, 203 Mo. 1, 101 S. W. 586 [1907]; *Gallagher v. Bartlett*, 64 Mo.

rule of apportionment,² or the method of computation.³ They need not name the owner,⁴ and, accordingly, are not invalid if made out in the name of the wrong owner,⁵ as where a bill is made out to the husband of the real owner,⁶ or is made out to the equitable owner without naming the trustee.⁷ If made out against the wrong person as owner it may be amended, but will not bear interest at the maximum rate prescribed by statute for delinquent assessments.⁸ The property which is assessed must be described with reasonable accuracy.⁹ A description of property as "the south sixty feet of the north one hundred and twenty-one and three-fourths feet, more or less," of a certain designated lot, is sufficient.¹⁰ A tax bill which does not state that the defendant is the owner of the property sought to be charged, and does not state what work was done, or who did it, or what material was furnished, or even that the property which it is sought to charge is within the state, has been held to be insufficient.¹¹ If distinct improvements have been made, separate tax bills may be issued therefor, although both improvements were made under one ordinance and under one contract.¹² A tax bill may be issued against a tract of land made up of two platted lots, if such lots are used as one.¹³ The tax bill must show that the amount charged against the lot is the proportion of the whole work chargeable to that particular lot.¹⁴

App. 258 [1896]; *Creamer v. Allen*, 3 Mo. App. 545 [1877].

² *Dickey v. Porter*, 203 Mo. 1, 101 S. W. 586 [1907]; *Haegele v. Mallinckrodt*, 3 Mo. App. 329 [1877].

³ *Dickey v. Porter*, 203 Mo. 1, 101 S. W. 586 [1907]; *Haegele v. Mallinckrodt*, 3 Mo. App. 329 [1877].

⁴ *Jaicks v. Sullivan*, 128 Mo. 177, 30 S. W. 890 [1895]; *City of St. Joseph ex rel. Swenson v. Forsee*, 110 Mo. App. 127, 84 S. W. 98 [1904]; *Gallagher v. Bartlett*, 64 Mo. App. 258 [1896].

⁵ *Stadler v. Roth*, 59 Mo. 400 [1875]; *Eyermann v. Scollay*, 16 Mo. App. 498.

⁶ *City of St. Louis to use of Rotchford v. De Nove*, 44 Mo. 136.

⁷ *City of St. Louis to use of Creamer v. Bernoudy*, 43 Mo. 552.

⁸ *City of St. Joseph ex rel. Gibson v. Forsee*, 110 Mo. App. 237, 84 S. W. 1138 [1905].

⁹ *Adkins v. Quest*, 79 Mo. App. 36 [1898].

¹⁰ *Adkins v. Quest*, 79 Mo. App. 36 [1898].

¹¹ *Galbreath v. Newton*, 30 Mo. App. 381. See also, *City of Linneus v. Locke*, 25 Mo. App. 407 [1887].

¹² *Crane v. Mallinckrodt*, 9 Mo. App. 316.

¹³ *Hill-O'Meara Construction Co. v. Sessinghaus*, 106 Mo. App. 163, 80 S. W. 747 [1904].

¹⁴ *Eyerman v. Hardy*, 8 Mo. App. 311 [1880].

§ 1138. New or amended tax bill.

If a tax bill is invalid or defective, a new tax bill may be issued within the statutory period for issuing tax bills,¹ but a tax bill cannot be amended so as to bring in a new party after the period of limitations has expired.²

§ 1139. Alteration of tax bill.

A material alteration in a tax bill prevents such bill from amounting to *prima facie* evidence of the regularity and validity of the proceeding;¹ but does not destroy the lien of the assessment and the original tax bill.² An immaterial alteration does not affect the validity of the bill.³ Where a tax bill described property as "Lot No. —, pt. 36 and 35," and it appeared that the letter "P" had been written before "35," and an attempt had been subsequently made to erase it, such erasure was held not to invalidate the bill where a definite and correct description of the property followed immediately.⁴

§ 1140. Collection of bill.

Provision may be made by statute for collecting a tax bill by suit.¹ In an action of this sort, trial by jury is necessary if the statute provides therefor.² Collection of a tax bill under these statutes is controlled by substantially the same principles as those applicable to the collection of assessments generally.³

§ 1141. Collection of assessment by action or suit.

Under many statutes it is provided that an assessment is to be collected by an action or suit in a court of competent jurisdiction in which proceedings ample opportunity is given to prop-

¹ State ex rel. Barber v. City of St. Louis, 183 Mo. 230, 81 S. W. 1104; Kiley v. Cranor, 51 Mo. 541 [1875]; Vieths v. Planet Property & Financial Co., 64 Mo. App. 207 [1895]; Riley v. Stewardt, 50 Mo. App. 594 [1892]; Galbreath v. Newton, 30 Mo. App. 381; Eyerman v. Blakesley, 13 Mo. App. 407 [1883]; Prendergast v. Richards, 2 Mo. App. 187 [1876].

² City of St. Joseph v. Forsee, 113 Mo. App. 691 [1905]; Eyerman v. Scolley, 16 Mo. App. 498 [1885].

³ Stadler v. Roth, 59 Mo. 400

[1875]; Kafferstein v. Knox, 56 Mo. 186 [1874].

² Stadler v. Roth, 59 Mo. 400 [1875].

³ Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163.

⁴ Heman v. Gilliam, 171 Mo. 258, 71 S. W. 163.

¹ City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 S. W. 1091 [1907]; City of Mexico v. Lakeman, — Mo. App. —, 108 S. W. 141 [1908].

² Gibson v. Zimmerman, 27 Mo. App. 90 [1887].

³ See § 1141 *et seq.*

erty owners to be heard upon such defences as remain open to them at that stage of the proceedings.¹ The collection of an assessment in this manner is controlled by the general rules of procedure applicable to ordinary legal proceedings, except where specific provision to the contrary is made by statute. The theory entertained as to the nature of the liability created by the assessment and the provisions of the statutes applicable thereto determine the procedure to be used and the relief to be obtained. The right of enforcing an assessment by action or suit is not lessened by the fact that the owner of the assessed realty is

¹ *Murdock v. City of Cincinnati*, 44 Fed. 726 [1891]; *Overstreet v. Levee District No. 1 of Conway County*, 80 Ark. 462, 97 S. W. 676 [1906]; *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290 [1903]; *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984 [1902]; *N. P. Perine Contracting & Paving Co. v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894]; *Santa Cruz Rock Pavement Co. v. Bowie*, 104 Cal. 286, 37 Pac. 934 [1894]; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435 [1891]; *Robinson v. Merrill*, 87 Cal. 11, 25 Pac. 162 [1890]; *Phelan v. Dunne*, 72 Cal. 229, 13 Pac. 662 [1887]; *City of Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004 [1897]; *City of Waterbury v. Schmitz*, 58 Conn. 522, 20 Atl. 606 [1890]; *Hammond v. People*, 178 Ill. 254, 52 N. E. 1030 [1899]; *Hammond v. People for use, etc.*, 169 Ill. 545, 48 N. E. 573 [1897]; *Sennott v. Moredock and Ivy Landing Drainage District No. 1*, 155 Ill. 96, 39 N. E. 567 [1895]; *Gauen v. Moredock and Ivy Landing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890]; *Samuels v. Drainage Commissioners*, 125 Ill. 536, 17 N. E. 829 [1889]; *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903]; *Martin v. Wills*, 157 Ind. 153, 60 N. E. 1021 [1901]; *Law v. Johnston*, 118 Ind. 261, 20 N. E. 745 [1888]; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; *Ma-*

rion Bond Co. v. Johnson, 29 Ind. App. 294, 64 N. E. 626 [1902]; *Smith v. City of Des Moines*, 106 Ia. 590, 76 N. W. 836 [1898]; *McInery v. Reed*, 23 Ia. 410 [1867]; *Holt v. Figg*, — Ky. —, 94 S. W. 34, 29 Ky. Law Rep. 613 [1906]; *Cabell v. City of Henderson*, — Ky. —, 88 S. W. 1095, 28 Ky. Law Rep. 89 [1903]; *Neff v. Covington Stone & Sand Co.*, 108 Ky. 457, 462, 55 S. W. 697, 56 S. W. 723 [1900]; *Wood v. City of Galveston*, 76 Tex. 126, 13 S. W. 227 [1890]; *Taylor v. Boyd*, 63 Tex. 533 [1885]; *Allen v. City of Galveston*, 51 Tex. 302 [1879]; *Bordages v. Higgins*, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726 [1892]; (not affected on this point by reversal in *Higgins v. Bordages*, 88 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895]); *McNair v. Ingebrigtsen*, 36 Wash. 186, 78 Pac. 789 [1904]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Northwestern and Pacific Hypotheek Bank v. City of Spokane*, 18 Wash. 456, 51 Pac. 1070 [1898]; *City of New Whatcom v. Bellingham Bay Improvement Co.*, 18 Wash. 181, 51 Pac. 360 [1897]; *City of New Whatcom v. Bellingham Bay Improvement Co.*, 16 Wash. 131, 47 Pac. 236 [1896].

non compos mentis.² If an assessment has become a lien upon the land of an insane person, it is not necessary to show that the interests of such insane person required the sale of such land, or that such claim can be paid only by sale.³

§ 1142. Collection by action at law.

If an assessment is a personal debt of the property owner, it may be collected by an action at law.¹ If authority, therefore, is given by statute, the action of the *assumpsit* will lie.² If a special contract as to the amount of the assessment has been entered into, recovery can be had on a count in *insimul computassent*.³ Under a statute which specifically authorizes suit "on the common counts," it has been held that such statute is permissive only and that any form of *assumpsit* will lie.⁴ In the absence of statutory authority, however, neither *assumpsit* nor an action corresponding thereto under the code, can be maintained.⁵ Under some statutes an action for debt will lie on an assessment.⁶ Such action may be brought upon an appeal bond, to secure the payment of the assessment,⁷ or upon a judgment for an assessment already rendered.⁸

§ 1143. Distress.

Under some statutes an assessment may be enforced by proceedings in distress,¹ and no objections can be made to such procedure if the assessment is the debt of the property owner,²

² See *Barron v. City of Lexington*, — Ky. —, 105 S. W. 395 [1907].

³ *Barron v. City of Lexington*, — Ky. —, 105 S. W. 395 [1907].

¹ *City of Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004 [1897]; *Board of Public Works of City of Niles v. Pinch*, — Mich. —, 116 N. W. 408 [1908].

² *Philadelphia, Wilmington & Baltimore R. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890]; *Clemens v. Mayor and Common Council of Baltimore to use of Volkmar*, 16 Md. 208 [1860].

³ *Clemens v. Mayor and Common Council of Baltimore to use of Volkmar*, 16 Md. 208 [1860].

⁴ *Board of Public Works of City of Niles v. Pinch*, — Mich. —, 116 N. W. 408 [1908].

⁵ *Dreake v. Beasley*, 26 O. S. 315 [1875]; *Scranton v. City of Sturges*, 202 Pa. St. 182, 51 Atl. 764 [1902]; *McKeesport Borough v. Fidler*, 147 Pa. St. 532, 23 Atl. 799 [1892]; *Scranton v. Robertson*, 28 Super. Ct. 55 [1905].

⁶ *Commissioners of Big Lake Special Drainage District v. Commissioner of Highways of Sand Ridge*, 199 Ill. 132, 64 N. E. 1094 [1902].

⁷ *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

⁸ *Buell v. Trustees of the Village of Lockport*, 11 Barb. 602 [1852].

¹ *Wetmore v. Campbell*, 4 N. Y. Sup. Ct. Rep. 341 [1849]; *Allen v. Drew*, 44 Vt. 174 [1872].

² *Allen v. Drew*, 44 Vt. 174 [1872].

since distress is a regular method of collecting taxes which are also personal debts. Distress cannot be resorted to if the assessment is not the personal debt of the property owner, but is chargeable only on the realty.³

§ 1144. Nature of proceeding to collect assessment.

A proceeding to collect an assessment is frequently said to be a proceeding *in rem*,¹ especially in jurisdictions in which an assessment is not a personal debt of the property owner. On the other hand, it has been said that even though the recovery is limited to the value of the land assessed, such a proceeding is not, properly speaking, one *in rem*.² It has been said not to be strictly a proceeding *in rem*, since interests of the parties to the proceeding were bound, and not the property itself.³ So it has been said that such a proceeding is not strictly one *in rem* where a decree *in personam* may be rendered, and the measure of recovery is the value of the defendant's interest in the land.⁴

§ 1145. Collection by proceedings in equity.

It may be provided that the lien of an assessment shall be enforced by a suit in equity;¹ in the nature of a suit to foreclose

³Green v. Ward, 82 Va. 324 [1886].

¹Chadwick v. Kelley, 187 U. S. 540, 47 L. 293, 23 S. Ct. 175 [1903]; (affirming Kelley v. Chadwick, 104 La. 719, 29 So. 295 [1901]); Hoover v. People ex rel. Peabody, 171 Ill. 182, 49 N. E. 367 [1898]; Chicago, Rock Island and Pacific Railway Co. v. City of Moline, 158 Ill. 64, 41 N. E. 877 [1895]; Crawl v. Tolono, 96 Ill. 255, 36 Am. Rep. 143 [1880]; Otis v. De Boer, 116 Ind. 531, 19 N. E. 317 [1888]; Orth v. Park, 80 S. W. 1108, 26 Ky. Law Rep. 184 [1904]; (denying rehearing of Orth v. Park & Co., 117 Ky. 779, 79 S. W. 206); (decree modified, 26 Ky. L. R. 342, 81 S. W. 251); Scherm v. Short, 77 S. W. 357, 25 Ky. Law Rep. 1108 [1903]; Kelly v. Mendlesohn, 105 La. 490, 29 So. 894 [1901]; Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70 [1899]; Rosetta Gravel Paving & Imp. Co. v.

Jollisaint, 51 La. Ann. 804, 25 So. 477 [1899]; Farrell v. City of St. Paul, 62 Minn. 271, 54 Am. St. Rep. 641, 29 L. R. A. 778, 64 N. W. 809 [1895]; City of Clinton to use of Thornton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893]; In the Matter of the Petition of Hun, 144 N. Y. 472, 39 N. E. 376 [1895]; Hagemann's Appeal, 88 Pa. St. (7 Norris) 21 [1878]; Delaney v. Gault, 30 Pa. St. (6 Casey) 63.

²Wood v. Curran, 99 Cal. 137, 33 Pac. 774 [1893].

³Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 890 [1895].

⁴Wood v. Curran, 99 Cal. 137, 33 Pac. 774 [1893].

¹Overstreet v. Levee District No. 1 of Conway County, 80 Ark. 462, 97 S. W. 676 [1906]; City of Highlands v. Johnson, 24 Colo. 371, 51 Pac. 1004 [1897]; Huff v. City of Jacksonville, 39 Fla. 1, 21 So. 776 [1897];

an equitable lien, or an equity of redemption in mortgaged property.² In the absence of statute it has been held that a court of chancery has no jurisdiction to entertain a bill for the foreclosure of a lien of an assessment.³ A court which has jurisdiction to entertain a proceeding to foreclose an assessment lien, has been held to have no authority to make an order directing the sale of a railroad to satisfy an assessment lien, even if such lien is itself valid.⁴

§ 1146. Suit foreclosing other lien.

Under statutes authorizing the foreclosure of an assessment lien, a lien may be enforced upon a judicial sale of the property

Maypothor v. Gast, — Ky. —, 110 S. W. 308 [1908]; Cabell v. City of Henderson, — Ky. —, 88 S. W. 1095, 28 Ky. Law Rep. 89 [1905]; Wood v. City of Galveston, 76 Tex. 126, 13 S. W. 227 [1890].

² Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290 [1903]; Crane v. Cummings, 137 Cal. 201, 69 Pac. 984 [1902]; N. P. Perine Contracting & Paving Co. v. Quackenbush, 104 Cal. 684, 38 Pac. 533 [1894]; Santa Cruz Rock Pavement Co. v. Bowie, 104 Cal. 286, 37 Pac. 934 [1894]; Manning v. Den, 90 Cal. 610, 27 Pac. 435 [1891]; Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162 [1890]; Phelan v. Dunne, 72 Cal. 229, 13 Pac. 662 [1887]; City of Waterbury v. Schmitz, 58 Conn. 522, 20 Atl. 606 [1890]; Hammond v. People, 178 Ill. 254, 52 N. E. 1030 [1899]; Hammond v. People for use, etc., 169 Ill. 545, 48 N. E. 573 [1897]; Sennott v. Moredock and Ivy Landing Drainage District No. 1, 155 Ill. 96, 39 N. E. 567 [1895]; Gartside Coal Company v. Turk, 147 Ill. 120, 35 N. E. 467 [1894]; Gauzen v. Moredock and Ivy Landing Drainage District No. 1, 131 Ill. 446, 23 N. E. 633 [1890]; Samuels v. Drainage Commissioners, 125 Ill. 536, 17 N. E. 829 [1889]; Scott v. Hayes, 162 Ind. 548, 70 N. E. 879 [1903]; Martin v. Wills, 157 Ind. 153, 60 N. E. 1021 [1901]; Garvin v. Daussman, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887]; Marion

Bond Co. v. Johnson, 29 Ind. App. 294, 64 N. E. 626 [1902]; McInery v. Reed, 23 Ia. 410 [1867]; Holt v. Figg, — Ky. —, 94 S. W. 34, 29 Ky. Law Rep. 613 [1906]; Neff v. Covington Stone and Sand Co., 108 Ky. 457, 462, 55 S. W. 697, 56 S. W. 723 [1900]; Bordages v. Higgins, 1 Tex. Civ. App. 43, 19 S. W. 446, 20 S. W. 184, 726 [1892]; (not affected on this point by reversal in Higgins v. Bordages, 86 Tex. 458, 53 Am. St. Rep. 770, 31 S. W. 52, 803 [1895]); City of Aberdeen v. Lucas, 37 Wash. 190, 79 Pac. 632 [1905]; McNair v. Ingebrigtsen, 36 Wash. 186, 78 Pac. 789 [1904]; Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900]; McNamee v. City of Tacoma, 24 Wash. 591, 64 Pac. 791 [1901]; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432 [1898]; Northwestern and Pacific Hypotheek Bank v. City of Spokane, 18 Wash. 456, 51 Pac. 1070 [1898]; City of New Whatcom v. Bellingham Bay Improvement Co., 18 Wash. 181, 51 Pac. 360 [1897]; City of New Whatcom v. Bellingham Bay Improvement Co., 16 Wash. 131, 47 Pac. 236 [1896].

³ Gauzen v. Moredock and Ivy Landing Drainage District No. 1, 131 Ill. 446, 23 N. E. 633 [1890].

⁴ Louisville, New Albany & Chicag Ry. Co. v. State for the use of Beckman, 122 Ind. 443, 24 N. E. 350 [1889].

under proceedings to enforce some other lien, or claim, against the property,¹ such as proceedings foreclosing the equity of redemption of mortgaged property,² as where a cross-petition asking for a sale of mortgaged premises is filed in a suit brought to enforce the lien of an assessment and the realty is sold upon such cross-petition,³ or a sale on arrears for ground rent,⁴ or a sale upon another assessment,⁵ or a sale had by a trustee.⁶ Installments of assessments which are not yet due should not be ordered to be paid out of the proceeds of the sale.⁷

§ 1147. Venue of action.

An action to collect a drainage assessment must be brought in the county in which the real estate assessed is situated,¹ although the owner resides in another county, and the drainage proceedings were instituted in the latter county,² or the entire improvement lies in another county, and proceedings to establish it were brought in such county.³ It will be presumed that the lands assessed in a drainage proceeding are situated in the county in which such proceeding is conducted in the absence of a showing to the contrary.⁴ If the lands affected are situated in several counties, the court of the county in which the improvement is situated and the proceedings for the improvement are begun, has jurisdiction of all the land assessed.⁵

¹ *Bryant's Appeal*, 104 Pa. St. 372 [1883]; *Pittsburg's Appeal*, 70 Pa. St. (20 P. F. Smith) 142 [1871]; *Myer v. Burns*, 4 Phil. 314 [1861].

² *Citizens' State Bank v. Jess*, 127 Ia. 450, 103 N. W. 471 [1905]; *Stanhrough v. Daniels*, 77 Ia. 561, 42 N. W. 443; *Bunce v. West*, 62 Ia. 80 [1883]; *Ayers v. Adair Co.*, 61 Ia. 728; *Day v. The Town of New Lots*, 107 N. Y. 148, 13 N. E. 915 [1887]; *People ex rel. Day v. Bergen*, 6 Hun (N. Y.) 267 [1875]; *Makley v. Whitmore*, 61 O. S. 587, 56 N. E. 461 [1899]; *City of Cincinnati v. Lingo*, 13 Ohio C. C. 334 [1897]; *Moerlein Brewing Co. v. Westmeier*, 4 Ohio C. C. 296 [1890]; *Appeal of the City of Pittsburg*, 40 Pa. St. (4 Wright) 455 [1861].

³ *Maypoth v. Gast*, — Ky. —, 110 S. W. 308 [1908].

⁴ *City of Philadelphia v. Cooke*, 30 Pa. St. (6 Casey) 56 [1858]; *Salter*

v. Reed, 15 Pa. St. (3 Harr.) 260 [1850].

⁵ *Philadelphia to use of Holgate v. Meager*, 67 Pa. St. (17 P. F. Smith) 345 [1871].

⁶ *Gould v. Mayor and City Council of Baltimore*, 59 Md. 378 [1882].

⁷ *People ex rel. Day v. Bergen*, 6 Hun (N. Y.) 267 [1875]; *Makley v. Whitmore*, 61 O. S. 587, 56 N. E. 461 [1899].

¹ *Dowden v. State for use of Bull*, 106 Ind. 157, 6 N. E. 136 [1885].

² *Dowden v. State for use of Bull*, 106 Ind. 157, 6 N. E. 136 [1885].

³ *State for the use of Cram v. Elliott*, 32 Ind. App. 605, 70 N. E. 397 [1903].

⁴ *Frazer v. State for use of Ingerman*, 106 Ind. 471, 7 N. E. 203 [1886].

⁵ *Shaw v. State of Indiana for use of Whitmore*, 97 Ind. 23 [1884].

§ 1148. Court in which action or suit may be brought.

A suit or action to enforce an assessment must be brought before a court of competent jurisdiction. If the jurisdiction of a court is limited as to the amount for which recovery is sought, a suit to enforce an assessment for less amount than the minimum prescribed by law as coming within the jurisdiction of such court, cannot be brought therein.¹

§ 1149. Notice of proceeding to enforce assessment.

If an assessment is collected by a suit, it is necessary that notice of such proceeding be given to the owners of the property to be affected thereby.¹ If no service is made in compliance with the provisions of the statute, a judgment rendered in such proceeding is void.² A summons issued against a deceased property owner, and returned "not found," and served by affixing a copy to the property and publishing a notice thereof, is insufficient, since the heirs and devisees of such deceased owner were the owners against whom summons should have been issued.³ Notice of the sale of two or more pieces of property may be given in one notice.⁴ If the proceedings up to the time of the sale are of such sort that the facts have been conclusively determined by competent authorities, and no question of fact remains open for investigation, it has been suggested that notice to the property owner is not necessary.⁵ Personal service is said not to be necessary in a summary proceeding to collect a judgment already rendered upon an assessment.⁶ This question, however, was not necessarily involved in the case, since the statute providing for such procedure was held to be invalid, because its title implied that it concerned ordinary proceedings at law for

¹ Williams v. Payne, 80 Mo. 409 [1883]; (amount less than fifty dollars).

² Greenstreet v. Thornton, 60 Ark. 369, 27 L. R. A. 735, 30 S. W. 347 [1895]; The People of the City and County of San Francisco v. Reay, 52 Cal. 423 [1877]; Edwards v. Cooper, 168 Ind. 54, 79 N. E. 1047 [1907]; Nichols v. Dallas, 165 Ind. 710, 75 N. E. 824 [1905]; London & Northwest American Mortgage Co. v. Gibson, 77 Minn. 394, 80 N. W. 205, 777 [1899]; West v. Porter, 89 Mo. App. 150 [1901].

³ Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595 [1867]; Adams v. Joyner, — N. C. —, 60 S. E. 725 [1908].

⁴ Greenstreet v. Thornton, 60 Ark. 369, 27 L. R. A. 735, 30 S. W. 347 [1895].

⁵ London & Northwest American Mortgage Co. v. Gibson, 77 Minn. 394, 80 N. W. 205, 777 [1899].

⁶ Barber Asphalt Paving Company v. French, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934 [1900].

⁷ Succession of Irwin, 33 La. Ann. 63 [1881].

the collection of the assessment, and the constitution required the subject matter to be expressed in the title. If it is provided by statute that a notice be given of the proceedings to collect the assessment, it will be presumed that such notice was given,⁷ and such notice constitutes due process of law, if the property owner is allowed to appear and be heard upon the merits, even if no prior notice of the assessment proceedings was given.⁸ After a summons has been returned it is *functus officio* and it cannot be served thereafter.⁹ A notice which upon its face is given for a less time than that prescribed by statute, is insufficient.¹⁰ A charter which provides that after a suit to enforce tax bills has been commenced, the plaintiff shall within ten days file in the office of the city treasurer a statement showing the tax bill sued on, when suit was brought, in what court, and against whom, and that in case of failure to file such bill, the property should be free from the lien of the assessment, is constitutional as far as it protects *bona fide* purchasers, but unconstitutional as far as it frees the land from the lien while in the hands of the original owner, if such charter is adopted by the city under a constitutional provision permitting a city to frame a charter consistent with and subject to the constitution and laws of the state, and no such provision freeing the land from a lien while in the hands of a property owner is found in the general statutes of the state.¹¹ While the lower courts held such a statute to be valid, notice of a suit was given which stated that the suit was begun one week earlier than it was in fact begun. Such notice was held to be insufficient to extend the lien.¹²

§ 1150. Necessity of demand.

Unless it is specifically required by statute, it is not necessary that a demand be made upon the property owner for payment of the assessment before bringing suit to collect the same.¹ If the

⁷ *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

⁸ *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

⁹ *Fanning v. Foley*, 99 Cal. 336, 33 Pac. 1098 [1893]; (service had eleven years after the complaint was filed).

¹⁰ *O'Byrne v. City of Philadelphia*, 93 Pa. St. (2 Norris) 220 [1880].

¹¹ *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391 [1904].

¹² *West v. Porter*, 89 Mo. App. 150 [1901].

¹ *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899]; *De Peyster v. Murphy*, 39 N. Y. Sup. Ct. Rep. 255 [1875].

demand is made necessary by statute, the repeal of such statute makes demand unnecessary.² Demand may be necessary to start interest upon the assessment, though not necessary as a condition precedent to bringing suit.³ It may be, however, provided by statute that an assessment cannot be collected by a suit unless a prior demand is made for the payment of such assessment; and in such case demand must be made in substantial compliance with the provision of the statute.⁴ If the statute requires two demands before suit is brought, such demands must be made.⁵ If the statute requires a warning that suit will be brought if the assessment is not paid within sixty days, mere demand is not sufficient.⁶

§ 1151. By whom demand may be made.

Demand may be made by the person indicated by statute, or by some one duly authorized to represent him.¹ If the demand is to be made by the contractor for whose benefit the assessment is issued, it may be made by one of two or more contractors,² or by authorized agent of the assignee of the contractor.³ If the contractor has assigned an assessment, such original contractor may make demand.⁴

§ 1152. Compensation for serving notices.

Compensation can be allowed for serving notices only when the notices are served in compliance with the terms of the statute.¹ If demands for the payment of an assessment are delivered to an officer who has no authority to serve them, by an officer

² Waite v. People, 228 Ill. 173, 81 N. E. 837 [1907].

³ Eyerman v. Provenchere, 15 Mo. App. 256 [1884].

⁴ Williams v. Bergin, 127 Cal. 578, 60 Pac. 164 [1900]; Moffitt v. Jordan, 127 Cal. 622, 60 Pac. 173 [1900]; Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125 [1896]; Striker v. Kelley, 2 Denio. 323 [1845]; (reversing Striker v. Kelley, 7 Hill, 9 [1844]); Paillet v. Youngs, 6 N. Y. Sup. Ct. Rep. 50 [1850].

⁵ Bennett v. Mayor, etc., of the City of New York, 3 N. Y. Sup. Ct. Rep. 485 [1848].

⁶ Philadelphia, Wilmington & Bal-

timore R. R. Co. v. Shipley, 72 Md. 88, 19 Atl. 1 [1890].

¹ San Francisco Paving Co. v. Egan, 146 Cal. 635, 80 Pac. 1076 [1905]; Williams v. Bergin, 127 Cal. 578, 60 Pac. 164 [1900]; Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125 [1896]; Himmelmann v. Hoadley, 44 Cal. 213 [1872].

² Gaffney v. Gough, 36 Cal. 104 [1868].

³ Himmelmann v. Woolrich, 45 Cal. 249 [1873].

⁴ Taylor v. Palmer, 31 Cal. 240 [1866].

⁵ Murphy v. Inhabitants of Clinton, 182 Mass. 198, 65 N. E. 34 [1902].

who has no authority to bind the city by a contract to pay for such service, no recovery can be had for service of such demands.²

§ 1153. Method of making demand.

Since the necessity for making demand is entirely statutory, it is sufficient if the provisions of the statute are complied with substantially in making such demand.¹ If the land is assessed to unknown owners, and the owner is known to the contractor, demand must be made upon the premises; and demand made upon the owner personally when not on the premises, or a demand made upon the street in front of the premises, is not sufficient.² Whether demand should be made upon the tenant in possession of the property has been queried.³ Demand must be made in such a way as to be intelligible to the party upon whom the demand is made.⁴ Under a statute which provides for a demand upon the owner, a demand made by sending in a tax bill by a servant, who returns with the statement that the owner asks that the bill be presented to his son, is not sufficient to enable the recovery of interest.⁵ The statute may provide that a reasonable effort must be made to find and serve the person assessed; that if this cannot be done, a reasonable effort must be made to find and serve the agent of the person assessed; and if this cannot be done, service may be made by a public demand upon the premises.⁶ Under such statute a demand made upon the premises because the contractor could not find the owner conveniently, was held to be insufficient;⁷ since the notice might have been served upon the agent of the owner, and no attempt to find him was shown. Public demand upon the premises is sufficient under such statute,⁸ even if no personal demand is made;⁹ and if at the time of the demand the contractor is stand-

² *Murphy v. Inhabitants of Clinton*, 182 Mass. 198, 65 N. E. 34 [1902].

¹ *Conlin v. Seamen*, 22 Cal. 546 [1863].

² *Alameda Macadamizing Company v. Williams*, 70 Cal. 534, 12 Pac. 530 [1886].

³ *Himmelman v. Townsend*, 49 Cal. 150 [1874].

⁴ *Himmelman v. Booth*, 53 Cal. 50 [1878].

⁵ *Stifel v. MacManus*, 74 Mo. App. 558 [1898].

⁶ *Guerin v. Reese*, 33 Cal. 292 [1867].

⁷ *McBean v. Martin*, 96 Cal. 188, 31 Pac. 5 [1892].

⁸ *Williams v. Bergin*, 127 Cal. 578, 60 Pac. 164 [1900]; *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896].

⁹ *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896].

ing upon any part of the premises lying within the exterior boundaries of the lot designated, such demand is made on the premises.¹⁰ If the premises are assessed to unknown owners, demand must be made upon the premises.¹¹ In the absence of specific provision for making demand upon the premises, it is not, however, necessary to make demand if the owners are unknown.¹² Under some statutes the assessment diagram and warrant must be recorded before payment is demanded.¹³

§ 1154. Affidavit of demand.

If by statute an affidavit must be made of the fact of the demand and refusal, such affidavit must show that the demand required by statute was made, and that payment was refused.¹ If by statute it is necessary that the collector state that he cannot find the property owner, and that the owner has no personal property which can be seized to pay the assessment, an affidavit is insufficient which fails to state such facts.² It may be required by statute that the affidavit of demand be recorded.³ Unless the statute fixes the time within which it must be recorded, there is no statutory limitation thereto.⁴ The fact that a blank is left in the record, does not invalidate the proceeding, nor deprive the contractor of his lien.⁵

§ 1155. Amount for which demand should be made.

The demand must be made for the sum which is properly due.¹ If two assessments have been levied, but a lot is chargeable with but one of them, the demand must be made for the assessment which is properly due.² A demand for the entire

¹⁰ *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860 [1892].

¹¹ *Engelbret v. McElwee*, 122 Cal. 284, 54 Pac. 900 [1898].

¹² *Whiting v. Townsend*, 57 Cal. 515 [1881].

¹³ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900]; *Himmelmänn v. Danos*, 35 Cal. 41 [1868].

¹ *Schirmer v. Hoyt*, 54 Cal. 280 [1880]; *Dyer v. Chase*, 52 Cal. 440 [1877]; *Bennett v. Mayor, etc., of the City of New York*, 3 N. Y. Sup.

Ct. Rep. 485 [1848].

² *Sharp v. Johnson*, 4 Hill (N. Y.) 92, 40 Am. Dec. 259 [1843].

³ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900]; *Himmelmänn v. Reay*, 38 Cal. 163 [1869].

⁴ *Himmelmänn v. Reay*, 38 Cal. 163 [1869].

⁵ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900].

¹ *Dyer v. Chase*, 52 Cal. 440 [1877].

² *Dyer v. Chase*, 52 Cal. 440 [1877].

amount of an assessment which is levied for items, some of which are valid and some of which are invalid, is insufficient.³ If separate demands are made, one for a sum properly due and the other for a sum which is not properly due, the latter demand does not invalidate the former.⁴ A demand for the aggregate sum due upon two or more lots is insufficient.⁵ The demand should be for the amount due upon each lot separately.⁶

§ 1156. Method of trial.

In foreclosure proceedings the property owner has no right to a jury,¹ and, accordingly, he is not entitled to a trial by jury in the absence of a statute providing specifically therefor. In an application for a judgment of sale, neither party is entitled to a trial by jury,² and hence the statute which permits the parties to submit propositions of law to the court where the parties have agreed that the court may decide both law and fact, has no application, since such statute is restricted to cases in which the parties have a right to a jury trial.³

§ 1157. Enforcement by *scire facias*.

In some jurisdictions, as in Pennsylvania, an assessment may be enforced by *scire facias*.¹ The municipal lien is the

³ *Dorland v. Bergson*, 78 Cal. 637, 21 Pac. 537 [1889].

⁴ *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860 [1892].

⁵ *Schirmer v. Hoyt*, 54 Cal. 280 [1880].

⁶ *Schirmer v. Hoyt*, 54 Cal. 280 [1880].

¹ *Santa Cruz Rock Pavement Co. v. Dowie*, 104 Cal. 286, 37 Pac. 934 [1894]; *Laverty v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774 [1886]; *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897]; *Baltimore & Ohio Railroad Co. v. City of Bellaire*, 60 O. S. 301, 54 N. E. 263 [1899].

² *People ex rel. v. Chicago, Burlington & Quincy R. Co.*, 231 Ill. 112, 83 N. E. 120 [1907].

³ *People ex rel. Chicago, Burlington & Quincy R. Co.*, 231 Ill. 112, 83 N. E. 120 [1907].

¹ *Philadelphia to use v. Cooper*, 212 Pa. 306, 61 Atl. 926 [1905]; *City of Scranton v. Levers*, 200 Pa. St. 56, 49 Atl. 980 [1901]; *City of Chester v. Bullock*, 187 Pa. St. 544, 41 Atl. 452 [1898]; *Philadelphia to use v. Spring Garden Farmers' Market Co.*, 154 Pa. St. 93, 25 Atl. 1077 [1893]; *Borough of Greensburg v. Laird*, 138 Pa. St. 533, 21 Atl. 96 [1890]; *City of Wilkes Barre v. Felts*, 134 Pa. St. 529, 19 Atl. 676 [1890]; *Ferguson v. Quinn*, 123 Pa. St. 337, 16 Atl. 844 [1889]; *Hering v. Chambers*, 103 Pa. St. 172 [1883]; *Brientnall v. Philadelphia*, 103 Pa. St. 156 [1883]; *City of Allentown v. Hower*, 93 Pa. St. (12 Norris) 332 [1880]; *O'Bryne v. Philadelphia*, 93 Pa. St. (12 Norris) 225 [1880]; *City of Pittsburgh v. McKnight*, 91 Pa. St. (10 Norris) 202 [1879]; *Craig v. City of Philadelphia*, 89 Pa. St. (8 Norris) 265

foundation of the proceedings in *scire facias*, and is not merely an exhibit appended to the statement of the claim.²

§ 1158. Defenses to *scire facias*.

Some of the statute limiting defenses to a municipal claim, to a denial that the work had been done, or the materials furnished, or to proof of value, or of payment of or of a release, applied only to certain cities, such as the incorporated districts of the county of Philadelphia.¹ It has been said that there is no general issue to a *scire facias*, and that the defendant ought to traverse by special pleas the material allegations made by the plaintiff.² However, a plea of *numquam indebitatus* is said to put in issue whatever the plaintiff had to prove, in order to support the assessment.³ A plea that the improvement was not constructed by the city, nor any of its agents, was not sustained by a showing that the city had let a contract for the improvement, since the contractor is to be regarded as the agent of the city for that purpose.⁴ If the council is given the final authority to determine whether a majority of the property owners have signed a petition, a defense that a majority of the property owners did not sign the petition is insufficient.⁵ Under some of the statutes, the value of the work done is not in issue, but the question is said to be as to the cost thereof.⁶ It is no defense that the work was not completed until after the municipal claim had been filed.⁷ Under a statute allowing a claim to be filed against the owner, but providing that a plea touching the question of ownership should not be allowed, a defendant may show

[1879]; *Breed v. City of Allegheny*, 85 Pa. St. (4 Norris) 214 [1877]; *Olds v. Erie City*, 79 Pa. St. (29 P. F. Smith) 380 [1875]; *Schenley v. Commonwealth for use of City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859]; *Britton v. City of Philadelphia*, 32 Pa. St. (8 Casey) 387 [1859]; *City of Philadelphia v. Sutter*, 30 Pa. St. (6 Casey) 53 [1858]; *Board of Health v. Gloria Dei*, 23 Pa. St. (11 Harr.) 259 [1854]; *Kennedy v. Board of Health*, 2 Pa. St. (2 Barr.) 366 [1845]; *Philadelphia v. Cooper*, 27 Pa. Super. Ct. 552 [1905]; *City of Philadelphia v. Nell*, 25 Pa. Super. Ct. 347 [1904]; *South Bethlehem Borough v. Laufer*, 1 Penn. Dist. Ct. 756 [1892].

² *South Bethlehem Borough v. Laufer*, 1 Penn. Dist. Ct. 756 [1892].

¹ *Craig v. City of Philadelphia*, 89 Pa. St. (8 Norris) 265 [1879].

² *Pittsburg v. Walter*, 69 Pa. St. (19 P. F. Smith) 365 [1871].

³ *Pittsburg v. Walter*, 69 Pa. St. (19 P. F. Smith) 365 [1871].

⁴ *City of Philadelphia v. Wistar*, 35 Pa. St. (11 Casey) 427 [1860].

⁵ *Olds v. Erie City*, 79 Pa. St. (29 P. F. Smith) 380 [1875].

⁶ *Schenley v. Commonwealth for use of City of Allegheny*, 36 Pa. St. (12 Casey) 62 [1859].

⁷ *Britton v. City of Philadelphia*, 32 Pa. St. (8 Casey) 387 [1859].

that he does not own the property, but merely has a right of way thereover.⁸ If the action is brought in the name of the city for the use of the contractor, it has been held that the property owner cannot inquire into the validity of the contract between the city and the contractor.⁹ If the contract provided that work should not be done between December first and the first of the April following, such provision was inserted for the benefit of the city and if the city waived it and permitted work to be done within such dates the property owner cannot interpose such fact as a defense.¹⁰ Whether a road exists, whether it is on defendant's land, and whether the petition is signed by a majority of the property owners, are questions for the jury, and, if true, constitute valid defenses.¹¹ Technical objections not going to the merits which have been not interposed during the proceedings, in time to permit such objections to be obviated, cannot be interposed in a proceeding in *scire facias*.¹² Accordingly, defenses as to the procedure of the viewers not made before the viewers, cannot be urged as a defense to a proceeding in *scire facias*.¹³ Want of power on the part of the public corporation to construct an improvement at the cost of the property owners, may be interposed on *scire facias*, though the objection thereto was not made before the viewers.¹⁴ Thus, the defense that the city has no power to widen the turnpike toll road at the expense of the property owners, may be made at *scire facias*, though not made before the viewers.¹⁵

§ 1159. Affidavit of defense.

A rule of the court providing for a judgment by default if an affidavit of defense is not filed within a certain time after the return day, applies to proceedings to enforce municipal claims.¹ This rule is, however, strictly construed, as it is said to be in derogation of the right of trial by jury.² The affidavit of defense must

⁸ Board of Health v. Gloria Dei, 23 Pa. St. (11 Harr.) 259 [1854].

⁹ Brientnall v. Philadelphia, 103 Pa. St. 156 [1883]; Pittsburg v. McKnight, 91 Pa. St. (10 Norris) 202 [1879].

¹⁰ Philadelphia to use of Dyer v. Brooke, 81 Pa. St. (31 P. F. Smith) 23 [1876].

¹¹ McKeesport Borough to use of McKeesport City v. Busch, 166 Pa. St. 46, 31 Atl. 49 [1895].

¹² City of Chester v. Bullock, 187 Pa. St. 544, 41 Atl. 452 [1898].

¹³ City of Chester v. Bullock, 187 Pa. St. 544, 41 Atl. 452 [1898].

¹⁴ Breed v. Allegheny, 85 Pa. St. (4 Norris) 214 [1877].

¹⁵ Breed v. Allegheny, 85 Pa. St. (4 Norris) 214 [1877].

¹ Wilkes-Barre v. Felts, 134 Pa. St. 529, 19 Atl. 676 [1890].

² Yates v. Borough of Meadville, 56 Pa. St. (6 P. F. Smith) 21 [1867].

state facts which, in law, constitute a defense to the assessment.³ An affidavit of defense which shows that the property against which the lien was filed, is used for railroad purposes,⁴ or that the street for the improvement of which the assessment was levied had already been improved,⁵ or that it was occupied by a railway company which was required to pave, repave and repair such street,⁶ or that land subject to assessment had been omitted from the assessment, thus increasing the burden upon the remaining land,⁷ or that the assessment had been paid, even though paid by an owner of other property under a mistake of fact,⁸ is, in each case, sufficient. An affidavit of defense which shows that the road was macadamized by a turnpike company nearly seventy years before, and that it had been repaired by the city,⁹ or that the petition was not signed by a majority of the property owners, the decision of the council being conclusive as to its sufficiency,¹⁰ or that the paving for which the assessment was levied was not an "original paving" without stating when the street was originally paved or of what material,¹¹ or an affidavit stating that the street had been improved by the property owners and was in good order and needed no repair, without alleging that the city had approved the kind or quality of the previous paving,¹² is, in each case, insufficient.

§ 1160. Service and return of writ.

Notice of this writ must be given as provided by statute.¹ If the return shows a compliance with the statute in general language, but is dated so that notice cannot have been given for

³ Harrisburg v. Baptist, 156 Pa. St. 526, 27 Atl. 8 [1893]; City of Pittsburg v. MacConnell, 130 Pa. St. 463, 18 Atl. 645 [1889]; Erie City for use v. Butler, 120 Pa. St. 374, 14 Atl. 153 [1888].

⁴ City of Erie v. Piece of Land Fronting on State Street, 175 Pa. St. 523, 34 Atl. 808 [1896].

⁵ Borough of Greensburg v. Laird, 138 Pa. St. 533, 21 Atl. 96 [1890]. See § 382 *et seq.*

⁶ Philadelphia to use v. Spring Garden Farmers' Market Company, 154 Pa. St. 93, 25 Atl. 1077 [1893].

⁷ City of Greenlaw v. Levers, 200 Pa. St. 56, 49 Atl. 980 [1901].

⁸ Delaney v. Gault, 30 Pa. St. (6 Casey) 63 [1858].

⁹ Philadelphia v. Eddleman, 169 Pa. St. 452, 32 Atl. 639. See §§ 382, 383.

¹⁰ Erie v. Bootz, 72 Pa. St. (22 P. F. Smith) 196 [1872].

¹¹ Harris v. Baptist, 156 Pa. St. 526, 27 Atl. 8 [1893].

¹² Philadelphia to use v. Baker, 140 Pa. St. 11, 21 Atl. 238 [1891].

¹ Ferguson v. Quinn, 123 Pa. St. 337, 16 Atl. 844 [1889].

the time required by statute, service is insufficient.² Irregular service of the writ is, however, cured by judgment, and such objection cannot be raised thereafter on collateral attack. If service is had upon the registered owner when the original writ is issued, it is not necessary upon issuing a subsequent writ to continue the lien, to give notice to one who has subsequently acquired an interest in the property, even if his title is registered.³ It is provided by statute that a *scire facias* must be prosecuted to judgment, or a return made showing good cause for returning the writ within five years after issuing the same.⁴ If no judgment is obtained during the five years, the lien cannot be revived by a writ of *scire facias*, issued more than five years after the filing of the claim, though within five years of the time of issuing the original writ.⁵ If the original writ is returned without filing an affidavit required by statute, showing that the registered owner is a non-resident, or cannot be found, an alias writ issued more than five years after the claim is filed, though within five years after the original writ was issued, does not continue the lien.⁶

§ 1161. Attachment and deduction from award.

Under some statutes proceedings in attachment are authorized, as against a non-resident property owner.¹ Inasmuch, however, as the Supreme Court of the United States has held that an assessment cannot be made the personal debt of a non-resident, the propriety of such statutes is doubtful.² If property upon which a valid assessment exists is taken in eminent domain, the amount of such assessment may be deducted from the damages awarded for taking such property.³ The right to make a deduction of this sort has already been discussed.⁴

§ 1162. Mandamus and mandatory injunction.

If a public corporation is bound to pay an assessment or a certain part thereof, the collection of such assessment may be

² O'Bryne v. City of Philadelphia, 93 Pa. St. (12 Norris) 225 [1880].

³ Ferguson v. Quinn, 123 Pa. St. 337, 16 Atl. 844 [1889]; Hering v. Chambers, 103 Pa. St. 172 [1883].

⁴ City of Philadelphia to use v. Nell, 31 Pa. Super. Ct. 78 [1906].

⁵ City of Philadelphia v. Scott, 93 Pa. St. (12 Norris) 25 [1880]; Philadelphia v. Merz, 28 Pa. Super. Ct. 227 [1905].

⁶ Philadelphia to use v. Cooper, 212 Pa. 306, 61 Atl. 926 [1905]; Philadelphia to use v. Cooper, 27 Pa. Super. Ct. 552 [1905].

¹ Syenite Granite Co. v. Bobb, 37 Mo. App. 483 [1889].

² See § 1046.

³ Fisher v. Mayor, etc., of City of New York, 3 Hun (N. Y.) 648.

⁴ See § 62 *et seq.*

had by proceedings in mandamus, to compel the levy of a tax to pay such assessment.¹ Mandamus proceedings may be brought after confirmation without recovering a judgment at law against the public corporation which is liable for such assessment.² Mandamus will lie at the instance of a party entitled to the proceeds of an assessment to compel a public corporation to levy an assessment.³ Under special statutory provision therefor, mandamus will lie to compel a private corporation, such as a railway company, to construct an improvement which it is bound in law to construct.⁴ Since mandamus will lie against a quasi corporation, it has been held that mandamus will lie to compel a street railway company to pave the space between its rails,⁵ at least under a state statute expressly authorizing such remedy.⁶ It has been held that mandamus will not lie to compel private corporation to construct an improvement which it is lawfully required by ordinance to construct if it has no money to pay therefor and cannot borrow any.⁷ A mandatory injunction will not lie to compel a property owner to construct a sidewalk which he has been ordered by a public corporation to construct.⁸

§ 1163. Period of limitations fixed by statute.

In the absence of a statute which either in express terms or by necessary implication limits the time within which a lien may be enforced, there is no limitation as to the time within which a lien may be taken or enforced.¹ While it has been

¹ Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County, 207 Ill. 17, 69 N. E. 576 [1904]. See § 107 *et seq.*

² Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County, 207 Ill. 17, 69 N. E. 576 [1904].

³ Higgins v. City of Chicago, 18 Ill. 276 [1857].

⁴ Northern Pacific Railway v. Duluth, 208 U. S. 583 [1908]; (affirming State ex rel. City of Duluth v. Northern Pacific Ry. Co., 98 Minn. 429, 108 N. W. 261).

⁵ New Orleans City & Lake Railroad Co. v. Louisiana ex rel. New Orleans, 157 U. S. 219, 39 L. 679,

15 S. 581 [1895]; (affirming State ex rel. City of New Orleans v. New Orleans City & Lake Railroad Co., 42 La. Ann. 550, 7 So. 606 [1890]).

⁶ New Orleans City & Lake Railroad Co. v. Louisiana ex rel. New Orleans, 157 U. S. 219, 39 L. 679, 15 S. 581 [1895]; (affirming State ex rel. City of New Orleans v. New Orleans City & Lake Railroad Co., 42 La. Ann. 550, 7 So. 606 [1890]).

⁷ City of Benton Harbor v. St. Joseph & Benton Harbor Street Ry. Co., 102 Mich. 386, 26 L. R. A. 245, 60 N. W. 758 [1894].

⁸ City of Owensboro v. Hope, — Ky. —, 110 S. W. 272 [1908].

¹ Williams v. Bergin, 116 Cal. 56, 47 Pac. 877 [1897].

suggested that delay in bringing suit to enforce an assessment should prevent recovery on the ground of laches,² the assessment in question was one for which there was no legal authority, and which the courts of the state had already held invalid.³ The terms of a statute which either expressly or by necessary implication restrict the time for completing or enforcing a lien, control.⁴ It may be provided that limitations shall run unless a specified notice is filed.⁵ Under such statute, the period of limitations may be a very short one, if the required notice is not filed,⁶ while if the notice is filed the lien may be a perpetual one.⁷ The statute may fix the time within which a lien may be filed.⁸ A lien can be filed only within the time fixed by statute.⁹ If the statute provides that this time is six months from the completion of the work, this means six months from the time that the work is finished by the contractor, and not six months from the time that it is apportioned by the city council.¹⁰ The statute may give a short time of limitations for a summary sale and a longer period for a formal action at law.¹¹

§ 1164. Period of limitations as fixed by implication.

Under some statutes which do not refer to assessments by express terms, the courts have been obliged to determine within what classes of rights, if any, the assessment was placed by the legislature. An assessment has been held not to be a tax within the meaning of the statute of limitations fixing the time for en-

² O'Brien v. Wheelock, 184 U. S. 450, 46 L. 636, 22 S. 354 [1902]; (affirming O'Brien v. Wheelock, 95 Fed. 883, 37 C. C. A. 309 [1899], which affirmed 78 Fed. 673).

³ Updike v. Wright, 81 Ill. 49 [1876].

⁴ Succession of Rousseau, 23 La. Ann. 1 [1871]; Ross v. Gates, 183 Mo. 338, 81 S.W. 1107 [1904]; City of Galveston v. Heard, 54 Tex. 420 [1881].

⁵ City of Meriden v. Camp, 46 Conn. 284 [1878].

⁶ Dann v. Woodruff, 51 Conn. 203 [1883]; The Norwich Savings Society v. City of Hartford, 48 Conn. 570 [1881].

⁷ City of Hartford v. Mechanics'

Savings Bank, 79 Conn. 38, 63 Atl. 658 [1906].

⁸ City of Pittsburg v. Knowlson, 92 Pa. St. (11 Norris) 116 [1879]. Such statute does not apply to improvements not within its terms and controlled by a later statute. Schenley v. Commonwealth for use of the City of Allegheny, 36 Pa. St. 29, 78 Am. Dec. 359 [1859].

⁹ City of Pittsburg v. Knowlson, 92 Pa. St. (11 Norris) 116 [1879]; Kaiser v. Weise, 85 Pa. St. (4 Norris) 366 [1877].

¹⁰ City of Pittsburg v. Knowlson, 92 Pa. St. (11 Norris) 116 [1879]; Kaiser v. Weise, 85 Pa. St. (4 Norris) 366 [1877].

¹¹ State ex rel. Henderson v. Taylor, 59 Md. 338 [1882].

forcing taxes.¹ If a special written promise has been made by the property owners to pay the assessment, this contract is governed by the period of limitations applicable to written contracts.² A charter of a corporation is not, however, a written contract within the meaning of such statute.³ In some jurisdictions an assessment has been held to be a liability created by a statute within the meaning of the statute of limitations, and to be barred within the period of time applicable to such rights.⁴ In such case, the right of a contractor to enforce payment from the city is governed by the period of limitations applicable to a contract,⁵ while his right to enforce payment from a property owner is governed by the statute referring to liabilities created by statute.⁶ In some jurisdictions an assessment is regarded as coming within the limitation applicable to relief not hereinbefore provided for.⁷ Under a statute which provides that an assessment shall be a lien on the property, like a mortgage, an assessment is not barred until the period which would bar the enforcement of a mortgage.⁸ If an assessment does not create a personal liability, it is not governed by the statute of limitations applicable to personal liability.⁹ Under some statutes it is held that application for a judgment of sale for a delinquent

¹ *City of Galveston v. Guaranty Trust Co. of New York*, 107 Fed. 325, 46 C. C. A. 319 [1901]; *City of Hartford v. Mechanics' Savings Bank*, 79 Conn. 38, 63 Atl. 658 [1906]; *Gould v. The Mayor and City Council of Baltimore*, 59 Md. 378 [1882].

² *Talcott Brothers v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899].

³ *City of Galveston v. Guaranty Trust Co. of New York*, 107 Fed. 325, 46 C. C. A. 319 [1901].

⁴ *People ex rel. v. Hulbert*, 71 Cal. 72, 14 Pac. 43 [1886]; *Voris' Ex'rs v. Gallaher*, — Ky. —, 87 S. W. 775, 27 Ky. Law Rep. 1001 [1905]; *Kirwin v. Nevin*, 111 Ky. 682, 64 S. W. 647, 23 Ky. L. R. 947 [1901]; *Gosnell v. City of Louisville*, 104 Ky. 201, 46 S. W. 722, 24 Ky. L. R. 519 [1898]; *St. Louis to use of Deppelheuer v. Newman*, 45 Mo. 138 [1869]; *Hartman v. Hunter*, 56 O. S. 175, 46 N. E. 577 [1897]; (reversing 8

Ohio C. C. 623, 4 Ohio C. D. 200). Whether an assessment was within the statute of limitations at all was originally queried in *Brenchweh v. Drake*, 31 O. S. 652 [1877].

⁵ *City of Louisville v. McNaughton*, 114 Ky. 333, 70 S. W. 841 [1902].

⁶ *Kirwin v. Nevin*, 111 Ky. 682, 64 S. W. 647 [1901]; *Gosnell v. City of Louisville*, 104 Ky. 201, 46 S. W. 722, 20 Ky. L. R. 519 [1898].

⁷ *City of Seattle v. De Wolfe*, 17 Wash. 349, 49 Pac. 553 [1897]; *City of Ballard v. West Coast Improvement Co.*, 15 Wash. 572, 46 Pac. 1055 [1896]; *City of Spokane v. Stephens*, 12 Wash. 667, 22 Pac. 123 [1895].

⁸ *Mayor, Aldermen, etc., of New York v. Colgate*, 12 N. Y. 140 [1854]; *Mayor, Aldermen and Commonalty of New York v. Colgate*, 9 N. Y. Sup. Ct. Rep. 1 [1853].

⁹ *Council v. Moyamensing*, 2 Pa. St. (2 Barr.) 224 [1845].

assessment is not a civil action not otherwise provided for within the meaning of the statute of limitations;¹⁰ and that there is no period of limitations applicable thereto.¹¹ If an assessment is made a lien, and can also be enforced by the action of debt, and the limitation to the action of debt is six years, failure to sue within six years does not discharge the lien.¹² If an assessment has been reduced to a judgment, the statute which is applicable to judgments in general, applies to assessments.¹³

§ 1165. Period of limitations as fixed by special statute.

In some states, statutes have been enacted which provide specifically for what period of time a special assessment may be enforced; and the length of time fixed by statute controls whether this is one year,¹ or one year from the date of the last installment,² or two years,³ or five years,⁴ or ten years.⁵

§ 1166. Construction of statutes applicable to limitations.

A limitation applicable to the enforcement of the contractor's rights against the city, is not applicable if he attempts to enforce an assessment against the property owner.¹ A general provision as to the limitation of the collection of an assessment is not applicable to cities incorporated under an act which makes an

¹⁰ *Shepard v. People ex rel. Raymond*, 200 Ill. 508, 65 N. E. 1068 [1903]; *The People ex rel. McCrea v. Atchison*, 95 Ill. 452 [1880].

¹¹ *Shepard v. People ex rel. Raymond*, 200 Ill. 508, 65 N. E. 1068 [1903]; *The People ex rel. McCrea v. Atchison*, 95 Ill. 452 [1880].

¹² *Dickinson v. City of Trenton*, 35 N. J. Eq. (8 Stew.) 416 [1882].

¹³ *City of St. Louis v. Annex Realty Co.*, 175 Mo. 63, 74 S. W. 961 [1903]; *Hinckley v. City of Seattle*, 37 Wash. 269, 79 Pac. 779 [1905].

¹ *People ex rel. Johnson v. Springer*, 106 Ill. 542 [1883].

² *Ross v. Gates*, 183 Mo. 336, 81 S. W. 1107 [1904]; *Ross v. Gates*, 117 Mo. App. 237, 93 S. W. 856 [1906].

³ *City of Galveston v. Guaranty Trust Co. of New York*, 107 Fed. 325, 46 C. C. A. 319 [1901]; *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984 [1902]; *Williamson v. Joyce*, 137

Cal. 151, 69 Pac. 980 [1902]; *Burnes v. Ballinger*, 76 Mo. App. 58 [1898].

⁴ *Dorland v. Hanson*, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552 [1889]; *Fitzgerald v. Sioux City*, 125 Ia. 396, 101 N. W. 268 [1904]; *Haddington Methodist Episcopal Church v. City of Philadelphia to use, etc.*, 108 Pa. St. 466 [1885]; *City of Philadelphia v. Scott*, 93 Pa. St. (12 Norris) 25 [1880]; *City of Philadelphia v. Seiple*, 31 Pa. Super. Ct. 64 [1906].

⁵ *Fogg v. Hoquiam*, 23 Wash. 340, 63 Pac. 234 [1900]; *Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551 [1897]; *State of Washington on relation of Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970 [1897].

¹ *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *Rosetta Gravel Paving & Improvement Co. v. Kennedy*, 51 La. Ann. 804, 26 So. 477 [1899].

especial provision on this point.² It appears to be held that the time during which an assessment cannot be collected on account of an injunction, is not to be counted in determining whether the period of limitations has elapsed.³

§ 1167. Waiver of limitations.

A property owner cannot waive limitations by a contract made in advance.¹ He may, however, estop himself from setting up limitations by failing to object to payment in installments when he knows that the city believes that he has requested payment in installments under a special contract.²

§ 1168. When period of limitations begins to run.

The time at which a statute of limitations begins to run is determined by statute. Limitations does not ordinarily run until a valid assessment has been levied.¹ The period of limitations does not run, in the absence of express statutory provision to the contrary, until the public corporation has the right to proceed to enforce the assessment.² Under some statutes limitations run only from the time that the work is accepted.³ If there has been a delay which apparently is the fault of the city, such delay cannot prevent the contractor from enforcing the assessment against the property owner.⁴ Under such statute the time for filing a lien runs from the completion of the work and not from the acceptance thereof.⁵ Under some statutes the period of limitations runs from the time that the assessment becomes delinquent, and not from the time that it is levied.⁶ If the assessment is payable in installments, the period of limitations

² *The People ex rel. Huck v. Pierce*, 90 Ill. 85 [1878].

³ *Howes v. City of Racine*, 21 Wis. 514 [1867].

¹ *Adkins v. Case*, 81 Mo. App. 104 [1899].

² *City of Lexington v. Bowman*, 119 Ky. 840, 84 S. W. 1161, 85 S. W. 1191, 27 Ky. L. Rep. 651, 27 Ky. Law Rep. 286 [1905].

¹ *Bowman v. City of Colfax*, 17 Wash. 344, 49 Pac. 551 [1897].

² *Kraut v. City of Dayton*, — Ky. —, 97 S. W. 1101 [1906].

³ *Dixon v. Labry*, 78 S. W. 430, 25 Ky. Law Rep. 1679 [1904].

⁴ *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897].

⁵ *City of Pittsburg v. Knowlson*, 92 Pa. St. (11 Norris) 116 [1879]. See also *Meriden v. Camp*, 46 Conn. 284 [1878].

⁶ *Poillon, Pros. v. Brunner*, 66 N. J. L. 116, 48 Atl. 541 [1901]; *Reynolds v. Green*, 27 O. S. 416 [1875]; *City of Seattle v. O'Connell*, 16 Wash. 625, 48 Pac. 412 [1897]. See also *Kraut v. City of Dayton*, — Ky. —, 97 S. W. 1101 [1906].

runs from the time each installment is due.⁷ Under some statutes the period of limitations runs from the date of maturity of the last installment.⁸ A statute which provides that default in the payment of one installment of an assessment may make the entire assessment due, does not accelerate the period of limitations as to the remaining installments.⁹ If an assessment is defective because the public corporation is not properly incorporated, limitations does not run until such incorporation is made legal and valid.¹⁰

§ 1169. Effect on statute of limitations of bringing suit.

Bringing a suit to enforce an assessment, stops the running of the period of limitations, even if judgment is not rendered until after the period of limitations has not elapsed.¹ The file mark on a petition is not conclusive as to the date on which the suit was brought; but if the file mark shows that it was brought on the last day of the period and the appearance docket shows that it was brought on the day following, the file marks will be regarded as correct in the absence of evidence to the contrary.² Bringing suit has this effect, however, only as to the parties to the suit.³ After the period of limitations has elapsed, the plaintiff cannot amend so as to include parties or property which were not included in the action as originally begun.⁴ The omission to bring in a proper party does not affect those who are properly made parties.⁵ A

⁷ *Pelton v. Bemis*, 44 O. S. 51, 4 N. E. 714 [1886]; *Bell v. City of Norwood*, 28 Ohio C. C. 809 [1906].

⁸ *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904]; *Ross v. Gates*, 117 Mo. App. 237, 93 S. W. 856 [1906]; *Voorhees v. Borough of North Wildwood*, — N. J. L. —, 68 Atl. 175 [1907].

⁹ *Gilsonite Construction Co. v. Arkansas McAlester Coal Co.*, 205 Mo. 49, 103 S. W. 93 [1907]; *Burnes v. Ballinger*, 76 Mo. App. 58 [1898].

¹⁰ *State of Washington on relation of Heman v. Ballard*, 16 Wash. 418, 47 Pac. Rep. 970 [1897].

¹ *Dorland v. McGliron*, 47 Cal. 47 [1873]; *Himmelman v. Carpentier*, 47 Cal. 42 [1873]; *Dougherty v. Hen-*

arie, 47 Cal. 9 [1873]; *Randolph v. Bryne*, 44 Cal. 366 [1872]; *Brenchweh v. Drake*, 31 O. S. 652 [1877]; *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

² *Lewis v. City of Seattle*, 28 Wash. 639, 69 Pac. 393 [1902].

³ *Page v. W. W. Chase Company*, 145 Cal. 578, 79 Pac. 278 [1904]; *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]; *Eyer mann v. Scollay*, 16 Mo. App. 498 [1885].

⁴ *City of St. Joseph ex rel. Forsee v. Baker*, 113 Mo. App. 691, 88 S. W. 1122 [1905]; *Eyer mann v. Scollay*, 16 Mo. App. 498 [1885].

⁵ *Smith v. Boese*, 39 Mo. App. 15 [1889].

suit brought to apply a fund which has been paid into court to the payment of the assessment, is sufficient to stop limitations from running, though no suit is brought against the land.⁶ If a suit is brought by trustees to raise a fund to pay the assessment, such suit stops limitations from running.⁷ In the absence of special statute, a suit brought without authority does not extend the period of limitations.⁸

§ 1170. Special statutory provisions.

Under some statutes the judgment must be obtained within a certain specified time from the issuing of the original writ, in order to preserve the lien.¹ Under some statutes a city is given power to extend a lien.²

§ 1171. Effect of lapse of period of limitations.

In case of delay beyond the period fixed by statute for enforcing an assessment, the assessment becomes unenforceable.¹ The bar of the statute is not, however, jurisdictional, and if a judgment is rendered upon an assessment barred by limitations, a sale under such decree cannot be attacked collaterally.²

§ 1172. Change of statutes of limitations.

Statutes fixing the period of limitations are sometimes changed by the legislature, and the question of the effect of such changes upon prior assessments becomes material. A statute which shortens the time for enforcing an assessment has been held to apply to prior assessments, but to give the full period of time from the date of the enactment of the statute, and not from the date of the assessment.¹ In other jurisdictions it has been held that statutes shortening the period of limitations do not apply to prior assessments.² A statute which lengthens the period of limita-

⁶ *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904].

⁷ *Gould v. Mayor and City Council of Baltimore*, 58 Md. 46 [1881].

⁸ *Scranton City v. Stokes* (No. 1), 28 Pa. Super. Ct. 434 [1905].

¹ *City of Philadelphia v. Scott*, 93 Pa. St. (12 Norris) 25 [1880].

² *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896].

¹ *Field v. Inhabitants of the Town-*

ship of West Orange, 39 N. J. Eq. (12 Stew.) 60 [1884]. See also § 1163.

² *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984 [1902].

¹ *Seibert v. Copp*, 62 Mo. 182 [1876]; *Stadler v. Strong*, 3 Mo. App. 568.

² *Kansas City to the use, etc. v. American Surety Co.*, 71 Mo. App. 315 [1897].

tions has been held applicable to a prior assessment.³ A statute which revives liens already barred by limitations, has been upheld.⁴ A subsequent statute may require the filing of a notice to prevent limitations from running, and this requirement may be applicable to prior assessments.⁵ The amending statute may, by its express terms, not be applicable to prior assessments.⁶ A statute which bars assessments which are not returned as therein provided does not apply to assessments which are confirmed before the statute is passed and which are returned under a prior statute.⁷

§ 1173. Power to sell to satisfy lien of assessments.

Power to sell property to satisfy an assessment exists if conferred by statute, and does not exist unless authorized by statute.¹ A statute authorizing a sale if the assessment is levied "on lands or tenements," does not authorize a sale if the assessment is levied on "owners and occupants."² Power to "levy and collect assessments" does not confer power to sell the property assessed.³ Under some statutes an assessment is held to be a tax within the meaning of provisions authorizing the sale of land for delinquent taxes.⁴ In other jurisdictions, however, a different view has been held and authority to sell land for taxes does not carry with it power to sell land for delinquent assessments.⁵ Under a statutory provision that assessments are to be collected as taxes, property may be sold for a delinquent assessment, if it could be sold for a delinquent tax.⁶ Such a pro-

³ State of Washington on the relation of Heman v. Ballard, 16 Wash. 418, 47 Pac. 970.

⁴ City of Philadelphia v. Hay, 20 Pa. Super. Ct. 480 [1902].

⁵ Security Savings Trust Co. v. Donnell, 81 Mo. App. 147 [1899]; (transferred from Superior Court, 145 Mo. 431, 46 S. W. 959 [1898]).

⁶ Walker v. People ex rel. Raymond, 202 Ill. 34, 66 N. E. 827 [1903]. See also Mecartney v. People ex rel. Raymond, 202 Ill. 51, 66 N. E. 873 [1903].

⁷ Cummings & Co. v. People ex rel. Hanberg, 213 Ill. 443, 72 N. E. 1094 [1905].

¹ Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920 [1899].

² Sharp v. Spier, 4 Hill. 76 [1843].

³ State of Nebraska ex rel. Ransom v. Irey, 42 Neb. 186, 60 N. W. 601 [1894].

⁴ Sanger v. Rice, 43 Kan. 580, 23 Pac. 633 [1890]; Pratt v. City of Milwaukee, 93 Wis. 658, 68 N. W. 392 [1896]; Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248 [1896].

⁵ City of Chicago v. Colby, 20 Ill. 614 [1858]; Paine v. Spratley, 5 Kan. 525 [1870]; (so Burns v. Spratley, 5 Kan. 551 [1870]; memorandum opinion); Allen v. City of Galveston, 51 Tex. 302 [1879].

⁶ Morrison v. Hershire, 32 Ia. 271 [1871].

vision adopts only the statutes on the subject of tax sales that are then in force and not subsequent amendments thereto.⁷ Authority to levy and collect a special tax which shall be a lien does not confer power to sell at summary sale, but only by proceedings in equity.⁸

§ 1174. Compliance with statutory provisions necessary.

In order to constitute a valid sale, it is necessary that the provisions of the statute authorizing the sale and prescribing the method thereof be complied with strictly,¹ especially where no provision is made for a judgment of a court of competent jurisdiction ordering the sale and approving the steps therein which might operate to cure defects in the sale as against collateral attack. Under some statutes which provide for a direct attack upon the assessment as by certiorari, its validity cannot be attacked collaterally in an ejectment suit against a purchaser at the sale.² If property is sold by order of a court of general jurisdiction, such sale is valid as against collateral attack, although the proceedings are erroneous.³ A sale conducted in accordance with the provisions of a general statute, instead of in accordance with the provisions of the city charter, specifically applicable thereto, is invalid.⁴

§ 1175. Amount of land subject to sale.

The amount of land which can be sold depends upon the provisions of the statute.¹ If the statute provides for selling the property as an entirety, an undivided part thereof cannot be sold.² Under a statute providing that the smallest part of the

⁷ *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920 [1899].

⁸ *McInery v. Reed*, 23 Ia. 410 [1867].

¹ *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352 [1907]; *Lantz v. Fishburn*, — Cal. App. —, 91 Pac. 816 [1906]; *Holbrook v. Dickinson*, 46 Ill. 285 [1867]; *Scammon v. City of Chicago*, 40 Ill. 146 [1866]; *Security Trust Co. v. Heyderstaedt*, 64 Minn. 409, 67 N. W. 219 [1896]; *Vasser v. George*, 47 Miss. 713 [1873]; *Hopkins v. Mason*, 61 Barb. 469 [1871]; *Adriance v. McCafferty*, 25 N. Y. Sup. Ct. Rep. 153 [1864]; *Fleetwood*

v. City of New York, 4 N. Y. Sup. Ct. Rep. 475 [1849]; *Kennedy v. Newman*, 3 N. Y. Sup. Ct. Rep. 187 [1848]; *O'Byrne v. Philadelphia*, 93 Pa. St. (2 Norris) 225 [1880].

² *State, Evans, Pros. v. Mayor and Common Council of Jersey City*, 35 N. J. L. (6 Vr.) 381 [1872].

³ *Paine v. Spratley*, 5 Kan. 525 [1870]. See § 998.

⁴ *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352 [1907].

⁵ *Powers v. Barr*, 24 Barb. (N. Y.) 142 [1857].

⁶ *Jordan v. Hyatt*, 3 Barb. 275 [1848].

tract that will suffice to pay the amount due and costs shall be sold, no larger amount can be sold.³ If different lots have been assessed separately, they must be sold separately,⁴ especially if they belong to different owners.⁵

§ 1176. By whom sale is to be made.

The sale must be made by the officer authorized by statute,¹ such as the county treasurer.² Under a statute which authorizes a judgment upon an assessment to be collected as any other judgment, land may be ordered sold by a master in chancery.³

§ 1177. Time and place of sale.

The property must be sold at the place specified by statute.¹ If the statute requires a sale at the "front door" of the court house, a sale at the "easterly door" is insufficient in the absence of a showing that this is the front door.² A sale is invalid if not commenced upon the day specified in the notice of sale.³

§ 1178. Notice of sale.

It has been held that a statute authorizing a sale which does not provide for a notice thereof, is invalid.¹ If the statute provides for notice of the sale, such notice must be given.² A statute requiring "six days' publication" has been held to mean publication for six separate days.³ The notice must state the true

³ Vasser v. George, 47 Miss. 713 [1873].

⁴ Brady v. Kelley, 52 Cal. 371 [1877]; Hoover v. People ex rel. Peabody, 171 Ill. 182, 49 N. E. 367 [1898]; Dempster v. People ex rel. Kern, 158 Ill. 36, 41 N. E. 1022 [1895].

⁵ Towne v. Salentine, 92 Wis. 404, 66 N. W. 395 [1896]; Jenkins v. Board of Supervisors of Rock County, 15 Wis. 11 [1862].

¹ Leindecker v. The People ex rel. Johnson, 98 Ill. 21 [1881]; Challiss v. Parker, 11 Kan. 384 [1873]; Nichols v. Voorhis, 18 Hun (N. Y.) 33 [1879].

² Challiss v. Parker, 11 Kan. 384 [1873].

³ Crane v. Cummings, 137 Cal. 201, 69 Pac. 984 [1902]; Samuels v.

Drainage Commissioners, 125 Ill. 536, 17 N. E. 829 [1889].

¹ Lantz v. Fishburn, — Cal. App. —, 91 Pac. 816 [1906]; Vasser v. George, 47 Miss. 713 [1873].

² Lantz v. Fishburn, — Cal. App. —, 91 Pac. 816 [1906].

³ Lovell v. City of St. Paul, 10 Minn. 290 [1865].

¹ People of the State of New York ex rel. Spencer v. Village of New Rochelle, 83 Hun, 185, 31 N. Y. S. 592 [1895].

² Bowman v. The People ex rel. Baker, Collector, 137 Ill. 436, 27 N. E. 598 [1892]; Lovell v. St. Paul, 10 Minn. 290 [1865]; Prindle v. Campbell, 9 Minn. 212 [1864]; Adams v. Fisher, 63 Tex. 651 [1885].

³ Scammon v. The City of Chicago, 40 Ill. 146 [1866].

amount due.⁴ If, however, the discrepancy between the amount due and the amount for which the notice is given is so slight as to be immaterial, and not to mislead the property owner, this discrepancy does not avoid the sale. The notice must, under some statutes, show whether the sale is for a tax or an assessment.⁵ The name of the owner must be given if known to the collector.⁶ The notice need not state that the assessment has not been modified or the warrant has not been recalled.⁷

§ 1179. Public corporation as purchaser at sale.

The public corporation by which the assessment is levied, may purchase the property in the absence of other bidders, if authorized so to do by statute,¹ even if such statute is passed after the assessment is made, and before the sale.² Under a statute authorizing assessments to be collected in the same manner as state and other general taxes, delinquent lands may be bid off in the name of the state, even though the statute provides that lands so bid are held "for the use of the state, county and town, in proportion to the amount due to each," and two of these bodies have no interest in the assessments.³ However, a statute authorizing assessments to be collected "by proceedings in all respects the same as are provided by law for the collection of delinquent state and county taxes," does not authorize a sale to the state by operation of law, if there are no bidders where such sale is provided for by an amendment to the general tax laws adopted after the enactment of the statute with reference to assessments.⁴ Under statutory authority a county,⁵ or a road district,⁶ may bid in the property sold for delinquent assessments.

⁴ *Mayor and Commonalty of Alexandria v. Hunter*, 16 Va. (2 Munf.) 228 [1811].

⁵ *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543 [1889].

⁶ *Gage v. People ex rel.*, 205 Ill. 547, 69 N. E. 80 [1903].

⁷ *Gage v. People ex rel.*, 205 Ill. 547, 69 N. E. 80 [1903].

¹ *Schneider v. City of Detroit*, 135 Mich. 570, 98 N. W. 256 [1904]; *Gray v. City of Detroit*, 113 Mich. 657, 71 N. W. 1107; *City of Columbus v. Schneider*, 7 Ohio N. P. 619 [1900]; *City of New Whatcom v. Bellingham Bay Improvement*

Company, 16 Wash. 131; 47 Pac. 236 [1896].

² *Sutphin v. Inhabitants of the City of Trenton*, 31 N. J. Eq. (4 Stewart) 468 [1879]; *Krutz v. Gardner*, 18 Wash. 332, 51 Pac. 397 [1897].

³ *Hilton v. Dumphey*, 113 Mich. 241, 71 N. W. 527 [1897].

⁴ *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920 [1899].

⁵ *Smith v. City of Frankfort*, 2 Kan. App. 411, 42 Pac. 1003 [1895]; *Berger v. Multnomah County*, 45 Or. 402, 78 Pac. 224 [1904].

⁶ *Essex Public Road Board v. Skin-*

§ 1180. Amount for which land is to be sold.

Under the statutory provisions generally in force, the sale must be for the amount due.¹ A sale under such statute for less than the amount due, is invalid,² unless the difference is so slight as to be immaterial.³

§ 1181. Certificate of sale.

Under the provisions of many statutes a certificate is to be issued to the purchaser at a sale for delinquent assessments.¹ Such a certificate is a "tax certificate" within the meaning of the statutes providing therefor.² Such certificate is often made *prima facie* evidence of the validity of the assessment.³ It is to be signed by the officer designated by statute.⁴ It has been held that it cannot be signed by his successor.⁵ Under a statute requiring the certificate to state the time at which the right to redeem would expire, a statement that the right would expire five years from the day of the certificate, does not render the certificate invalid, if it is dated upon the date of the sale, even though the statute provides that the period of redemption ends five years from the date of the sale.⁶ Under such statutes a notice that on a certain date the purchaser would be entitled to a deed, but not stating that the right of redemption would then expire, is insufficient.⁷ The certificate must ordinarily describe the property which is sold. Under such statutes a description of property as "fifty feet middle south half of" a designated square, is insufficient.⁸

kle, 140 U. S. 334, 35 L. 446, 11 S. 790 [1891] (affirming *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 65, 6 Atl. 435 [1886], which was affirmed in *Essex Public Road Board v. Skinkle*, 49 N. J. L. (20 Vr.) 641, 10 Atl. 379 [1887]).

¹ *Security Trust Company v. Heyderstaedt*, 64 Minn. 409, 67 N. W. 219 [1896].

² *Security Trust Co. v. Heyderstaedt*, 64 Minn. 409, 67 N. W. 219 [1896]. (Amount of assessment, \$17.00; amount of judgment, \$18.46; amount of judgment, interest, and costs, \$19.38; property sold for \$17.00.)

³ *London and Northwest American Mortgage Co. v. Gibson*, 77 Minn. 394, 80 N. W. 777, 205 [1899]. (The assessment was \$628.03; interest,

\$4.19; costs of sale, \$5.00; property was sold for \$.75 too little.)

⁴ *Clarke v. Mead*, 102 Cal. 516, 36 Pac. 862 [1894]; *Wales v. Warren*, 66 Neb. 455, 92 N. W. 590 [1902]; *Alford v. City of Syracuse*, 163 N. Y. 158, 57 N. E. 310 [1900].

⁵ *Pratt v. City of Milwaukee*, 93 Wis. 656, 68 N. W. 392 [1896].

⁶ *Wales v. Warren*, 66 Neb. 455, 92 N. W. 590 [1902].

⁷ *Lockwood v. Gehlert*, 53 Hun. (N. Y.) 15, 6 N. Y. Supp. 20 [1889].

⁸ *Lockwood v. Gehlert*, 53 Hun. (N. Y.) 15, 6 N. Y. Supp. 20 [1889].

⁹ *Willard v. Hodapp*, 98 Minn. 269, 107 N. W. 954 [1906].

¹⁰ *Lantz v. Fishburn*. — Cal. App. —; 91 Pac. 816 [1906].

¹¹ *Naltner v. Blake*, 56 Ind. 127 [1887].

§ 1182. Form of judgment or decree of sale.

The form of the judgment or decree which is to be rendered in a proceeding to enforce the assessment, depends on the nature of the liability created by the assessment and the jurisdiction of the court in which such relief is sought. If the judgment omits to include interest, such omission cannot be supplied by reference to a schedule even if such schedule is referred to in the judgment as being made a part thereof.¹ The finding of the court should show the amounts of the different assessments, and the date thereof, so that interest can be computed thereon to the date of the sale.² Since an assessment is ordinarily a lien upon each separate tract of land in the amount of the assessment levied against such tract, a decree rendered against two or more lots for the aggregate amount of the assessments levied against such lots, is erroneous.³ If a mistake has been made in describing the ownership of land, but such mistake does not increase the amount of the taxation, and does not cast upon one tract of land the burden which should be borne by another tract, a decree of sale rendered in a suit to enforce the assessment does not deprive the owners of such land of their property without due process of law, within the meaning of the Fourteenth Amendment.⁴ A decree which establishes as valid an assessment levied against land not abutting on the improvement, and against which an assessment cannot be levied by statute, is erroneous but not absolutely void. While such judgment may be reversed, it is conclusive, if proceedings are not taken to vacate it by error or appeal.⁵ The judgment ordering a sale of the property, must describe the lot sold so as to identify it with the lot assessed.⁶ A decree which does not identify the property without reference to the pleadings is insufficient.⁷ A judgment for the sale of property in proceedings

¹ *People ex rel. Thompson v. Smythe*, 232 Ill. 567, 83 N. E. 1063 [1908]; follows *People ex rel. Thompson v. Smythe*, 232 Ill. 242, 83 N. E. 821 [1908]; so *People ex rel. Thompson v. Smythe*, 232 Ill. 259, 83 N. E. 828 [1908]; and the same style in 232 Ill. 575, 83 N. E. 1066 [1908]; 232 Ill. 576, 83 N. E. 1066 [1908]; 232 Ill. 621, 83 N. E. 1083, 232 Ill. 629, 83 N. E. 1086.

² *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872].

³ *Brady v. Kelley*, 52 Cal. 371

[1877]; *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367 [1898]; *Brockschmidt v. Cavendar*, 3 Mo. App. 568 [1877].

⁴ *Ballard v. Hunter*, 204 U. S. 241, 27 S. 261 [1907].

⁵ *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595 [1867].

⁶ *Diggins v. Hartshorne*, 103 Cal. 154, 41 Pac. 283 [1895].

⁷ *Neff v. Covington Stone and Sand Co.*, 108 Ky. 457, 462, 55 S. W. 697, 56 S. W. 723 [1900].

properly instituted is not avoided because the property has been listed against one who is not the owner thereof.⁸ If the statute provides for an appraisal under a sale upon a decree to enforce the lien of an assessment, a sale without such appraisal is invalid, and should be set aside.⁹ A decree foreclosing a lien for an assessment should not include an amount added by a county court in excess of the amount awarded by the jury.¹⁰ If the time and terms of the sale are left within the discretion of the court, the decree of sale must fix the time and terms of sale.¹¹ If a finding is made that the allegations of the answer are true, without passing specifically upon an issue tendered as to whether the portion of the street which has been improved has ever been dedicated, a judgment rendered on such finding is erroneous, and an order refusing a new trial should be reversed.¹² Under statutes which provide for collecting an assessment by a suit in equity in the nature of foreclosure proceedings a personal judgment cannot be rendered against a property owner,¹³ especially in jurisdictions where an assessment is not a personal debt.¹⁴ Under a statute which provides for a personal liability and for a lien, the decree may order a general execution against the property owner for any balance which may remain due after the lien has been enforced.¹⁵ A judgment rendered in a proceeding to collect or enforce an assessment is final and conclusive between the parties.¹⁶ A judgment rendered in a suit to enforce an assessment, settles the rights of all the parties thereto,¹⁷ including the parties who are defendants as having some interest in the premises assessed subordinate to the alleged lien.¹⁸ However, the conduct of the parties in treating a default judgment as set aside and proceeding to a trial upon the merits, the issues having been made up after the default judgment was rendered, pre-

⁸ *Felker v. City of New Whatcom*, 16 Wash. 178, 47 Pac. 505 [1896].

⁹ *Cox v. Bird*, 88 Ind. 142 [1882].

¹⁰ *Hammond v. People for use*, 178 Ill. 254, 52 N. E. 1030 [1899].

¹¹ *Neff v. Covington Stone and Sand Co.*, 108 Ky. 457, 462, 55 S. W. 697, 56 S. W. 723 [1900].

¹² *Spaulding v. Wesson*, 84 Cal. 141, 24 Pac. 377 [1890].

¹³ *Manning v. Den*, 90 Cal. 610, 27 Pac. 435 [1891]; *Neenan v. Smith*, 50 Mo. 525 [1872].

¹⁴ *Heman Construction Co. v. Loevy*, 179 Mo. 544, 78 S. W. 613 [1903]; *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1895]; *Neenan v. Smith*, 50 Mo. 525 [1872].

¹⁵ *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897].

¹⁶ See § 986 *et seq.*

¹⁷ *Williamson v. Joyce*, 137 Cal. 151, 69 Pac. 980 [1902].

¹⁸ *Williamson v. Joyce*, 137 Cal. 151, 69 Pac. 980 [1902].

cludes the parties from subsequently claiming that said judgment remained in full force and effect.¹⁹ Even after the expiration of the term at which such judgment was rendered, the court may regard it as vacated by mutual consent.²⁰ A judgment ordering the sale of a tract of land for an assessment is said to affect only so much of the land as is subject to the lien of such assessment.²¹

§ 1183. Application for judgment of sale.

A judgment for sale for delinquent assessments rendered upon application after notice has been given, and an opportunity for hearing offered, confers authority to sell the property assessed;¹ under statutes in which provision is made for collecting an assessment by a proceeding in some respects intermediate between the formal action or suit to enforce an assessment, and a summary sale without the intervention of a court. This intermediate proceeding is one in which application is made upon delinquency

¹⁹ *Philadelphia v. Coulson*, 118 Pa. St. 541, 12 Atl. 604 [1888].

²⁰ *Philadelphia v. Coulson*, 118 Pa. St. 541, 12 Atl. 604 [1888].

²¹ *City of Philadelphia v. Phil. & Reading R. R. Co.*, 177 Pa. 292, 34 L. R. A. 564, 35 Atl. 610 [1896]. (A tract belonging to a railroad company, part of which was used for the road-bed and therefore not subject to the lien of the assessment.)

¹ *Treat v. City of Chicago*, 125 Fed. 644; (affirmed, 130 Fed. 443, 64 C. C. A. 645 [1903]); *Wiemers v. People ex rel. Price*, 225 Ill. 82, 80 N. E. 68 [1907]; *Rogne v. People ex rel. Goedtner*, 224 Ill. 449, 79 N. E. 662 [1906]; *Noonan v. People ex rel. Hanberg*, 221 Ill. 567, 77 N. E. 930 [1906]; *Gage v. People ex rel. Hanberg*, 219 Ill. 369, 76 N. E. 498 [1906]; *Gage v. People ex rel. Hanberg*, 219 Ill. 20, 76 N. E. 56 [1905]; *Phillips v. People ex rel. Goedtner*, 218 Ill. 450, 75 N. E. 1016 [1905]; *People ex rel. Russel v. Brown*, 218 Ill. 375, 75 N. E. 989 [1905]; *Wagg v. People ex rel. Hanberg*, 218 Ill. 337, 75 N. E. 977 [1905]; *Harman v. People ex rel. Munsterman*, 214 Ill. 454, 73 N. E. 760 [1905]; *Gage v. People ex rel. Hanberg*, 213 Ill. 468, 72 N. E. 1108 [1905]; *People ex rel.*

Jeffries v. Record, 212 Ill. 62, 72 N. E. 7 [1904]; *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904]; *Gage v. People ex rel. Hanberg*, 207 Ill. 61, 69 N. E. 635 [1904]; *McDonald v. People ex rel. Hanberg*, 206 Ill. 624, 69 N. E. 509 [1904]; *Perry v. People ex rel. Hanberg*, 206 Ill. 334, 69 N. E. 63 [1903]; *People ex rel. Selby v. Dyer*, 205 Ill. 575, 69 N. E. 70 [1903]; *People ex rel. Raymond v. Fuller*, 204 Ill. 290, 68 N. E. 371 [1903]; *Bass v. People ex rel. Raymond*, 203 Ill. 206, 67 N. E. 806 [1903]; *Chew v. People ex rel. Raymond*, 202 Ill. 380, 66 N. E. 1069 [1903]; *Johnson v. People ex rel. Reed*, 202 Ill. 306, 66 N. E. 1081 [1903]; *Shepard v. People ex rel. Raymond*, 200 Ill. 508, 65 N. E. 1068 [1903]; *McChesney v. People ex rel. Raymond*, 200 Ill. 146, 65 N. E. 626 [1902]; *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902]; *Vandersyde v. People ex rel. Raymond*, 195 Ill. 200, 62 N. E. 806 [1902]; *Givins v. People ex rel. Raymond*, 194 Ill. 150, 88 Am. St. Rep. 143, 52 N. E. 534 [1902]; *People ex rel. Funk v. Keener*, 194 Ill. 16, 61 N. E. 1069 [1901]; *Gross v. People ex rel. Raymond*, 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901];

to a court of competent jurisdiction for a judgment ordering a sale of the property. A proceeding of this sort is said to be an

Elgin, Joliet & Eastern R. R. Co. v. Hohenshell, 193 Ill. 159, 61 N. E. 1102 [1901]; People ex rel. Raymond v. Whidden, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; Fischback v. People ex rel. Tetherington, 191 Ill. 171, 60 N. E. 887 [1901]; Conlin v. The People ex rel. Lassig, 190 Ill. 400, 60 N. E. 55 [1901]; Job v. City of Alton, 189 Ill. 256, 82 Am. St. Rep. 448, 59 N. E. 622 [1901]; Illinois Central R. R. Co. v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901]; Johnson v. People ex rel. Raymond, 189 Ill. 83, 59 N. E. 515 [1901]; Glover v. People ex rel. Raymond, 188 Ill. 576, 59 N. E. 429 [1901]; Glover v. People ex rel. Raymond, 188 Ill. 576, 59 N. E. 429 [1901]; Blount v. People ex rel. Raymond, 188 Ill. 538, 59 N. E. 241 [1901]; Lawrence v. People ex rel. Foote, 188 Ill. 407, 58 N. E. 991 [1900]; Fiske v. People ex rel. Raymond, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985 [1900]; Vennum v. People ex rel. Galloway, 188 Ill. 158, 58 N. E. 979 [1900]; Perisho v. People ex rel. Gannaway, 185 Ill. 334, 56 N. E. 1134 [1900]; Pipher v. People ex rel. Gannaway, 183 Ill. 436, 56 N. E. 84 [1900]; McManus v. People ex rel. Raymond, 183 Ill. 391, 55 N. E. 886 [1899]; Clingman v. People ex rel. Raymond, 183 Ill. 339, 55 N. E. 727 [1899]; Murphy v. People ex rel. Raymond, 183 Ill. 185, 55 N. E. 678 [1899]; People ex rel. McCornack v. McWethy, 177 Ill. 334, 52 N. E. 479 [1898]; Johnson v. People ex rel. Kochersperger, 177 Ill. 64, 52 N. E. 308 [1898]; Upton v. People ex rel. Murrie, 176 Ill. 632, 52 N. E. 358 [1898]; Church v. People ex rel. Kochersperger, 174 Ill. 366, 51 N. E. 747 [1898]; Kunst v. People ex rel. Kochersperger, 173 Ill. 79, 50 N. E. 168 [1898]; People ex rel. Kochersperger v. Warneke, 173 Ill. 40, 50 N. E. 221 [1898]; Steidl v. People

ex rel. Alexander, 173 Ill. 29, 50 N. E. 129 [1898]; Gross v. People ex rel. Kochersperger, 172 Ill. 571, 50 N. E. 334 [1898]; Larson v. City of Chicago, 172 Ill. 298, 50 N. E. 179 [1898]; Connecticut Mutual Life Insurance Co. v. People ex rel. Kochersperger, 172 Ill. 31, 49 N. E. 989 [1898]; Young v. People ex rel. Kochersperger, 171 Ill. 299, 49 N. E. 503 [1898]; Larson v. People ex rel. Kochersperger, 170 Ill. 93, 48 N. E. 443 [1897]; Hammond v. People for Use, etc., 169 Ill. 545, 48 N. E. 573 [1897]; Walker v. People ex rel. Kochersperger, 169 Ill. 473, 48 N. E. 694 [1897]; People ex rel. Kochersperger v. Hurford, 167 Ill. 226, 47 N. E. 368 [1897]; O'Neil v. People ex rel. Kochersperger, 166 Ill. 561, 46 N. E. 1096 [1897]; People ex rel. Kochersperger v. Clifford, 166 Ill. 165, 46 N. E. 770 [1897]; Cass v. People ex rel. Kochersperger, 166 Ill. 126, 46 N. E. 729 [1897]; People ex rel. Kochersperger v. Markley, 166 Ill. 48, 46 N. E. 742 [1897]; Nicholes v. People ex rel. Kochersperger, 165 Ill. 502, 46 N. E. 237 [1897]; People ex rel. McCornack v. McWethy, 165 Ill. 222, 46 N. E. 187 [1897]; People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. 10 [1897]; Zeigler v. People ex rel. Kochersperger, 164 Ill. 531, 45 N. E. 965 [1897]; People ex rel. Kochersperger v. Eggers, 164 Ill. 515, 45 N. E. 1074 [1897]; Steenberg v. People ex rel. Kochersperger, 164 Ill. 478, 45 N. E. 970 [1897]; People of the State of Illinois v. Weber, 164 Ill. 412, 45 N. E. 723 [1897]; Gage v. People ex rel. Kochersperger, 163 Ill. 39, 44 N. E. 819 [1896]; Harris v. City of Chicago, 162 Ill. 288, 44 N. E. 437 [1896]; Illinois Central Railroad Company R. R. Co. v. People ex rel. Alexander, 161 Ill. 244, 43 N. E. 1107 [1896]; Chandler v. People ex rel. Kochersperger, 161 Ill. 41, 43 N. E.

action *in rem*.² If a prior proceeding in confirmation has been had, questions arising before confirmation cannot be heard at such application for judgment, if the court which confirmed the assessment had jurisdiction to make such order of confirmation.³ Questions arising after confirmation, however, can be heard.⁴ If the judgment of confirmation has been reversed, the court has no power to order a sale of the property assessed.⁵ Under some statutes, similar provision is made for an application for a judgment, but no provision is made for a prior confirmation by a court of competent jurisdiction,⁶ and orders of sale are to be made by the city court, at which proceedings the property owner is to be given an opportunity to show cause why a decree of sale should not be entered.⁷

§ 1184. Notice of application for judgment of sale.

Notice of such application is ordinarily required by statute. It is sufficient if such notice is published for the number of times required by statute,¹ and insufficient if it is published for a less number of times.² The notice must show for what year the assessment for which the property is to be sold, is levied.³ Notice

590 [1896]; *Doremus v. People*, Kochersperger, 161 Ill. 26, 43 N. E. Rep. 701 [1896]; *Dickey v. People ex rel. Kochersperger*, 160 Ill. 633, 43 N. E. 606 [1896]; *Boynnton v. People ex rel. Kern*, 159 Ill. 553, 42 N. E. 842 [1896]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Tucker v. People ex rel. Wall*, 156 Ill. 108, 40 N. E. 451. [1895]; *Link v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893]; *The People ex rel. Ijams v. Meyers*, 124 Ill. 95, 16 N. E. 89 [1889]; *Blake v. The People for Use of Caldwell*, 109 Ill. 504 [1884]; *Prout v. The People ex rel. Miller*, 83 Ill. 154 [1876]; *The People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875]; *Smith v. The People ex rel. Rumsey*, 75 Ill. 36 [1874]; *Pittsburg, Ft. Wayne & Chicago Railroad Co. v. City of Chicago*, 53 Ill. 80 [1869]; *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. Rep. 829 [1899]; *Rogers v. Heyderstaedt*, 65 Minn. 229, 68 N. W. 8 [1896]; *State of Minnesota ex rel.*

Thompson v. District Court of Ramsey County, 51 Minn. 401, 53 N. W. 714 [1892].

² *St. John v. City of East St. Louis* 50 Ill. 92 [1869].

³ See § 927 *et seq*; 986 *et seq*.

⁴ See § 989.

⁵ *Glos v. Collins*, 110 Ill. App. 121 [1903]; (judgment of confirmation reversed in *Foss v. City of Chicago*, 184 Ill. 436, 56 N. E. 1133 [1900]).

⁶ *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899].

⁷ *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899].

¹ *Andrews v. People ex rel. Rumsey*, 83 Ill. 529 [1876]; *Jenks v. City of Chicago*, 48 Ill. 296 [1868].

² *Hawes v. Fliegler*, 87 Minn. 319, 92 N. W. 332, 934 [1902].

³ *Gage v. Webb*, 141 Ill. 533, 31 N. E. 130 [1893]; *Gage v. Dupuy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386 [1892].

of application for judgment for an assessment for a given improvement does not authorize a judgment for an assessment for a different improvement.⁴ Notice of application for a judgment of sale for a special assessment may be given, together with notice of application for judgment for sale for ordinary taxes,⁵ or separate notices may be given therefor.⁶ A finding by the court that due notice was given is *prima facie* evidence, at least, that such notice was given;⁷ and is conclusive on collateral attack.⁸ Defects in the notice are waived if the property owner appears and is heard upon the merits.⁹ A property owner who files an objection based on the theory that he is a resident landowner, cannot complain if the court assumes such fact to be true.¹⁰ Actual notice of the pendency of an application for a judgment of sale has been held to be a substitute for formal notice.¹¹ A premature application for judgment before the day limited in the notice for payment, has been held to be an error or irregularity not affecting the substantial justice of the assessment, and hence to be cured by a provision that assessment proceedings shall not be set aside for errors or irregularities not affecting substantial justice.¹² A different result was reached under a statute which made an assessment fall due thirty days from the date of the notice, since the property owners would thus be misled as to the time as to which the assessment should be paid.¹³ A certificate of publication of a notice or application for a judgment of sale which recites that the foregoing "is a list of delinquent . . . lots" upon which taxes remained due and unpaid, and also "a list of delinquent . . . lots" upon which special assessments remained due and unpaid, "with notices hereto attached, and that the same were duly published and advertised," has been held to be ambiguous, since the words "the same" apply to and in-

⁴ Waller v. City of Chicago, 53 Ill. 88 [1869].

⁵ The People ex rel. Miller v. Sherman, 83 Ill. 165 [1876].

⁶ McCauley v. The People ex rel. Huck, 87 Ill. 123 [1877].

⁷ Prout v. The People, Miller, 83 Ill. 154 [1876].

⁸ Illinois Central Railway Co. v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901].

⁹ Dickey & Baker v. People ex rel. Hanberg, 213 Ill. 51, 72 N. E. 791

[1904]; Zeigler v. People ex rel. Kochersperger, 164 Ill. 531, 45 N. E. 965 [1897].

¹⁰ Elgin, Joliet & Eastern R. R. Co. v. Hohenshell, 193 Ill. 159, 61 N. E. 1102 [1901].

¹¹ Hewes v. Village of Winnetka, 60 Ill. App. 654 [1895].

¹² The People ex rel. Little v. Clayton, 115 Ill. 150, 4 N. E. 193 [1886].

¹³ Bowman v. People ex rel. Baker, 137 Ill. 436, 27 N. E. 598 [1892].

clude all the lists and notices thereinbefore mentioned.¹⁴ The notice is fatally defective if it does not contain the names of the delinquent owners.¹⁵ A slight variance in the name of the property owner is not necessarily fatal.¹⁶ If the owner actually has knowledge of the proceeding to sell his land and appears and is heard on the merits, the omission to include his name in the list of delinquent property owners is held not to be a defense to the application for a judgment of sale.¹⁷ The list of delinquent assessments which is published must contain a correct description of the property assessed, and the notice must conform thereto.¹⁸ A description of a property in a delinquent list as being in "Sherman and Krutz's Roseland Park Addition to Pullman," and in the notice as being in "Herman and Krutz's Roseland Park Addition to Pullman," is insufficient, as such variance is fatal.¹⁹

§ 1185. Who may apply for judgment.

If a constitution has been adopted containing a provision that land must be sold by some general officer of the county, authorized to receive taxes, such provision does not apply to a judgment rendered before the constitution took effect, and before the necessary legislation was passed.¹ Accordingly, the city collector of taxes can apply for such judgment.² After such constitutional provision takes effect, the city collector cannot apply for such judgment.³ If the county treasurer is authorized to collect taxes, he is the proper person to apply for judgment for special assessments.⁴

¹⁴ *Gage v. People ex rel. Hanberg*, 213 Ill. 410, 72 N. E. 1084 [1904].

¹⁵ *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301 [1901].

¹⁶ *People v. Smythe*, 232 Ill. 242, 83 N. E. 821 [1908]; same style 232 Ill. 348, 83 N. E. 858 [1908]; 232 Ill. 259, 83 N. E. 828 [1908]; (cases where the names of the owners were stated on the delinquent list as "Smith and Chew" and in the notice as "Smyth and Chew").

¹⁷ *Zeigler v. People ex rel. Kochersperger*, 164 Ill. 531, 45 N. E. 965 [1897].

¹⁸ *Smythe v. People ex rel. Hanberg*, 219 Ill. 76, 76 N. E. 82 [1905].

¹⁹ *Smythe v. People ex rel. Hanberg*, 219 Ill. 76, 76 N. E. 82 [1905].

¹ *Garrick v. Chamberlain*, 97 Ill. 620, [1881].

² *Garrick v. Chamberlain*, 97 Ill. 620 [1881].

³ *Brown v. City of Chicago*, 62 Ill. 289 [1871]; *Marsh v. City of Chicago*, 62 Ill. 115 [1871]; *Harrison v. City of Chicago*, 60 Ill. 360 [1871]; *Hills v. City of Chicago*, 60 Ill. 86 [1871].

⁴ *People ex rel. Miller v. Brislin*, 80 Ill. 423 [1875].

§ 1186. Form of application.

In an application for judgment no formal pleadings are necessary.¹ In an application for a judgment of sale, the delinquent list is equivalent to a declaration,² and the notice thereof is equivalent to process.³ An error in naming the board by which the assessment was levied does not render an application for a judgment of sale invalid.⁴ A judgment must describe the land so as to identify it.⁵ If no land exists which corresponds to the description given, the court may refuse to enter judgment, though such judgment, if rendered, would be a nullity.⁶ In the absence of a statute requiring it, it is not necessary that the original assessment warrants be filed when judgment of sale is sought.⁷

§ 1187. Form of objections.

Land owners whose objections are identical, may join in objecting to an application for a judgment of sale.¹ The property owners must reduce to writing, and file, the objections upon which they intend to rely.² The objections relied upon must be specifically stated.³ No objection can be interposed which could have been made to the confirmation of the assessment;⁴ but if the objection concerns matters arising after confirmation, such objection may be interposed.⁵ The objection that the special assessment has not been confirmed, presents an issue of fact.⁶ Objections must be supported by proof, and cannot be determined finally upon demurrer.⁷

¹ *People ex rel. McCornack v. McWethy*, 177 Ill. 334, 52 N. E. 479 [1898].

² *Smythe v. People ex rel. Hanberg*, 219 Ill. 76, 76 N. E. 82 [1905].

³ *Smythe v. People ex rel. Hanberg*, 219 Ill. 76, 76 N. E. 82 [1905].

⁴ *Cummings & Company v. People ex rel. Hanberg*, 213 Ill. 443, 72 N. E. 1094 [1905].

⁵ *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. 1074 [1897].

⁶ *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. 1074 [1897].

⁷ *Rogers v. Heyderstaedt*, 65 Minn. 229, 68 N. W. 8 [1896].

¹ *People v. Phinney*, 231 Ill. 180, 83 N. E. 143 [1907]; *People ex rel. Funk v. Keener*, 194 Ill. 16, 61 N. E. 1069 [1901].

² *Jerome v. City of Chicago*, 62 Ill. 285 [1871].

³ *Smith v. City of Chicago*, 57 Ill. 497 [1870].

⁴ *Nicholas v. People ex rel. Kochersperger*, 171 Ill. 376, 49 N. E. 574 [1898].

⁵ *Creote v. Chicago*, 56 Ill. 422 [1870].

⁶ *Dempster v. People ex rel. Kern*, 158 Ill. 36, 41 N. E. 1022 [1895].

⁷ *The People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872 [1890].

§ 1188. Term of court.

The term of court at which application may be made depends upon the provisions of the statute authorizing such application.¹ A statute applicable to judgments for delinquent taxes does not apply to applications for judgment for assessments, and does not determine at what term of court such application must be made.²

§ 1189. Rendition of judgment.

Judgment can be rendered only for such assessments as are delinquent.¹ The return makes out a *prima facie* case of delinquency.² A statute which authorizes an application for judgment upon such assessments as have been returned as delinquent on or before the first day of April, means assessments which are delinquent at that date, and not assessments which have been returned by that date.³ Judgment of sale cannot be entered until the amount due is determined;⁴ and rebates for the excess of the amount of the assessment over the cost, if susceptible of accurate determination, should be made before judgment of sale is rendered.⁵ Refusal to enter judgment because of the omission of the clerk of the court to certify the assessment roll, and the judgment of confirmation to the clerk of the city, which omission makes the warrant issued by the city clerk void, does not destroy the lien of the assessment,⁶ and if such defects are corrected by subsequent proceedings, judgment of sale may be rendered on a subsequent application.⁷ The judgment of sale must show the amount for which judgment is entered; but if the error is only in the entry of the judgment, in failing to show such amount, the judgment may be reversed with directions to enter it properly.⁸ The judgment of sale must show with sufficient accuracy the property which is subject to the lien of the assessed,

¹ Illinois Central R. R. Co. v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901]; Leindecker v. The People ex rel. Johnson, 98 Ill. 21 [1881].

² Leindecker v. The People ex rel. Johnson, 98 Ill. 21 [1881].

³ Steidl v. People ex rel. Alexander, 173 Ill. 29, 50 N. E. 129 [1898].

⁴ Illinois Central Railroad Co. v. People ex rel. Alexander, 161 Ill. 244, 43 N. E. 1107 [1896].

⁵ Steidl v. People ex rel. Alexander, 173 Ill. 29, 50 N. E. 129 [1898].

⁶ Gage v. People ex rel. Hanberg, 219 Ill. 634, 76 N. E. 834 [1906].

⁷ Gage v. People ex rel. Hanberg, 219 Ill. 634, 76 N. E. 834 [1906].

⁸ Brackett v. People of Weienett, 115 Ill. 29, 3 N. E. 723 [1886].

⁹ Brackett v. People of Weienett, 115 Ill. 29, 3 N. E. 723 [1886].

¹⁰ Gage v. People ex rel. Hanberg, 213 Ill. 457, 72 N. E. 1099 [1905].

and the sale of which is decreed.⁹ If there is no land answering to the description given, the court may refuse to enter judgment of sale;¹⁰ and if judgment is rendered in such a case it is void.¹¹ Thus, a description of land as being a tract of certain dimensions in a certain quarter section, without anything further as a means of locating it, is insufficient.¹² A judgment which orders sale of a less amount of the tract than that which is subject to the lien of the assessment is, if erroneous, not prejudicial to the property owner.¹³ A finding that all notices had been complied with, and that all affidavits had been complied with, is meaningless and cannot be construed to mean that the notices required by statute have been given.¹⁴ It may be provided by statute that the judgment of sale must be signed by the judge who renders it.¹⁵ A judgment which is not signed, is not a bar to a subsequent judgment which is signed as required by statute.¹⁶ Entry of a judgment of sale exhausts the power of the court,¹⁷ even if such judgment is erroneous as not signed by the judge,¹⁸ and entry of another judgment of sale against such lots at a subsequent term is error.¹⁹ Under a statute which requires judgments, orders, and the like, to be recorded, omission to perform such acts does not render the judgment invalid, even if the statute is regarded as mandatory, since such acts are to be performed after the judgment.²⁰

⁹ *Gage v. People ex rel. Hanberg*, 207 Ill. 61, 69 N. E. 635 [1904]; *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. 1074 [1897]. See as to sufficiency of description, *Security Trust Co. v. Heyderstaedt*, 64 Minn. 409, 67 N. W. 219 [1896].

¹⁰ *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. 1074 [1897].

¹¹ *People ex rel. Russell v. Colegrove*, 218 Ill. 545, 75 N. E. 991 [1905]; *Vennum v. People ex rel. Galloway*, 188 Ill. 158, 58 N. E. 979 [1900]; *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. 1074 [1897].

¹² *People ex rel. Russel v. Colegrove*, 218 Ill. 545, 75 N. E. 991 [1905].

¹³ *The Bloomington Cemetery Asso-*

ciation v. The People of the State of Illinois, 139 Ill. 16, 28 N. E. 1076 [1893].

¹⁴ *People v. Phinney*, 231 Ill. 180, 83 N. E. 143 [1907].

¹⁵ *Cummings & Company v. People ex rel. Hanberg*, 213 Ill. 443, 72 N. E. 1094 [1905].

¹⁶ *Cummings & Company v. People ex rel. Hanberg*, 213 Ill. 443, 72 N. E. 1094 [1905].

¹⁷ *Dickey & Baker v. People ex rel. Hanberg*, 213 Ill. 51, 72 N. E. 791 [1904].

¹⁸ *Dickey & Baker v. People ex rel. Hanberg*, 213 Ill. 51, 72 N. E. 791 [1904].

¹⁹ *Dickey & Baker v. People ex rel. Hanberg*, 213 Ill. 51, 72 N. E. 791 [1904].

²⁰ *Smith v. City of Chicago*, 57 Ill. 497 [1870].

§ 1190. Summary sale.

Under some statutes an assessment may be enforced by a summary sale of the property assessed, under the direction of the executive officers who are authorized by statute to conduct such sales.¹ A statute authorizing the collection of assessments has been held to imply a proceeding in equity to sell, and not to authorize a summary tax sale.² In the absence of a statute authorizing a summary sale, such sale cannot be had under authority conferred by a city ordinance.³

§ 1191. Precept for sale.

Under some statutes, a precept for a sale must be issued as the means of enforcing the assessment.¹ Such precept can be issued only if ordered by the council.² A precept cannot be issued upon an invalid assessment.³ Only the land named in a precept can be sold thereunder.⁴ A precept cannot be issued against two or more lots, for the collection of the aggregate sum due as an assessment upon all the lots where the assessment is levied against each lot separately.⁵ Such a precept is, however, not absolutely void, and a sale thereunder is valid if objection is not made in time to the form of the precept.⁶ The precept must be signed by the officer authorized by statute.⁷ A precept cannot be issued after the repeal of the statute authorizing a sale by precept, and requiring the collection of an assessment by proceedings in a court of competent jurisdiction.⁸ A notice of issuing a precept in which the amount of the assessment is slightly mis-stated, does not make the precept invalid.⁹

¹ Zeigler v. Hopkins, 117 U. S. 683, 29 L. 1019, 6 S. 919 [1886]; Bothwell v. Millikan, 104 Ind. 162, 2 N. E. 959, 3 N. E. 816 [1885].

² McInery v. Reed, 23 Ia. 410 [1867].

³ Allen v. City of Galveston, 31 Tex. 302 [1879].

⁴ Pardridge v. Village of Hyde Park, 131 Ill. 537, 23 N. E. 345 [1890]; Martin v. Wills, 157 Ind. 153, 60 N. E. 1021 [1901]; First Presbyterian Church v. City of Lafayette, 42 Ind. 115 [1873].

⁵ Martin v. Wills, 157 Ind. 153, 60 N. E. 1021 [1901].

⁶ Lammers v. Balfe, 41 Ind. 218 [1872].

⁷ Langhor v. Smith, 81 Ind. 495 [1882].

⁸ Martindale v. Palmer, 52 Ind. 411 [1875].

⁹ Martindale v. Palmer, 52 Ind. 411 [1875].

¹ City of Jeffersonville v. Patterson, 32 Ind. 140 [1869].

² Crowell v. Jaqua, 114 Ind. 246, 15 N. E. 242 [1887].

³ Burt v. Hasselman, 139 Ind. 196, 38 N. E. 598 [1894]; (amount due \$32.20; amount stated in notice \$31.10).

§ 1192. Affidavit for precept.

If the statute requires an affidavit for issuing a precept, such affidavit is necessary;¹ but in the absence of such statute an affidavit is not necessary.² An affidavit which contains the statutory requirements is sufficient.³ It need not contain a recapitulation of the steps that have already been taken.⁴ If a notice to the proper owner is combined with an affidavit for a precept, and the notice contains a description of the property assessed, the affidavit is not invalid because such description is not repeated therein.⁵ The statutory requirements must, however, appear with substantial accuracy; and an affidavit which does not contain substantially the statements required by statute is void.⁶ If the statute requires the affidavit to show the amount due, an affidavit in which the amount due is left blank, is insufficient.⁷ An affidavit may be made by one or two or more joint contractors,⁸ whether the other contractors are dead,⁹ or whether they are alive.¹⁰

§ 1193. Notice of summary sale.

Under a statute providing that the "time, place, and manner of sale" should be the same in municipal tax sales as in sheriff's sales for taxes, it is not necessary that a sale for assessments should be advertised in the same newspaper as that in which sheriff's sales for city and county taxes are advertised.¹ If a summary judgment of sale may be entered upon motion, the statutes authorizing such summary proceeding must be complied with strictly, and judgment cannot be entered if notice for the correct amount is not given.²

¹ Clements v. Lee, 114 Ind. 397, 16 N. E. 799 [1887]; City of Indianapolis v. Patterson, 33 Ind. 157 [1870].

² Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897].

³ Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889 [1891].

⁴ Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889 [1891].

⁵ Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889 [1891].

⁶ Clements v. Lee, 114 Ind. 397, 16 N. E. 799 [1887].

⁷ Clements v. Lee, 114 Ind. 397, 16

N. E. 799 [1887]; (distinguished in Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889 [1891]).

⁸ Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889 [1891]; Jenkins v. Stetler, 118 Ind. 275, 20 N. E. 788 [1888].

⁹ Ray v. City of Jeffersonville, 90 Ind. 567 [1883].

¹⁰ Jenkins v. Stetler, 118 Ind. 275, 20 N. E. 788 [1888].

¹ Bacon v. City of Savannah, 86 Ga. 301, 12 S. E. 580 [1890].

² Mayor and Commonalty of Alexandria v. Hunter, 16 Va. (2 Munf.) 228 [1811].

§ 1194. Sale as discharge of lien.

A proceeding to foreclose an assessment bars the lien of the assessment as to those who are parties to the foreclosure proceeding,¹ but not as to others.² If two assessment liens exist and the earlier has priority, a sale under the later lien followed by a sale under the earlier gives a superior title to the purchaser under the earlier lien, since the deed relates back to the date of the lien.³ The purchaser at an assessment sale takes free from the lien of the assessment under which the land was sold.⁴ If the plaintiff in a suit on an apportionment warrant to enforce an assessment lien buys in the property, this merges the assessment.⁵ If the assessment exists in favor of the city and the city purchases the land at the sale for the assessment, this merges the assessment.⁶ A sale for the satisfaction of general taxes cuts off the lien of an assessment in jurisdictions where the tax lien is prior to the lien of the assessment.⁷ Under some statutes, the lien of an assessment is not discharged by a judicial sale, unless a fund is raised by such sale sufficient to discharge the assessment.⁸ This is true, even if several liens exist in favor of the city on one of which the land is sold.⁹ Under such statute the lien is discharged if the property is sold for more than enough to pay the claim,¹⁰ even though by an erroneous order of the court the fund is not applied to satisfy the assessment.¹¹ While a sale for more than enough to pay the lien operates as a discharge, actual payment to the party entitled thereto is necessary to discharge the debt.¹²

¹ *Williamson v. Joyce*, 137 Cal. 151, 69 Pac. 980 [1902].

² *Wood v. Brady*, 68 Cal. 78, 5 Pac. 623, 8 Pac. 599 [1885].

³ *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891].

⁴ *Fitzgerald v. City of Sioux City*, 125 Ia. 396, 101 N. W. 268 [1904].

⁵ *Kirwin v. Nevin*, 111 Ky. 682, 64 S. W. 647 [1901].

⁶ *Schneider v. City of Detroit*, 135 Mich. 570, 98 N. W. 258 [1904]; *Gray v. City of Detroit*, 113 Mich. 657, 71 N. W. 1107.

⁷ *Dougherty v. Henarie*, 47 Cal. 9 [1873]; *Pennsylvania Co. v. City of Tacoma*, 36 Wash. 656, 79 Pac. 306 [1905]; *City of Ballard v. Way*, 34 Wash. 116, 101 Am. St. Rep. 993, 74 Pac. 1067 [1904].

⁸ *Pittsburg's Appeal*, 70 Pa. St. (20 P. F. Smith) 142 [1871]; *Philadelphia to Use of Holgate v. Meager*, 67 Pa. St. (17 P. F. Smith) 345 [1871]; *Olyphant Borough to use v. Egreski*, 29 Pa. Super. Ct. 116 [1905]; *City v. Lewis*, 4 Phil. 135 [1860]; *Philadelphia v. Cox*, 1 Penna. Dis. Rep. 280 [1892].

⁹ *Philadelphia to use of Holgate v. Meager*, 67 Pa. St. (17 P. F. Smith) 345 [1871].

¹⁰ *Myer v. Burns*, 4 Phil. 314 [1861].

¹¹ *City v. Lewis*, 4 Phil. 135 [1860]. See also *Philadelphia to Use of Holgate v. Meager*, 67 Pa. St. (17 P. F. Smith) 345 [1871].

¹² *City of Philadelphia v. Cooke*, 30 Pa. St. (6 Casey) 56 [1858].

§ 1195. Effect of sale upon title to realty.

If a sale for a delinquent assessment is regular, or, if irregular, is not attacked in the time and method prescribed by the legislature, such sale is good as against the owner of the property, or those claiming under him by title subsequent to the sale.¹ If the assessment is a lien only upon the interest which the taxpayer has at the time of listing, a sale on an assessment against a property owner made after the county has bought in his land at a tax sale, cannot bar the right of the county.² Accordingly, if the land is purchased by the public corporation which has levied the assessment, the lien of the assessment is merged in the sale, and subsequent adverse possession is a bar to the city after the expiration of the statutory period of limitations.³ A sale had under a decree foreclosing the lien of an assessment is valid and conclusive as against an owner of the property who was a party to the proceedings.⁴ A sale had under a decree foreclosing the lien of an assessment, is not valid as against an owner who was not made a party to such proceedings.⁵ Neither has such sale any effect as against one who has purchased at a judicial sale, who is not made a party to subsequent proceedings to enforce an assessment.⁶ A mortgagee who was not made a party to such proceedings may redeem.⁷ Under a statute which makes a decree of foreclosure conclusive against persons claiming under the mortgagor, whose conveyances or liens were not of record when the action was commenced, a purchaser at a sale for an assessment is not included, and he is not bound by such subsequent decree in foreclosure.⁸ Under a statute requiring suit to be brought against the owner, it has been held to be sufficient to sue the party who appears upon the offi-

¹ Kelly v. Mendelsohn, 105 La. 490, 29 So. 894 [1901]; National Bond & Security Co. v. City of St. Paul, 91 Minn. 223, 97 N. W. 878 [1904]; Henningsen v. City of Stillwater, 81 Minn. 215, 83 N. W. 983 [1900]; Wright v. Jessup, 44 Wash. 618, 87 Pac. 930 [1906]; Pratt v. City of Milwaukee, 93 Wis. 658, 68 N. W. 392 [1896].

² Berger v. Multnomah County, 45 Or. 296, 78 Pac. 224 [1904].

³ Schneider v. City of Detroit, 135 Mich. 570, 98 N. W. 258 [1904].

⁴ Wright v. Jessup, 44 Wash. 618, 87 Pac. 930 [1906].

⁵ Gwynn v. Dierssen, 101 Cal. 563, 36 Pac. 103 [1894].

⁶ Salter v. Reed, 15 Pa. St. 260 [1850].

⁷ Corrigan v. Bell, 73 Mo. 53 [1880]; Olmstead v. Tarsney, 69 Mo. 396 [1879]; Krutz v. Gardner, 25 Wash. 396, 65 Pac. 771 [1901].

⁸ Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119 [1898]; Stansbury v. White, 121 Cal. 433, 53 Pac. 940 [1898].

cial records as the owner of the land assessed.⁹ A sale under a decree of court for an installment of an assessment has been held not to free the land from the lien of installments falling due thereafter.¹⁰

§ 1196. Effect of sale if assessment is invalid.

If the assessment is illegal, or is irregular in such a way as to affect the substantial rights of the property owner, a sale for such assessment is void in the absence of some statutory curative provision, or in the absence of waiver or estoppel of some kind.¹ The fact that the property owner has a right to redeem, does not render the sale valid under such circumstances.² Under a statute authorizing the collection of an assessment "as other taxes are collected" the purchaser at a void sale has a lien for the amount of the assessments, as far as the assessments originally constituted a valid lien upon the premises.³ It has been suggest-

⁹ *Vance v. Corrigan*, 78 Mo. 94 [1883]; *City of St. Joseph ex rel. Swenson v. Forsee*, 110 Mo. App. 127, 84 S. W. 98 [1904]; *Batty v. City of Hastings*, 63 Neb. 26, 88 N. W. 139 [1901].

¹⁰ *Kraut v. City of Dayton*, — Ky. —, 97 S. W. 1101 [1906].

¹ *Ziegler v. Hopkins*, 117 U. S. 683, 29 L. 1019, 6 S. 919 [1886]; *Wilcoxon v. San Luis Obispo*, 101 Cal. 508, 35 Pac. 988 [1894]; *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332 [1903]; *Hammond v. Carter*, 161 Ill. 621, 44 N. E. Rep. 274 [1896]; *Gage v. Dupuy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386 [1892]; *Wells v. City of Chicago*, 66 Ill. 280 [1872]; *Naltner v. Blake*, 56 Ind. 127 [1877]; *Gallagher v. Garland*, 126 Ia. 206, 101 N. W. 867 [1904]; *Smith v. Petree*, 25 Ky. Law Rep. 2014, 79 S. W. 251 [1904]; *State, McCarty, Pros. v. Mayor, etc., of Jersey City*, 44 N. J. L. (15 Vroom) 136 [1882]; *State, Baxter, Pros. v. Mayor and Aldermen of Jersey City*, 36 N. J. L. (7 Vr.) 188 [1873]; *State, Evans, Pros. v. Mayor and Common Council Jersey City*, 35 N. J. L. (6 Vr.) 381 [1872]; *Carron v.*

Martin, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]; (reversing *Martin v. Carron*, 26 N. J. L. (2 Dutcher) 228 [1857]; *McClave v. Mayor and Common Council of City of Newark*, 31 N. J. Eq. (4 Stew.) 472 [1879]; *Nehasane Park Association v. Lloyd*, 167 N. Y. 431, 60 N. E. 741 [1901]; *Newell v. Wheeler*, 48 N. Y. 486 [1872]; *Hopkins v. Mason*, 42 Howard (N. Y.) 115 [1871]; *Hopkins v. Mason*, 61 Barb. (N. Y.) 469 [1871]; *Paillet v. Youngs*, 6 N. Y. S. Ct. Rep. 50 [1850]; *Kennedy v. Newman*, 3 N. Y. Sup. Ct. Rep. 187 [1848]; *Younglove v. Hackman*, 43 O. S. 69, 1 N. E. 230 [1885]; *Stone v. Viele*, 38 O. S. 314 [1882]; *Goodall v. City*, 5 Ohio N. P. 428 [1898]; *Towne v. Salentine*, 92 Wis. 404, 66 N. W. 395 [1896]; *Dietz v. City of Neenah*, 91 Wis. 422, 65 N. W. 500, 64 N. W. 299 [1895]; *Liebermann v. City of Milwaukee*, 89 Wis. 336, 61 N. W. 1112 [1895]; *Dean v. Borchsenius*, 30 Wis. 234 [1872].

² *Stebbins v. Kay*, 123 N. Y. 31, 25 N. E. 207 [1890].

³ *Skelton v. Sharp*, 161 Ind. 383, 67 N. E. 535 [1903].

ed that a sale is void in case of a total want of power to sell,* but not void if such power exists, although it is exercised in an irregular manner.⁵ A curative statute passed after a sale, has been held to be without effect in making valid a sale which was void when made.⁶ If the officers of a city seize and sell property to pay a void special assessment, the city is liable in tort.⁷ If two judgments of confirmation have been rendered for the same assessment and the only invalidity that can be urged against the second judgment is the fact that the first judgment had been rendered and was not set aside until after the term had expired, a judgment of sale is valid since one of the two judgments of confirmation must have been properly rendered.⁸ If the first judgment was valid the second judgment is said to be void on the theory that the court exhausted its jurisdiction in entering the first judgment.⁹

§ 1197. Right of redemption.

Under many statutes it is provided that the property owner may redeem for a certain time after the sale of his property to pay delinquent assessments.¹ This right has been recognized under statutes which do not expressly confer it;² as where this right is secured by prior statutes which provide for the right of redemption in such cases, and the later statute does not expressly take away such right.³ A statute giving the right of redemption has been held to apply to sales made before the passage of such statute in which deeds have not yet been delivered.⁴ In such case, the delivery of the sheriff's deed to the purchaser after the passage of such statute, does not deprive the property owner

* *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465.

⁵ *Pratt v. City of Milwaukee*, 93 Wis. 658, 68 N. W. 392 [1896]; (distinguishing *Smith v. Sherry*, 54 Wis. 114, 11 N. W. 465).

⁶ *Hopkins v. Mason*, 61 Barb. 469 [1871]; *Zeigler v. Flack*, 54 N. Y. Sup. Ct. Rep. 69 [1886]; *Lennon v. Mayor, etc., of City of New York*, 5 Daly, 347 [1874].

⁷ *Durkee v. City of Kenosha*, 59 Wis. 123, 48 Am. Rep. 480, 17 N. W. 677 [1883].

⁸ *Keeler v. People ex rel. Kern*, 160 Ill. 179, 43 N. E. 342 [1896].

⁹ *Otis v. Weide*, 98 Minn. 227, 107 N. W. 540 [1906].

¹ *Heard v. Walton*, 39 Miss. 388 [1860]; *Duncan v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Green) 430 [1874]; *Lockwood v. Gehlert*, 53 Hun (N. Y.) 15, 6 N. Y. Supp. 20 [1889]; *Gault's Appeal*, 33 Pa. St. (9 Casey) 94 [1859].

² *Bryant v. Russell*, 127 Mo. 422, 30 S. W. 107.

³ *Bryant v. Russell*, 127 Mo. 422, 30 S. W. 107.

⁴ *Gault's Appeal*, 33 Pa. St. (9 Casey) 94 [1859]; *The City v. Lukins*, 3 Phil. 333 [1859].

of his right to redeem.⁵ A statute securing the right of redemption applies to lands purchased by a private individual as well as to land purchased by the public corporation which levies the assessment.⁶ If the owner of the property makes tender of a sufficient amount for the redemption of his property within the time limit, and such tender is refused, he may maintain ejectment to recover possession of the property for twenty-one years thereafter.⁷ If a suit is brought against a husband to enforce a sale of the homestead, and pending such suit he abandons his wife, leaving her in possession of the homestead, which is sold for the assessment without her knowledge of the suit or of the sale, it has been held that she may redeem, even though the statutory time for redemption has passed.⁸ The right of redemption exists though the bond which was issued for the cost of the improvement and on which the sale has been made has not been canceled,⁹ and, accordingly, the owner of the right of redemption cannot compel the cancellation of such bond.¹⁰

§ 1198. Method of redeeming.

If, by statute, tender of the money to be paid for the redemption of the property is to be made to the purchaser at the sale, the right to such money does not pass to the grantee of such property from such purchaser, and, accordingly, tender to the purchaser is sufficient.¹ If tender is made in the proper amount, and within the time specified by statute, the owner may bring ejectment,² and he may maintain such action within twenty-one years, since he is not required to bring it within the time fixed for redemption, his tender being regarded as equivalent to redemption for the purpose of ending the rights of the purchaser.³

§ 1199. Amount payable on redemption.

The amount payable upon redemption depends upon the provision of the statute authorizing redemption. Tender of all as-

⁵ Gault's Appeal, 33 Pa. St. (9 Casey) 94 [1859].

⁶ Heard v. Walton, 39 Miss. 388 [1860].

⁷ Hess v. Potts, 32 Pa. St. (8 Casey) 407 [1859].

⁸ Nevin v. Allen, — Ky. —, 26 S. W. 180, 15 Ky. Law Rep. 836 [1894].

⁹ Ellis v. Workman, 144 Cal. 113, 77 Pac. 822 [1904].

¹⁰ Ellis v. Workman, 144 Cal. 113, 77 Pac. 822 [1904].

¹ Hess v. Potts, 32 Pa. St. (8 Casey) 407 [1859].

² Hess v. Potts, 32 Pa. St. (8 Casey) 407 [1859].

³ Hess v. Potts, 32 Pa. St. (8 Casey), 407 [1859].

assessments due, as well as all unpaid and unlevied installments, together with the interest which the bondholder for whose benefit the assessment was made a lien, would be entitled to receive up to the maturity of the bond, was held to be sufficient.¹ It is frequently provided by statute that an additional penalty must be paid by a property owner who seeks to redeem from a sale.² If tracts of land belonging to different property owners have been sold together, the different owners may each redeem his own land; and, if this right is denied, each may have an injunction restraining the city from executing and delivering a declaration of sale to the purchaser.³ If the purchaser accepts money paid in to redeem property, he cannot subsequently question the right of the party who paid it in to redeem such property.⁴

§ 1200. Notice of expiration of redemption.

Under many statutes it is necessary to give notice of the time at which the right to redeem will end.¹ Such notice is insufficient if not given in substantial compliance with the terms of the statute;² even if it is not shown affirmatively that such error was prejudicial.³ If the statute requires the notice to be given by a certain period before the expiration of the redemption period, and such notice is to be published a certain number of times, publication must be complete by the end of the time thus fixed by statute.⁴ If the notice as given is insufficient, the city may give a new notice,⁵ even after the statutory period of redemption has expired.⁶ Under the statute which gives the property owner

¹ State ex rel. Embree v. Rathbun, 22 Wash. 651, 62 Pac. 85.

² Gage v. Parker, 103 Ill. 528 [1882].

³ Duncan v. City of Elizabeth, 25 N. J. Eq. (10 C. E. Green) 430 [1874].

⁴ Ellison v. Branstrator, 34 Ind. App. 410, 73 N. E. 146 [1904].

⁵ Such notice must under some statutes be given in the certificate of sale. Lantz v. Fishburn, — Cal. App. —, 91 Pac. 816 [1906].

² Brophy v. Harding, 137 Ill. 621, 27 N. E. 523, 34 N. E. 253 [1892]; Phillips v. City of Hudson, 31 N. J. L. (2 Vr.) 143 [1864]; Martin v. McCormick, 8 N. Y. 331 [1854]; Bennett v. Mayor, etc., of the City

of New York, 3 N. Y. Sup. Ct. Rep. 485 [1848].

³ Brophy v. Harding, 137 Ill. 621, 34 N. E. 253, 27 N. E. 523 [1892]; (a notice fixing the period for redemption as ending on a day two years from the date of sale; when as that day came on Sunday the property owner was entitled to redeem on the following Monday.)

⁴ Bergen v. Anderson, 62 Minn. 232, 64 N. W. 561 [1895]; Gaston v. Merriam, 33 Minn. 271, 22 N. W. 614 [1885].

⁵ Merchant's Realty Company v. City of St. Paul, 77 Minn. 343, 79 N. W. 1040 [1899].

⁶ Flanagan v. City of St. Paul, 65 Minn. 347, 68 N. W. 47 [1896].

a certain time after the sale to redeem; but a shorter time after the giving of a notice to redeem, time does not run against the property owner until the notice is published.⁷ Under some statutes notice for redemption cannot be given until the deed has been delivered to the purchaser.⁸ A slight error in the amount for which property is to be redeemed does not invalidate the proceedings.⁹ If the sale is void, redemption is not necessary to protect the rights of the property owner.¹⁰

§ 1201. Notice of application for deed.

Under some statutes it is necessary that notice of application for a deed under a sale for a delinquent assessment should be given. Such notice need not be dated if the statute does not require it.¹ Accordingly, it will not be rendered invalid because it bears the wrong date.² If the statute requires notice of the application for a tax deed to be served upon the owner of the premises, in possession thereof, failure to serve such notice invalidates the deed.³

§ 1202. Deed given on sale for assessment.

The deed which is given upon a sale for a delinquent assessment must be in the form prescribed by statute.¹ If, by act of the legislature of the territory, it is provided that such deeds shall be in the name of the territory as grantor, it is proper to make them out in such form, and the city need not appear as grantor.² Statutory provisions as to the contents of the deed must be observed strictly.³ If the deed purports to convey premises different from those the sale of which is ordered by the judgment, such deed is of no effect.⁴ If the deed describes the land by the number of the lot, block, acreage, and district, but does not refer to any map, an old map of the district may, never-

⁷ Rumsey v. City of Buffalo, 97 N. Y. 114 [1884].

⁸ Martin v. McCormick, 8 N. Y. 331 [1854]; Paillet v. Youngs, 6 N. Y. Sup. Ct. Rep. 50 [1850].

⁹ Willard v. Hodapp, 98 Minn. 269, 107 N. W. 954 [1906].

¹⁰ West Chicago Park Commissioners v. Novak, 121 Ill. App. 287 [1905].

¹ Clarke v. Mead, 102 Cal. 516, 36 Pac. 862 [1894].

² Clarke v. Mead, 102 Cal. 516, 36 Pac. 862 [1894].

³ Towne v. Salentine, 92 Wis. 404, 66 N. W. 395 [1896].

⁴ Felker v. City of New Whatcom, 16 Wash. 178, 47 Pac. 505 [1896].

⁵ Felker v. City of New Whatcom, 16 Wash. 178, 47 Pac. 505 [1896].

⁶ Hubbell v. Campbell, 56 Cal. 527 [1880].

⁷ Flint v. Webb, 25 Minn. 93 [1878].

theless, be considered in determining the sufficiency of the description.⁵ Under many statutes a deed is *prima facie* evidence of the validity and regularity of the proceedings under which it was issued.⁶ In the absence of such a statutory provision a deed is not *prima facie* evidence of the validity and regularity of the proceedings, but these must be shown affirmatively to prove title under the deed.⁷ A title to land under a judgment foreclosure of the lien of a street assessment relates back to the original lien upon which such foreclosure proceedings were brought.⁸ Accordingly, title derived through foreclosure proceedings upon an earlier lien is superior to a title upon similar proceedings upon a later lien, although judgment was rendered upon the later lien before it was rendered upon the earlier one.⁹ When the deed issues to the purchaser it relates back to the sale;¹⁰ and a deed to such realty, executed and delivered by the purchaser between the time of the sale and the time that he receives his deed passes the title that he acquires under such deed.¹¹ While a tax deed is ordinarily construed strictly, yet if the grantee takes possession and makes improvements, and no adverse claim to the property is made for a considerable period of time, such deed is construed liberally.¹²

§ 1203. Property rights of vendee at judicial sale.

If realty is sold at a judicial sale as the result of a suit brought to sell such land in order to satisfy the lien of the assessment, the purchaser at such sale acquires a title good as against all the parties to the suit over whom the court obtained jurisdiction.¹ If a suit has been brought for the purpose of selling land to satisfy

⁵ Best v. Wohlford, 144 Cal. 733, 78 Pac. 293 [1904].

⁶ United States Security and Bond Co. v. Wolfe, 27 Colo. 218, 60 Pac. 637 [1900]; Sanger v. Rice, 43 Kan. 580, 23 Pac. 633 [1890]; Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535 [1903]; Alvord v. City of Syracuse, 163 N. Y. 158, 57 N. E. 310 [1900]; Striker v. Kelley, 2 Denio. 323 [1845]; (reversing Striker v. Kelley, 7 Hill 9 [1844]).

⁷ Bucknall v. Story, 36 Cal. 67 [1868]; Pardridge v. Village of Hyde Park, 131 Ill. 537, 23 N. E.

345 [1890]; Nichols v. Voorhis, 18 Hun (N. Y.) 33 [1879].

⁸ Brady v. Burke, 90 Cal. 1, 27 Pac. 52 [1891].

⁹ Brady v. Burke, 90 Cal. 1, 27 Pac. 52 [1891].

¹⁰ Howard v. Brown, 197 Mo. 36, 95 S. W. 191 [1906].

¹¹ Howard v. Brown, 197 Mo. 36, 95 S. W. 191 [1906].

¹² Sanger v. Rice, 43 Kan. 580, 23 Pac. 633 [1890].

¹ Wright v. Jessup, 44 Wash. 618, 87 Pac. 930 [1906].

the lien of an assessment, and a judgment rendered in such action is erroneous but not void,² as where judgment is rendered as an entirety against two or more tracts of land which are subject to separate assessments, the purchaser at such sale acquires a valid title. A vendee who buys land which is sold in a suit to enforce the lien of an assessment against the property of an insane person, acquires a good title, although the claim has not been verified.³ If land is sold for overdue installments of an assessment, the purchaser takes subject to the installments which are not yet due.⁴ While the purchaser does not perfect his title until the execution deed is delivered to him by the proper officer, yet when such deed is delivered his title relates back to the date of the purchase.⁵ A sale which is ineffective to pass the rights of a minor co-tenant may nevertheless pass the rights of an adult co-tenant.⁶ If land is sold to the county for want of bidders at the tax sale, and the title of the county is not perfected until the period of redemption has passed, the interest of the county is not divested by the subsequent sale of such property for taxes,⁷ since the statute under which the sale is conducted provides that only such interest should be assessed as the taxpayer had in the realty at the time it was listed for taxation. A decree of sale of a tract of land belonging to a railroad company is not erroneous, although a part of such land is used for a roadbed, and is not affected by the lien of the assessment, since such sale would pass to the purchaser only such interest as was subject to the lien.⁸ A vendee acquires title as against a grantee from the owner claiming under an unrecorded deed.⁹ One who holds an interest in the property,¹⁰ such as a remainderman,¹¹ or a mortgagee,¹² and who is not made a party to the proceedings in which

² Gray v. Bowles, 74 Mo. 419 [1881].

³ Barron v. City of Lexington, — Ky. —, 105 S. W. 395 [1907].

⁴ Kraut v. City of Dayton, — Ky. —, 97 S. W. 1101 [1906].

⁵ Howard v. Brown, 197 Mo. 36, 95 S. W. 191 [1906].

⁶ Squillier v. Kern, 69 Pa. St. (19 P. F. Smith) 16 [1871].

⁷ Berger v. Multnomah County, 45 Or. 402, 78 Pac. 224 [1904].

⁸ City of Philadelphia v. Philadelphia & Reading R. R. Co., 177 Pa.

292, 34 L. R. A. 564, 35 Atl. 610 [1896].

⁹ City of St. Joseph ex rel. Swenson v. Forsee, 110 Mo. App. 127, 84 S. W. 98 [1904].

¹⁰ Meanor v. Goldsmith, 216 Pa. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907].

¹¹ Meanor v. Goldsmith, 216 Pa. 489, 10 L. R. A. (N. S.) 342, 65 Atl. 1084 [1907].

¹² Corrigan v. Bell, 73 Mo. 53 [1880].

the property is sold, is not affected thereby, and he may maintain ejectment against the vendee. The sale, under some statutes, transfers the lien of the assessment to the vendee, even if it may not pass the legal title.¹³ If the lien of an assessment is prior to that of an earlier mortgage, a valid sale under such assessment confers a title paramount to prior mortgage liens.¹⁴

§ 1204. Property rights of vendee at summary sale.

If land is sold at a summary sale, and not as the result of judicial proceedings, the property owner, having no prior opportunity to attack the validity of the assessment, or the regularity of the proceedings which result in the sale of the property, is not bound by such sale if the assessment is substantially defective, or if the sale is not had in substantial compliance with the statutes.¹ If the assessment is void,² as where a resolution of intention to do the work is not published for the requisite period,³ a deed under a sale to satisfy the lien of such assessment passes no title. If a defective notice is given of a summary sale, the vendee acquires no interest thereunder.⁴ On the other hand, if the assessment proceedings are merely irregular, but are not substantially defective, a property owner who has omitted or neglected to raise the question of the validity of the assessment when the opportunity was given to him by statute so to do, cannot attack the assessment collaterally in an action in ejectment against the purchaser at the sale.⁵ If certain public officials are charged with the duty of determining whether a contract has been performed properly or not, the question of the performance of such improvement contract cannot be tested collaterally in a suit to set aside the sale of land for the non-payment of assess-

¹³ Cullen v. Stranz, 124 Ind. 340, 24 N. E. 883 [1890].

¹⁴ O'Brien v. Bradley, 28 Ind. App. 487, 61 N. E. 942 [1901].

¹ Zeigler v. Hopkins, 117 U. S. 683, 29 L. 1019, 6 S. 919 [1886]; Mulligan v. Smith, 59 Cal. 206 [1881]; Carron v. Martin, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]; (reversing Martin v. Carron, 26 N. J. L. (2 Dutch.) 228 [1857]); Mitchell v. Lane, 62 Hun, 253, 16 N. Y. Supp. 707 [1891]; Adriance v.

McCafferty, 25 N. Y. Sup. Ct. Rep. 153 [1864]; Krutz v. Gardner, 18 Wash. 332, 51 Pac. 397 [1897].

² Brady v. Burke, 90 Cal. 1, 27 Pac. 52 [1891]; Neltner v. Blake, 56 Ind. 127 [1877].

³ Brady v. Burke, 90 Cal. 1, 27 Pac. 52 [1891].

⁴ Hawes v. Flieglar, 87 Minn. 319, 92 N. W. 223 [1902].

⁵ State, Evans, Pros. v. Mayor and Common Council of Jersey City, 35 N. J. L. (6 Vr.) 381 [1872].

ments, which suit is brought on the theory that the improvement has not been constructed in the proper manner.⁶

§ 1205. Evidence in ejectment.

In the absence of statute a vendee at an assessment sale who seeks to recover the property sold, must introduce in evidence the assessment proceedings, and the proceedings leading up to the sale, as well as his tax deed.¹ If, however, a tax deed is made *prima facie* evidence of its own validity, he may offer such deed in evidence without proof of the previous proceedings.² In a suit by the original owner of realty against a purchaser at a judicial sale it is sufficient if the original owner proves possession and use of the property, without showing the source of his title.³ If the tax deed shows on its face that the assessment was substantially defective, such deed is void, and is inadmissible in evidence to prove the title of the vendee.⁴ Thus, if the deed recites that the property was assessed to a certain named person and two unknown owners, it is said that the deed is void, since, under the statute, it was necessary to name the owner if he was known, and if he was unknown to state such fact, and it was impossible that the owner should be at once known and unknown.⁵

§ 1206. Right of vendee at void sale to recover payment from public corporation.

The right of the purchaser of property at an invalid sale to satisfy the lien of an assessment, as against the public corporation which has conducted such sale, is occasionally presented for adjudication. In the absence of statute, such purchaser cannot recover from the public corporation for the amount paid by him.¹

⁶ Simonton v. Hays, 88 Ind. 70 [1882].

¹ Bucknall v. Story, 36 Cal. 67 [1868].

² See § 1202.

³ Hopkins v. Mason, 61 Barb. 469 [1871].

⁴ Jatunn v. O'Brien, 89 Cal. 57, 26 Pac. 635 [1891].

⁵ Jatunn v. O'Brien, 89 Cal. 57, 26 Pac. 635 [1891].

¹ Richardson v. City of Denver, 17 Colo. 398, 30 Pac. 333 [1892]; McCague v. City of Omaha, 58 Neb. 37,

78 N. W. 463 [1899]; Pennock v. County of Douglas, 39 Neb. 293, 27 L. R. A. 121, 42 Am. St. Rep. 579, 58 N. W. 117 [1894]; Budge v. City of Grand Forks, 1 N. D. 309, 10 L. R. A. 165, 47 N. W. 390 [1890]; Dowell v. City of Portland, 13 Ore. 248, 10 Pac. 308 [1886]. See to the same effect, City of Logansport v. Humphrey, 84 Ind. 467; Packard v. New Limerick, 34 Me. 266; Hamilton v. Valiant, 30 Md. 139; Lynde v. Inhabitants of Melrose, 10 All. (Mass.) 49.

He cannot recover from the officer who conducts such sale, even if the sale is rendered invalid by reason of the neglect of such officer to give the notice required by law.² These results are reached upon the theory that the facts which lead up to the sale are matters of record, and that the purchaser is charged with the notice of the facts which appear of record and with notice of the legal formalities necessary to a valid sale. Under some statutes it is in effect provided that no recovery can be had. Under a statute which provides that persons who enter into contracts with a city, and agree to be paid out of the proceeds of special assessments, shall have no claim upon the city except for the collection of the special assessments levied for such improvement, no action will lie against the city to recover the amount paid for a void certificate of the sale of land to satisfy the lien of such assessments.³ In other jurisdictions it is held that the public corporation is bound to refund to the purchaser at a void sale.⁴ A purchased property at a sale to satisfy the lien of an assessment, and received assessment certificates therefor. Subsequently the judgment upon which such certificates were issued was held invalid by the trial court, and the city refunded the money to A. The city then entered a second judgment upon the assessments, and A purchased the property at a sale thereon, receiving other certificates therefor. Subsequently, in an action to which the city was not a party, it was held that the first judgment was valid, and that the second judgment and sale based thereon were invalid, and that, accordingly, the city had impliedly contracted upon issuing the second certificates that the purchaser should receive a lien which would mature into a valid title upon the property, or that if the property was redeemed by the owner, the purchaser should receive the consideration paid with interest, or that if the certificates determined judicially to be invalid as the result of *bona fide* litigation, the purchaser should receive the amount paid in by him with interest, and that, accordingly, A was entitled to recover the amount paid by him upon the second sale.⁵ The right of a vendee at a void sale to recover from the

² Hamilton v. Valient, 30 Md. 139 [1868].

³ Heller v. City of Milwaukee, 96 Wis. 134, 70 N. W. 1111 [1897].

⁴ Corbin v. Davenport, 9 Ia. 239 [1859]; Chapman v. City of Brook-

lyn, 40 N. Y. 372 [1869]; Mayor, Aldermen, etc., of New York v. Colgate, 12 N. Y. 140 [1854].

⁵ Otis v. City of St. Paul, 102 Minn. 208, 113 N. W. 269 [1907].

city, has been considered indirectly in cases in which it is held that the amount paid by such vendee need not be credited upon the assessment if the assessment is invalid and a second assessment is levied.⁶ The right of the purchaser at an invalid sale to recover from the public corporation is given in some jurisdictions by statute.⁷ A statute which provides for refunding money paid by the purchaser at a void tax sale, has been held not to apply to void assessment sales.⁸ In order that the purchaser at a sale may recover, it is necessary that the sale be declared to be void in proceedings instituted by the property owner.⁹ If the property owner does not attack the sale, the purchaser at such sale cannot do so.¹⁰ The right of the purchaser at a void sale to recover, is not contingent upon bringing an action to test the validity of the proceedings within three years from the date of the sale.¹¹ If realty has been assessed to the wrong person, and the assessment is on that account invalid, a purchaser who has paid for such property at an assessment sale, may recover the amount thus paid, if it is not shown that the city has paid the amount over to the contractors.¹² If land which has been sold at an assessment sale is actually redeemed, and the purchaser has accepted the money thus paid, the question of the right to redeem cannot be raised in proceedings brought by the party who redeems against persons who are alleged to have some interest in the property, to enforce against their interests the lien for the amount paid by him.¹³ If a city sells its own property for delinquent assessments, such sale is void, and the purchaser may recover the amount paid in by him,¹⁴ but he cannot compel the city to redeem under the statute for double the amount for which the property was sold, even if the city has set aside such amount for redemption.¹⁵ If a sale is made void by reason of facts sub-

⁶ *Wells v. City of Chicago*, 66 Ill. 280 [1872].

⁷ *Bennett v. Mayor, etc., of the City of New York*, 3 N. Y. Sup. Ct. Rep. 485 [1848].

⁸ *Heller v. City of Milwaukee*, 96 Wis. 134, 70 N. W. 1111 [1897].

⁹ *National Bond & Security Co. v. City of St. Paul*, 91 Minn. 223, 97 N. W. 878 [1904].

¹⁰ *National Bond & Security Co. v.*

City of St. Paul, 91 Minn. 223, 97 N. W. 878 [1904].

¹¹ *Otis v. City of St. Paul*, 94 Minn. 57, 101 N. W. 1066 [1904].

¹² *Chapman v. City of Brooklyn*, 40 N. Y. 372 [1869].

¹³ *Ellison v. Branstrator*, 34 Ind. App. 410, 73 N. E. 146 [1904].

¹⁴ *Taylor v. The People*, 66 Ill. 322 [1872].

¹⁵ *Taylor v. The People*, 66 Ill. 322 [1872].

sequent to such sale,¹⁶ as by failure to advertise the end of the redemption period as required by statute,¹⁷ the purchaser at such sale may recover. If, however, the city may give a new notice and issue a new deed thereunder which will be valid, and if it has not delayed unreasonably in so doing, it is not liable to the purchaser.¹⁸

§ 1207. Right of purchaser at invalid sale as against owner of realty.

Under many statutes the purchaser at a void sale which is conducted under a valid assessment, has a lien upon the land for the amount of such assessment.¹ This result has been reached under a statute which provides that a certain assessment shall be collected "as other taxes are collected," and by statute purchasers at void tax sales are given a lien for the amount of the valid taxes.² Under some statutes, the vendee at a void sale may recover from the owner the amount of the taxes and assessments which were legally due upon the property, and those which such vendee has paid after such sale.³ Thus, if the notice of the assessments designates the owners of the land as "the heirs" of the former owner, and the heirs and occupants alone have actual notice of the proceedings, the purchaser acquires no title, but he requires a lien for the amount of the assessment and costs paid by him, with interest from the date of the payment.⁴ If, however, the assessment is invalid, the purchaser cannot be reimbursed out of the property for the amount paid by him.⁵ The purchaser cannot enforce his lien if the assessment is for valid and invalid items, and the purchaser cannot show the amount of the valid items.⁶ If, by statute, notice that the property has

¹⁶ Phillips v. City of Hudson, 31 N. J. L. (2 Vr.) 143 [1864].

¹⁷ Phillips v. City of Hudson, 31 N. J. L. (2 Vr.) 143 [1864].

¹⁸ Merchant's Realty Company v. City of St. Paul, 77 Minn. 343, 79 N. W. 1040 [1899].

¹ Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535 [1903]; Mathews v. Wagner, — Wash. —, 94 Pac. 759 [1908]; (citing Denman v. Steinbach, 29 Wash. 179, 69 Pac. 751 [1902]; Packwood v. Briggs, 25 Wash. 530, 65 Pac. 846).

² Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535 [1903].

³ Chapman v. Sollars, 38 O. S. 378 [1882].

⁴ Smith v. Petree, — Ky. —, 79 S. W. 251, 25 Ky. Law Rep. 2014 [1904].

⁵ West Chicago Park Commissioners v. Novak, 121 Ill. App. 287 [1905]; Glos v. Cannata, 121 Ill. App. 215 [1905].

⁶ Naltner v. Blake, 56 Ind. 127 [1877].

been sold must be given to the owner, or his agent, in order to secure a valid tax deed for such property, an affidavit stating that notice was served upon the owner by handing it to A, his legal agent, is insufficient, as it does not show that A was such agent of the owner as to make service upon him equivalent to service upon the owner.⁷ If an apportionment warrant is issued against one who is not the owner of the property described in the warrant, and the property is sold, in a suit to enforce the lien, as the property of the person named in such warrant, and is purchased by the holder of the warrant, it has been held that such sale extinguishes the lien of the assessment and that the true owner of such realty is not in any way liable to such vendee and holder of such warrant.⁸ The public corporation cannot levy a re-assessment and re-sell the property for the benefit of the purchaser at a void sale.⁹

⁷ Gage v. Waterman, 121 Ill. 115, 13 N. E. 543 [1889].

⁸ Kirwin v. Nevin, 111 Ky. 682, 64 S. W. 647 [1901].

⁹ Budge v. City of Grand Forks, 1 N. D. 309, 10 L. R. A. 165, 47 N. W. 390 [1890]; Gaston v. City of Portland, 48 Or. 82, 84 Pac. 1040 [1906].

CHAPTER XXIII.

PARTIES, PLEADING AND PROCEDURE IN ENFORCEMENT OF ASSESSMENT.

§ 1208. Statutory provision conclusive as to plaintiff.

The legislature may regulate all questions of parties, pleadings and procedure in actions to collect assessments,¹ as long as the constitutional rights of the property owners are not infringed, and they are not deprived of substantial rights under guise of regulating procedure. Accordingly, statutory provisions are controlling, in determining who shall be the plaintiff in a proceeding to enforce an assessment.²

§ 1209. State as plaintiff.

Under some statutes it is provided that suit must be brought upon an assessment in the name of the state,¹ or of the territory.² Under such statutes, suit should be brought in the name of the people of the state for the use of the drainage district, and not in the name of the drainage district.³ Under such statutes, an action cannot be brought in the name of a city, and if so brought a judgment is void, even if it is in favor of the people of the state, as well as in favor of the city.⁴ If the suit is to be brought in the name of the state to the use of the commissioner, a suit brought in such name and showing that it is brought for the use of the commissioner, is properly brought, although the commissioner styles himself the "relator."⁵

¹ *Sullivan v. Mier*, 67 Cal. 264, 7 Pac. 691 [1885].

² *Sullivan v. Mier*, 67 Cal. 264, 7 Pac. 691 [1885].

³ *Sullivan v. Mier*, 67 Cal. 264, 7 Pac. 691 [1885]; *Sennett v. Moredock and Ivy Landing Drainage District No. 1*, 155 Ill. 96, 39 N. E. 567 [1895]; *McKinney v. State for use of Nixon*, 101 Ind. 355 [1884].

² *English v. Territory*, — Ariz —, 89 Pac. 501 [1907].

³ *Sennett v. Moredock and Ivy Landing Drainage District No. 1*, 155 Ill. 96, 39 N. E. 567 [1895].

⁴ *Sullivan v. Mier*, 67 Cal. 264, 7 Pac. 691 [1885].

⁵ *McKinney v. State for use of Nixon*, 101 Ind. 355 [1884].

§ 1210. City.

Under statutes which authorize the city to recover assessments which it has levied, the city is the proper plaintiff.¹ A statute requiring suit to be brought in the name of the city, instead of the name of the contractor, does not apply to actions upon assessments where the contract was entered into before such statute was passed;² but it is proper to bring such actions in the name of the contractor, in compliance with the pre-existing law.³ If the city is given the election between suing in its own name, and certifying the assessment to the county auditor for collection, the city cannot sue in its own name after it has elected to certify such assessment to the county auditor, but under such statute the county treasurer is the party authorized to bring the suit.⁴ In the absence of a statute specifically allowing the city to sue, the city cannot sue if it is not the real party in interest.⁵

§ 1211. City to use of contractor.

Under some statutes, suit is to be brought in the name of the city to the use of the contractor by whom the improvement is constructed, and for whose benefit the assessment is levied.¹ Under such statutes, the city may sue to the use of the assignee of such contractor.² Under statutes of this class, an action in the name of the city alone is insufficient, but the style and the aver-

¹City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342 [1889]; Inhabitants of Town of Palmyra v. Morton, 25 Mo. 593 [1857]; City of Philadelphia v. Wistar, 35 Pa. St. (11 Casey) 427 [1860]; Gest v. City of Cincinnati, 26 O. S. 275 [1875]; City of Pittsburg v. Harrison, 91 Pa. St. (10 Norris) 206 [1879].

²Dyer v. Pixley, 44 Cal. 153 [1872].

³Dyer v. Pixley, 44 Cal. 153 [1872].

⁴Central Ohio Railroad Company v. City of Bellaire, 67 Ohio St. 297, 65 N. E. 1007 [1902].

⁵In re Vacation of Center Street, 115 Pa. St. 247, 8 Atl. 56 [1886].

¹Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468 [1861]; State of Maryland ex rel. Henderson v. Taylor, 59 Md. 338 [1882]; Dashiell v. Mayor and City Council of Baltimore to use of Hax,

45 Md. 615 [1876]; Thornton v. City of Clinton, 148 Mo. 648, 50 S. W. 295 [1898]; City of St. Louis to use of McGrath v. Clemens, Jr., 49 Mo. 552 [1872]; St. Louis to use of Deppeheuer v. Newman, 45 Mo. 138 [1869]; City of St. Louis to use of Lohrum v. Coons, 37 Mo. 44 [1865]; City of St. Louis to use of Stadler v. Armstrong, 38 Mo. 29 [1866]; City of St. Louis to use of Carroll v. Hardy, 35 Mo. 261 [1864]; Horn v. City of Columbus, 1 Ohio C. C. 337 [1886]; Erie City for use v. Butler, 120 Pa. St. 374, 14 Atl. 153 [1888]; City v. Wood, 3 Phil. 145 [1858].

²The City of Kansas City to the use of Enright v. City of Rice, 89 Mo. 685, 1 S. W. 749 [1886]; Hutchinson v. Pittsburg, 72 Pa. St. (22 P. F. Smith) 320 [1872].

ments of the complaint must show that it is for the use of the contractor.³ In some jurisdictions it is said that under statutes of this type the city is not the real party, and that no judgment can be rendered against it.⁴ In other jurisdictions it is said that the property owner cannot set off any claim which he may have against the contractor, since the suit is in the name of the city.⁵ The property owner is said to have no interest in the specific assessments, and the city is said not to be a stakeholder of unpaid assessments. These views seem to be inconsistent in part, since either the city or the contractor must be the real party. Under statutes of this sort, the contractor cannot sue in his own name,⁶ nor can his assignee sue in his own name,⁷ but the suit must be brought in the name of the city.

§ 1212. County.

Under some statutes, suit may be brought in the name of the county by which the assessment is levied.¹ If the statute provides that suit is to be brought in the name of the county, the surveyor in charge of the improvement cannot sue in his own name.²

§ 1213. Assessment district.

Under some statutes, an assessment district,¹ such as a reclamation district,² or a drainage district,³ may sue in its own name.

³ *City of Bevier v. Watson*, 113 Mo. App. 506, 87 S. W. 612 [1905].

⁴ *City of St. Louis to use of McGrath v. Clemens, Jr.*, 49 Mo. 552 [1872].

⁵ *City of Pittsburg v. Harrison*, 91 Pa. St. (10 Norris) 206 [1879].

⁶ *Scully v. Ackmeyer*, 2 Cin. Sup. Ct. Rep. 296 [1872].

⁷ *Scully v. Ackmeyer*, 2 Cin. Sup. Ct. Rep. 296 [1872].

¹ *County of San Luis Obispo v. White*, 91 Cal. 432, 27 Pac. 756, 24 Pac. 864 [1891]; *Ingersoll v. Buchanan*, 1 W. Va. 181 [1865].

² *Ingersoll v. Buchanan*, 1 W. Va. 181 [1865].

³ *Reclamation District No. 3 v. Parvin*, 67 Cal. 501, 8 Pac. 43 [1885]; *Reclamation District No. 108 v. Ha-*

gar, 66 Cal. 54, 4 Pac. 945 [1884]; *Reclamation No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; *Gauen v. The Moredock and Ivy Landing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890].

² *Reclamation District No. 3 v. Parvin*, 67 Cal. 501, 8 Pac. 43 [1885]; *Reclamation District No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884]; *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884]; (decided apparently on the theory that the complaint had been held valid on a prior appeal).

³ *Sennott v. Drainage District*, 155 Ill. 96, 39 N. E. 567 [1895]; *Gauen v. The Moredock and Ivy Landing Drainage District No. 1*, 131 Ill. 446, 23 N. E. 633 [1890].

§ 1214. **Special officer.**

It is sometimes provided by statute that suit is to be brought in the name of some specified public officer in his official capacity,¹ such as the collector.² Under some statutes, the duty of the collector with reference to the money collected by him, is owing to the state and not to the city, and hence the city cannot sue the tax collector, or the sureties on his bond, for the money collected by him upon assessments.³

§ 1215. **Contractor.**

Under many statutes, it is provided that the contractor by whom the improvement is constructed and for whose benefit the assessment is levied, shall sue in his own name to enforce payment of the assessment.¹ Under statutes of this sort, the contractor is said to be the quasi assignee,² or agent of the city.³ If suit is brought in the name of the city, and no objection is made to the plaintiff and a judgment is rendered, ordering the money when collected to be paid to the contractor, a court of error will regard the contractor as the substantial plaintiff, and will treat the complaint as amended by making him plaintiff therein.⁴ The right of the contractor to sue in his own name is held to be a part of the contract, and cannot be taken away by a statute passed after the contract is entered into,⁵ especially if such stat-

¹ *Litchfield v. McComber*, 42 Barb. 288 [1864].

² *Litchfield v. McComber*, 42 Barb. 282 [1864].

³ *House v. City of Dallas*, 96 Tex. 594, 74 S. W. 901 [1903].

⁴ *Dowling v. Conniff*, 103 Cal. 75, 36 Pac. 1034 [1894]; *Schmidt v. Market Street and Willow Glenn R. Co.*, 90 Cal. 37, 27 Pac. 61 [1891]; *Bays v. Lapidge*, 52 Cal. 481 [1877]; *Dyer v. North*, 44 Cal. 157 [1872]; *Dyer v. Pixley*, 44 Cal. 153 [1872]; *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Taylor v. Palmer*, 31 Cal. 240 [1866]; *Hendrick v. Crowley*, 31 Cal. 471 [1866]; *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906]; *Bennett v. Seinert*, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071 [1894]; *Edwards & Welsh Construction Co. v. Jasper County* 117 Iowa,

365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *Risdon v. Shank*, 37 Ia. 82 [1873]; *Morton v. Sullivan*, — Ky. —, 96 S. W. 807 [1906]; *Louisiana Improvement Co. v. Baton Rouge Electric & Gas Co.*, 114 La. 534, 38 So. 444 [1905]; *Hastings v. Columbus*, 42 O. S. 585 [1885]; *Corry v. Gaynor*, 22 O. S. 584 [1872]; *Burns v. Patterson*, 2 Handy, 271 [1855]; *Northern Indiana Railroad Company v. Connelly*, 10 O. S. 160 [1859]; *Taylor v. Boyd*, 63 Tex. 533 [1885].

² *Hendrick v. Crowley*, 31 Cal. 471 [1866].

³ *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309 [1901]; *Hendrick v. Crowley*, 31 Cal. 471 [1866].

⁴ *First Presbyterian Church v. City of Lafayette*, 42 Ind. 115 [1873].

⁵ *Creighton v. Pragg*, 21 Cal. 115 [1862].

ute contains a clause saving existing rights and liabilities.⁶ If a street railway company has accepted a franchise binding it to pay street assessments, this liability is not to the city alone, but such liability may be enforced, like other assessments, by an action in the name of the contractor.⁷ The contractor may be given the right to elect between having an assessment for his benefit collected by a proceeding to foreclose the lien, or having it collected as delinquent taxes are;⁸ and he is not deprived of this right of election because the council, in ordering the assessment, has directed that it should be collected as taxes are.⁹

§ 1216. Assignee of contractor.

If the statute authorizes a suit in the name of the contractor, the assignee of the contractor, to whom such contractor has transferred his interest in the assessment, may sue in his own name to enforce the lien.¹ If the contractor has assigned the improvement contract before performance, and the assignee performs, he may have an assessment levied for his benefit, and may enforce it in his own name if the original contractor could have done so.² One who claims as assignee, cannot recover on the assessment, if the assignment is not shown.³ If an informal assignment is shown, and the parties to the assignment treat it as in full force and effect, the property owner cannot object thereto.⁴ An assignment made by the general manager of a corporation,

⁶ Corry v. Gaynor, 22 O. S. 584 [1872].

⁷ Schmidt v. Market Street & Willow Glenn R. R. Co., 90 Cal. 37, 27 Pac. 61 [1891].

⁸ Shirk v. Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906].

⁹ Shirk v. Hupp, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906].

¹ Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901]; Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557 [1896]; Cochran v. Collins, 29 Cal. 130 [1865]; Watkins v. State ex rel. Van Auken, 151 Ind. 123, 51 N. E. 79, 49 N. E. 169 [1898]; City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506 [1907]; Bambrick v. Campbell, 27 Mo. App.

460 [1889]; People ex rel. Crowell v. Lawrence, 36 Barb. 178 [1862].

² Anderson v. De Urioste, 96 Cal. 404, 31 Pac. 266 [1892]; Warren & Malley v. Russell, 129 Cal. 381, 62 Pac. 75 [1900]; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500 [1900]; Himmelmann v. Reay, 38 Cal. 163 [1869]; Hendrick v. Crowley, 31 Cal. 471 [1866]; Taylor v. Palmer, 31 Cal. 240 [1866]; Gest v. City of Cincinnati, 26 O. S. 275 [1875]; Ernst v. Kunkle, 5 O. S. 521 [1856].

³ Louisiana Improvement Company v. Baton Rouge Electric & Gas Company, 114 La. 534, 38 So. 444 [1905].

⁴ Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557 [1896]; Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901].

has been held to be valid where it is shown that he has executed assignments on behalf of the corporation with the knowledge, assent and acquiescence of the board of directors.⁵ If an improvement contract has been assigned to a corporation, which, it is claimed, has no power to take such assignment, and if it has, in fact, performed the work, and the city has accepted the performance, the property owner cannot raise the question of the lack of power of such corporation to take the assignment.⁶ If the city is authorized to advance money to the contractor, it may take an assignment of his lien for improvements.⁷ If an assessment is assigned merely as security, the title remains in the assignor, and he should make demand where necessary, and should sue in his own name.⁸ If the assessment is assigned for security, but it is expressly agreed that the assignee shall have authority to demand, sue for, settle and compromise the assessment, the assignee may sue in his own name.⁹ If an improvement contract is assigned, and the assessment is made in the name of the original contractor, the assignee may, nevertheless, recover thereon.¹⁰ If the land owner has taken the contract, and then assigned the same, the assignee may recover from the land owner who is the assignor of such contract.¹¹ Notice of the assignment must be given in order to protect the rights of the assignee.¹² If an improvement contract has been assigned, and has been performed by the assignee, and he in turn assigns his claim to another person, the property owner cannot have his claim against the original contractor deducted, although he and the original contractor had agreed that it might be credited on the amount of the assessment, if neither of the assignees knew of such agreement.¹³ A judgment upon an assessment may be assigned, and the assignee thereof will have such rights of priority as had his assignee.¹⁴ If a public corporation assigns an assessment to the contractor,

⁵ Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901].

⁶ Gest v. City of Cincinnati, 26 O. S. 275 [1875].

⁷ Becker v. City of Henderson, 100 Ky. 450, 38 S. W. 857 [1897].

⁸ Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082 [1893].

⁹ Diggins v. Hartshorne, 108 Cal. 154, 41 Pac. 283 [1895].

¹⁰ Ernst v. Kunkle, 5 O. S. 521 [1856].

¹¹ Hendrick v. Crowley, 31 Cal. 471 [1866].

¹² Watkins v. State ex rel. Van Auken, 151 Ind. 123, 51 N. E. 79, 49 N. E. 169 [1898].

¹³ Himmelmann v. Reay, 38 Cal. 163 [1869].

¹⁴ Hagemen's Appeal, 88 Pa. St. (7 Norris) 21 [1878].

such assignment cannot include charges for engineering, advertising, or attorney's fees.¹⁵

§ 1217. Bondholders.

An assessment for a public improvement may be levied and collected, although the proceeds are to be paid over to the holders of bonds which were issued to pay for the cost of such improvement. This is not an exercise of the right of taxation for the benefit of individuals.¹ It may be provided by statute that the holders of bonds may sue to foreclose the lien of the assessment by which the bonds are secured.² In such case it is not necessary that the common council by resolution authorized the bondholders to proceed to collect such bonds.³

§ 1218. Holder of improvement certificate.

If street improvement certificates are issued to the contractor to pay for the work done, such certificates may be assigned,¹ and the assignee may sue thereon in his own name.² The assignee takes subject to all defenses that might have been made against his assignor.³

§ 1219. Owner of property as defendant.

The defendant in a proceeding to enforce an assessment, must own the property assessed, or have some interest therein,¹ or he must be in some way liable upon the claim. Any person who has an interest in the property assessed may be made defendant.² If the proceeding to enforce the assessment is substantially one *in rem*, it is sufficient to make defendant a party in possession

¹⁵ *Carry v. Gaynor*, 22 O. S. 584 [1872].

¹ *Schintgen v. City of LaCrosse*, 117 Wis. 158, 94 N. W. 84 [1903].

² *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906]; *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

³ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

¹ *Knapp v. Mayor and Council of City of Hoboken*, 38 N. J. L. (9 Vr.) 371 [1876]; *Taylor v. Boyd*, 63 Tex. 533 [1885]; *Berwind v. Galveston & Houston Investment Company*, 20

Tex. Civ. App. 426, 50 S. W. 413 [1899].

² *Taylor v. Boyd*, 63 Tex. 533 [1885].

³ *Knapp v. Mayor and Council of City of Hoboken*, 38 N. J. L. (9 Vr.) 371 [1876]; *Berwind v. Galveston & Houston Investment Company*, 20 Tex. Civ. App. 426, 50 S. W. 413 [1899].

¹ *The People of the City and County of San Francisco v. Doe*, 48 Cal. 560 [1874].

² *Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317 [1888].

under an apparent title.³ It is ordinarily held to be sufficient to make the party who appears upon the records to be the owner of the property the defendant in such proceeding,⁴ at least, if it is not known that the property has been conveyed to another person. Thus, it is sufficient to make the record owner a defendant where he has given an unrecorded deed,⁵ or where he is, in fact, a mortgagee, but holds by a mortgage which is on its face an absolute deed.⁶ If an assessment is levied against community property, the wife may be made a party to the foreclosure proceedings, though she was not made a party to the assessment.⁷ Since no judgment can be rendered against the state, the state cannot be made a party defendant,⁸ even though the assessment is levied against property belonging to the estate.⁹

§ 1220. Co-owners.

If property belongs to two or more co-owners, they should all be made parties, and if some are not made parties, and the remaining owners object for failure to make them all parties, it is error to proceed without bringing in the remaining co-owners.¹ If, however, the owners who are brought in make no objection for failure to make the other co-tenants parties, such non-joinder of parties is waived.²

§ 1221. Representatives of deceased or insane owner.

If the party in whose name the record shows the title to be is dead, he can not be made a defendant to the suit.¹ In such case

³ Kelly v. Mendlesohn, 105 La. 490, 29 So. 894 [1901].

⁴ Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119 [1898]; Vance v. Corrigan, 78 Mo. 94 [1883]; City of St. Joseph ex rel. Swenson, 110 Mo. App. 127, 84 S. W. 98 [1904]; City of St. Joseph ex rel. Forsee, 86 Mo. App. 310 [1900]; Salter v. Reed, 15 Pa. St. (3 Harr.) 260 [1850]; Philadelphia v. Peyton, 25 Pa. Super. Ct. 350 [1904].

⁵ Vance v. Corrigan, 78 Mo. 94 [1883]; City of St. Joseph ex rel. Forsee v. Baker, 86 Mo. App. 310 [1900].

⁶ Wilson v. California Bank, 121 Cal. 630, 54 Pac. 119 [1898].

⁷ Town of Elma v. Carney, 4 Wash. 418, 30 Pac. 732 [1892].

⁸ *In re* Petition of City of Mt. Vernon to Assess Cost of Local Improvements, etc., 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533 [1894].

⁹ *In re* Petition of City of Mt. Vernon to Assess Cost of Local Improvements, etc., 147 Ill. 359, 23 L. R. A. 807, 35 N. E. 533 [1894].

¹ Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162 [1890]; Driscoll v. Howard, 63 Cal. 438 [1883]; Whiting v. Townsend, 57 Cal. 515 [1881].

² Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082 [1893].

³ Parkinson v. Meredith, 158 Mo. 457, 59 S. W. 1099 [1900]; Eyer-

the action should be against his heirs and devisees, and not against his executor,² except where the executor is entitled to the possession of the realty upon which the assessment is levied.³ If suit is brought against one as guardian of an insane owner, but the averments of the petition show that the action is brought to recover against the insane owner for the assessment, advantage cannot be taken of the fact that the insane owner is not named as defendant after judgment has been rendered,⁴ especially under a statute authorizing amendment by adding to or striking out the name of a party.⁵

§ 1222. Dower, homestead and community interests.

A husband or wife of the owner, who has an inchoate dower interest in the property assessed, is a proper party defendant.¹ If it is sought to enforce an assessment against community property, the wife is a necessary party defendant.² It has been held not to be necessary to make the wife of an owner of realty a party to the suit to foreclose an assessment.³

§ 1223. Mortgagees.

A mortgagee of the property assessed is not a necessary party, although perhaps he is a proper one.¹ He is not bound by the decree if he is not made a party.² It has not been said that he is not a necessary party, if the superiority of the assessment lien over the mortgage cannot be made the subject of litigation.³

§ 1224. City as defendant.

If the city is liable to the contractor in case the assessment against the property owner cannot be enforced, it has been held to be proper, under some statutes, to make the city a party de-

mann v. Scollay, 16 Mo. App. 498 [1885]; Estate of White, 19 Phil. 106 [1888].

²Phelan v. Dunne, 72 Cal. 229, 13 Pac. 662 [1887].

³Prendergast v. Richards, 2 Mo. App. 187 [1876].

⁴Hunter v. Kansas City Safe Deposit & Savings Bank, 158 Mo. 262, 58 S. W. 1053 [1900].

⁵Hunter v. Kansas City Safe Deposit & Savings Bank, 158 Mo. 262, 58 S. W. 1053 [1900].

¹Coburn v. Bossert, 13 Ind. App. 359, 40 N. E. 281 [1895].

²McNair v. Ingebrigtsen, 36 Wash. 186, 78 Pac. 789 [1904].

³People v. Weber, 164 Ill. 412, 45 N. E. 723 [1897].

⁴Krutz v. Gardner, 18 Wash. 332, 51 Pac. 397 [1897].

⁵Krutz v. Gardner, 18 Wash. 332, 51 Pac. 397 [1897].

⁶People of the State of Illinois v. Weber, 164 Ill. 412, 45 N. E. 723 [1897].

fendant.¹ If the city is liable in case the assessment cannot be enforced against the property owners, the action may, under some statutes, be brought against the city and the property owners jointly.² If the city is not liable to the contractor, and has no interest in the property assessed, it should not be made a party.³ If it is not shown that the city has authorized a transfer of improvement certificates to the contractor, he cannot recover against the city in case of his failure to recover against the property owners.⁴ In a foreclosure suit brought by a mortgagee, however, the city may be made a defendant, and may set up its lien for assessments,⁵ even after the property has been sold.⁶ If it is attempted to levy an assessment against a road on the theory that it is benefited by drainage, the highway commissioners are the proper parties to resist such assessment, though they do not own the highway.⁷

§ 1225. Effect of proceedings upon one not party thereto.

A person who has, or claims, some interest in the property assessed, and who is not made a party to the proceedings to foreclose the lien of the assessment, is not bound thereby.¹ Thus, a mortgagee who was not made a party to such proceeding, may redeem, and possibly may contest, the validity of the assessment.² Lien holders are not barred by foreclosure if not made parties.³

¹ Morton v. Sullivan, — Ky. —, 96 S. W. 807, 29 Ky. L. R. 943 [1906]; Louisville v. Henderson, 68 Ky. (5 Bush.) 515 [1869]; Hastings v. Columbus, 42 O. S. 585 [1885]; Burns v. Patterson, 2 Handy, 271 [1855].

² Louisville v. Henderson, 68 Ky. (5 Bush.) 515 [1869].

³ Lake Erie & Western Ry. Co. v. Bowker, 9 Ind. App. 428, 36 N. E. 864 [1893].

⁴ Louisiana Improvement Company v. Baton Rouge Electric & Gas Co., 114 La. 534, 38 So. 444 [1905].

⁵ Moerlein Brewing Co. v. Westmeier, 4 Ohio C. C. 296 [1890].

⁶ Moerlein Brewing Co. v. Westmeier, 4 Ohio C. C. 296 [1890].

⁷ Commissioners of Big Lake Special Drainage District v. Commissioners of Highways of Sand Ridge, 199 Ill. 132, 64 N. E. 1095 [1902].

¹ Wood v. Curran, 99 Cal. 137, 33 Pac. 774 [1893]; Brady v. Burke, 90 Cal. 1, 27 Pac. 52 [1891]; Wood v. Brady, 68 Cal. 78, 8 Pac. 599, 5 Pac. 623 [1885]; McCollum v. Uhl, 128 Ind. 304, 27 N. E. 152, 27 N. E. 725 [1890]; Deisner v. Simpson, 72 Ind. 435 [1880]; Barber Asphalt Paving Company v. Peck, 186 Mo. 506, 85 S. W. 387 [1905]; Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 890 [1895]; Krutz v. Gardner, 25 Wash. 396, 65 Pac. 771 [1901].

² Corrigan v. Bell, 73 Mo. 53 [1880]; Olmstead v. Tarsney, 69 Mo. 396 [1879]; Krutz v. Gardner, 25 Wash. 396, 65 Pac. 771 [1901]; Krutz v. Gardner, 18 Wash. 332, 51 Pac. 396 [1901].

³ Wood v. Brady, 68 Cal. 78, 8 Pac. 599, 5 Pac. 623 [1885].

If an executrix gave a mortgage in her official capacity, and subsequent foreclosure proceedings are brought against her individually, and not in her official capacity, and in such proceedings a cross complaint is filed by a reclamation district to enforce its assessment, no judgment can be rendered against the estate of the decedent.⁴ One who holds an interest in property which does not appear of record, and of which the party enforcing the assessment has no notice, is held to be bound, although he is not made a party to the proceedings.⁵ Thus, in case of a trust which does not appear of record, proceedings in which the trustee is made a party are binding upon the beneficiary.⁶ Arrears due under a reservation of ground rent in a deed which is not recorded, have been held to be barred by a sale on an assessment to which the grantee, who had been in possession for twenty-three years, was a party.⁷ The validity of bonds cannot be determined finally on a cross petition if the county is not a party to the suit.⁸ If, however, the statute requires notice to be given to the property owner only, the lien of an assessment in favor of a city may be barred by foreclosure of a tax in a proceeding to which the city is not a party, the tax having priority over the assessment.⁹ Commencement of an action does not suspend the running of the statute of limitations in favor of a purchaser of the property who is not a party to the proceedings.¹⁰ A summons which is served upon one who is not a party to the suit, has no validity.¹¹

§ 1226. Joinder of causes of action.

Whether two or more assessments can be joined as different causes of action in one petition, depends upon the provisions of the statute authorizing the enforcement of such assessment.¹ Tax

⁴Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254 [1898].

⁵Roman Catholic Archbishop of San Francisco v. Shipman, 79 Cal. 288, 21 Pac. 830 [1889]; Salter v. Reed, 15 Pa. St. (3 Harr.) 260 [1850].

⁶Roman Catholic Archbishop of San Francisco v. Shipman, 79 Cal. 288, 21 Pac. 830 [1889].

⁷Salter v. Reed, 15 Pa. St. (3 Harr.) 260 [1850].

⁸Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 [1904].

⁹Pennsylvania Company v. City of Tacoma, 36 Wash. 656, 79 Pac. 306 [1905].

¹⁰Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278 [1904].

¹¹Fanning v. Foley, 99 Cal. 336, 33 Pac. 1098 [1893].

¹That such assessment may be joined. District No. 110 v. Feek, 60 Cal. 403 [1882]. That such assessments cannot be joined. Dyer v. Barstow, 50 Cal. 652 [1875].

bills issued against two or more lots belonging to the same owner may be joined in one action.²

§ 1227. Necessity of formal pleadings.

Under some statutes, formal pleadings are unnecessary,¹ and a certified copy of the assessment,² or a transcript of the proceedings,³ is equivalent to a complaint, and the defendant is permitted to interpose defenses without pleading them. In the absence of express statutory provision dispensing with formal pleadings, pleadings are necessary in actions and suits to enforce an assessment, and they are governed by the principles which control pleadings in ordinary proceedings.⁴

§ 1228. Necessity of filing pleadings.

If the statute contemplates and requires formal pleadings, such pleadings must be filed as in ordinary proceedings.¹ If, however, an amended complaint is treated by the court and all the parties as filed, it will be presumed on error to have been filed,² although the transcript does not show that it ever was filed.³

§ 1229. Contents of complaint.

The complaint should state the facts which give the power to levy the assessment, and which show that the statutory provisions concerning the assessments have been complied with in a substantial manner.¹ If, by statute, an assessment may be levied

² *City of Mexico v. Lakenan*, — Mo. App. —, 108 S. W. 141 [1908].

¹ *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Baker v. Arctic Ditchers*, 54 Ind. 310 [1876].

² *Baker v. Arctic Ditchers*, 54 Ind. 310 [1876].

³ *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886].

⁴ See § 1228 *et seq.*

¹ *Mahlstadt v. Blanc*, 34 Cal. 577 [1868].

² *Mahlstadt v. Blanc*, 34 Cal. 577 [1868].

³ *Mahlstadt v. Blanc*, 34 Cal. 577 [1868].

⁴ *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *Himmelmänn v. Danos*, 35 Cal. 441 [1868]; *Commis-*

sioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District, 127 Ill. 581, 21 N. E. 206 [1890]; *Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 305 [1891]; *Shaw v. State of Indiana for use of Whitmore*, 97 Ind. 23 [1884]; *Overshiner v. Jones*, 66 Ind. 452 [1879]; *Cooper v. Arctic Ditchers*, 56 Ind. 233 [1877]; *Etebison Ditching Association v. Hillis*, 40 Ind. 408 [1872]; *Cleveland, Cincinnati & St. Louis Railway Company v. The Edwards Jones Company*, 20 Ind. App. 87, 50 N. E. 319 [1897]; *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910 [1888]; *City of Cincinnati for use of Deters v. McDuffie*, 1 Ohio N. P. 53 [1894]; *Wood v. City of Galveston*, 76 Tex. 126, 13 S. W. 227 [1890].

by a ditching company only if the main line of the improvement does not exceed sixteen miles, the complaint must show that the main line of the improvement is less than sixteen miles in length.² So, if a ditching company cannot collect an assessment unless a bond has been given by the directors of such company conditioned on faithful application of the assessments collected, the giving of such bond must be averred.³ If the facts stated in the complaint do not show authority to levy the assessment in substantial compliance with the requirements of the statute, such complaint is insufficient.⁴ Thus, if a resolution of intention is jurisdictional, an averment that shows that "suitable drains" were to be constructed, without specifying their number, size, material and the like, is insufficient.⁵ If the complaint contains two or more causes of action, and some are defective, it has been held that judgment cannot be sustained if it does not show affirmatively that it was based upon the valid cause of action.⁶ It is generally held not to be necessary to state each step of the proceedings in detail.⁷ Under some statutes, it is sufficient to allege that the assessment has been levied and has not been paid.⁸ The complaint need not negative defenses in advance,⁹ such as the expiration of the period fixed by limitations.¹⁰

§ 1230. Allegation of facts which are presumed.

If, by the express terms of the statute, or by necessary implication therefrom, certain facts make an assessment *prima facie* valid, it has been held sufficient to plead such facts.¹ Thus, if

²Cooper v. Arctic Ditchers, 56 Ind. 233 [1877].

³Cooper v. Arctic Ditchers, 56 Ind. 233 [1877].

⁴Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445 [1903].

⁵Fay v. Reed, 128 Cal. 357, 60 Pac. 927 [1900].

⁶Daly v. Gubbins, 35 Ind. App. 86, 73 N. E. 833 [1904].

⁷Daly v. Gubbins, — Ind. —, 82 N. E. 659 [1907]; Low v. Dallas, 165 Ind. 392, 75 N. E. 822 [1905]; Bannister v. Grassy Fork Ditching Association, 52 Ind. 178 [1875]; Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071 [1899]; Cleveland, Cincinnati & St. Louis Ry. Co. v. The

Edward Jones Co., 20 Ind. App. 87, 50 N. E. 319 [1897].

⁸Board of Improvement District Number Five of Texarkana v. Offenhauser, 84 Ark. 257, 105 S. W. 265 [1907].

⁹Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772 [1900]; Spades v. Phillips, 9 Ind. App. 487, 37 N. E. 297 [1893].

¹⁰Adkins v. Quest, 79 Mo. App. 36 [1898].

¹City of Mexico v. Lakenan, — Mo. App. —, 108 S. W. 141 [1908]; City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506 [1907]; Town of Elma v.

the assessment roll is *prima facie* valid, it has been held to be unnecessary to aver notice, want of notice constituting a defense.² In other jurisdictions, however, it has been held that such statutes concern evidence, and not pleadings, and that essential facts must be averred, even though they may be proved *prima facie* by showing the facts which by statute are made *prima facie* evidence of the validity of the assessment.³ If the schedule of benefits must be recorded to constitute a lien, a complaint must allege that such schedule was recorded even if, by statute, there is a presumption that all the provisions of the statute have been complied with.⁴

§ 1231. Method of stating facts.

Facts, and not conclusions, should be pleaded, and averments which are purely conclusions are to be disregarded, and do not form any part of the pleading in legal effect.¹ Thus, an allegation that "the effect of said order was to rescind and revoke the order of ratification," was held to be insufficient if the facts alleged did not show such revocation in law.² Under some statutes, however, it is sufficient to aver in general terms a compliance with the statutes.³ The facts which it is necessary to allege, or to deny, should be stated in positive and direct terms.⁴ The pleadings should state the ultimate facts, and not the evidence.⁵ If the essential facts are alleged, although defectively and imperfectly, such complaint is insufficient as against a special objection, but is sufficient after a trial on the merits and judgment, if no special objection has been made.⁶ Averments

Carney, 4 Wash. 418, 30 Pac. 732 [1892].

² City of Seattle v. Smith, 8 Wash. 387, 36 Pac. 280 [1894].

³ Himmelmann v. Danos, 35 Cal. 441 [1868]; Welch v. Town of Roanoke, 157 Ind. 398, 61 N. E. Rep. 791 [1901].

⁴ Welch v. Town of Roanoke, 157 Ind. 398, 61 N. E. Rep. 791 [1901].

⁵ Ede v. Cuneo, 126 Cal. 167, 58 Pac. 538 [1899]; Philadelphia, Wilmington & Baltimore R. R. Co. v. Shipley, 72 Md. 88, 19 Atl. 1 [1890].

⁶ Philadelphia, Wilmington & Baltimore R. R. Co. v. Shipley, 72 Md. 88, 19 Atl. 1 [1890].

¹ Jonesboro, L. C. & E. R. Co. v. Board of Directors of St. Francis Levee District, 80 Ark. 316, 97 S. W. 281 [1906]; City of Waterbury v. Schmitz, 58 Conn. 522, 20 Atl. 606 [1890].

² Gilmore v. Norton, 10 Kan. 491 [1872].

³ Miles v. McDermott, 31 Cal. 271 [1866].

⁴ Schmidt v. Market Street & Willow Glenn Railroad Company, 90 Cal. 37, 27 Pac. 61 [1891]; City of St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54 [1895].

which are not made expressly, but which can be inferred fairly from the entire complaint, are regarded as sufficient, at least if no special objection is made thereto.⁷ Thus, if it fairly appears that the money to be raised by the assessment is to be used for the construction of the improvement described in the complaint, an express averment to that effect is not necessary.⁸

§ 1232. Averments as to plaintiff.

The petition or complaint must show the capacity of the plaintiff to maintain the action.¹ Thus, if suit is brought by an officer in his own name, and the complaint shows that his predecessor had charge of the improvement, but does not show that the term of such predecessor has expired, or that the plaintiff has become his successor, such complaint is insufficient.² If suit is brought by a draining association in a court of a county where these articles are recorded, and the court is required to take judicial notice of such articles of association, they need not be pleaded.³ The articles of association have been held not to be a part of the complaint,⁴ even if filed therewith,⁵ and hence not to be regarded for the purposes of a demurrer, even if included therein.⁶ It is not necessary that the petition should contain the articles of association or allege their substance.⁷

§ 1233. Averments as to defendant.

The petition must show the right to maintain an action against the defendant. If suit is brought against an administratrix of the estate of a decedent, but there are no averments as to her capacity, judgment cannot be rendered against the estate.¹ It is

⁷ *Large v. Kien's Creek Draining Company*, 30 Ind. 263, 95 Am. Dec. 696 [1868].

⁸ *Large v. Kien's Creek Draining Company*, 30 Ind. 263, 95 Am. Dec. 696 [1868].

¹ *Frazer v. State for use of Ingerman*, 106 Ind. 471, 7 N. E. 203 [1886].

² *Frazer v. State for use of Ingerman*, 106 Ind. 471, 7 N. E. 203 [1886].

³ *Eel River Draining Association v. Topp*, 16 Ind. 242 [1861].

⁴ *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872]; *Etchison*

Ditching Association v. Busenback, 39 Ind. 362 [1872]; *Excelsior Draining Co. v. Brown*, 38 Ind. 384 [1871].

⁵ *Dobson v. Duck Pond Ditching Association*, 42 Ind. 312 [1873].

⁶ *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872]; *Etchison Ditching Association v. Busenback*, 39 Ind. 362 [1872]; *Excelsior Draining Company v. Brown*, 36 Ind. 384 [1871].

⁷ *Jordan Ditching & Draining Association v. Wagoner*, 33 Ind. 50 [1870].

¹ *Flinn v. Gouley*, 139 Cal. 623, 73 Pac. 542 [1903].

sufficient, if no personal judgment is sought, to aver that the defendant has or claims some interest in the property.²

§ 1234. Averments as to improvement.

The complaint or petition must allege that the council fixed the grade, if such fact is essential to the validity of subsequent proceedings.¹ An averment in general terms, that the grade of an improvement was fixed by resolution, is sufficient though the date of such resolution is left blank.² It is held not necessary to aver that the width of the sidewalk was fixed before the proceedings for doing the work were begun.³ If the property assessed is described as being located in a certain addition to a certain named city, this has been held to be sufficient to show that the improvement is situated within the city.⁴ The same view has been entertained where a street is named and described as being a street of a certain city, and it is alleged that a certain part of such street is improved.⁵ It is not necessary to aver that the city had title to the land upon which the street or other public improvement is constructed.⁶ It is not necessary to aver that the total length of the improvement was more than one whole square if such fact did not affect the jurisdiction of the board of trustees to order the improvement.⁷

§ 1235. Averments as to contract.

Whether it is necessary to allege the improvement contract in a proceeding to enforce an assessment which is levied for the purpose of raising a fund to pay for the expenses incurred under such contract, is a question upon which there is a conflict of authority, even in states in which somewhat similar formalities are required. In some states it is said that the assessment, not the contract, is the basis of the action, and that, therefore, it is not

² *Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317 [1888].

¹ *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891].

² *Bitzer v. O'Bryan*, 107 Ky. 590, 54 S. W. 951 [1900]. See also, *Barfield v. Gleason*, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901].

³ *Doane v. Houghton*, 75 Cal. 360, 17 Pac. 426 [1888].

⁴ *Spades v. Phillips*, 9 Ind. App. 487, 37 N. E. 297 [1893].

⁵ *Deane v. Indiana Macadam and Construction Company*, 161 Ind. 371, 68 N. E. 686 [1903].

⁶ *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899].

⁷ *Daly v. Gubbins*, — Ind. —, 82 N. E. 659 [1907].

necessary to allege the contract.¹ In other jurisdictions it is held that since an assessment cannot be levied to pay the contract price unless the contract is valid and enforceable, the contract must be alleged.² A general averment that the contractor entered into a contract has been held sufficient.³ In some jurisdictions, it is not necessary to aver that the contract was in writing, even if the statute provides that it must be in writing, on the theory that the contract is not the basis of the action.⁴ Under other statutes, the complaint must allege that the contract is in writing or a copy must be filed with the complaint.⁵ In some jurisdictions it is held that the complaint must aver an advertisement for bids,⁶ and that it is defective if it shows that the bids were opened before the time fixed by the advertisement.⁷ It has been held not necessary to aver that the contract was let to the best bidder.⁸ If the statute requires a notice of the award of the contract to be published, this fact must be averred.⁹ If the statute requires a contract to be entered into within a certain time after posting the notices of the award, the complaint must show that the contract was entered into within such time.¹⁰ It is held to be unnecessary to allege that the council adopted plans and specifications where the ordinance alleged provides for plans and specifications, and shows the nature of the improvement fully.¹¹ It has been held that it is not necessary to file plans and specifications or make them a part of the complaint,¹² at least if no specific objection is made thereto, and the plans and specifications are set out in the answer.¹³ It is not necessary to allege

¹ *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899]; *City of St. Louis to use of Carroll v. Hardy*, 35 Mo. 261 [1864].

² *McAboy v. Gosnell*, — Ky. —, 63 S. W. 961, 23 Ky. Law Rep. 1187 [1901].

³ *California Improvement Company v. Reynolds*, 123 Cal. 88, 55 Pac. 802 [1898].

⁴ *Drew v. Town of Geneva*, 159 Ind. 364, 65 N. E. 9 [1902].

⁵ *Overshiner v. Jones*, 66 Ind. 452 [1879].

⁶ *McEwen v. Gilker*, 38 Ind. 233 [1871]; *Breath, Guardian v. City of Galveston*, 92 Tex. 454, 45 S. W. 575 [1899].

⁷ *N. P. Perine Contracting & Paving Company v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894].

⁸ *Spaulding v. Baxter*, 25 Ind. App. 485, 58 N. E. 551 [1900].

⁹ *Himmelmann v. Townsend*, 49 Cal. 150 [1874].

¹⁰ *Libbey v. Ellsworth*, 97 Cal. 316, 32 Pac. 228 [1893]; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893].

¹¹ *Fralich v. Barlow*, 25 Ind. App. 383, 58 N. E. 271 [1900].

¹² *Bate v. Sheets*, 50 Ind. 329 [1875]; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899].

¹³ *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720 [1897].

that the engineer has made a survey and estimate before application is made to the commissioners for the appointment of appraisers.¹⁴

§ 1236. Averments as to performance.

It is not necessary to aver that the improvement has been completed if an assessment might be levied upon a partial estimate before the improvement was completed.¹ It has been held not to be necessary to aver performance of the contract in accordance with the plans and specifications, on the theory that this is a matter of defense.² At any rate, the omission of these averments from the petition is immaterial, if want of performance is pleaded in the answer and a trial had thereon.³ An averment that "plaintiffs completed said work in accordance with the terms and stipulations of said agreement to the entire satisfaction of the department of public works of said city, and the same was duly accepted by said department" has been held to be a sufficient averment of performance.⁴ In jurisdictions where an assessment cannot be levied unless the contract fixes the time for the completion of the work, the complaint must show that such time was fixed by the contract.⁵ In the absence of special objection, however, an averment that "all the work ordered to be done was completed pursuant to the contracts within the time given by the commissioner of streets on the contract," was held to be sufficient, though it was said to be subject to a special demurrer.⁶

§ 1237. Averments as to notice.

The complaint must aver that notice was given where the statute requires such notice.¹ A complaint omitting such averment

¹⁴ *Slusser v. Ransom*, 39 Ind. 506 [1872].

¹ *Eel River Draining Association v. Topp*, 16 Ind. 242 [1861]; *Fralich v. Barlow*, 25 Ind. App. 383, 58 N. E. 271 [1900].

² *Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28 [1896]; *Guinotte v. Ridge*, 46 Mo. App. 254 [1891]; *contra*, that an averment of substantial performance is necessary. *Meyer v. Wright*, 18 Mo. App. 283 [1885].

³ *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897].

⁴ *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676 [1897].

⁵ *Washburn v. Lyons*, 97 Cal. 314, 32 Pac. 310 [1893].

⁶ *Treanor v. Houghton*, 103 Cal. 53, 36 Pac. 1081 [1894].

¹ *Jackson v. State for use of Lindley*, 103 Ind. 250, 2 N. E. 742 [1885]; *Kennedy v. State for use of Dorsett*, 109 Ind. 236, 9 N. E. 778 [1886]; *Pickering v. State for use of Dyer*, 106 Ind. 228, 6 N. E. 611 [1885]; (*limiting Albertson v. State ex rel. Wells*, 95 Ind. 370 [1883]).

is defective, even though the transcript of the proceedings filed as an exhibit shows that notice was given.² Averments showing that notice was given in substantial compliance with the terms of the statute, are sufficient.³ It has been held sufficient if the transcript which by law is in the nature of a complaint, shows that some notice was given, on the theory that if the notice was defective this must be set up by answer.⁴ It is sufficient if the complaint shows that some notice was given, and that the court regarded it as sufficient before taking action upon the petition for the improvement.⁵ In the absence of special objection thereto, an averment that "notice of the assessment, and of the hearing and considering of objections to the assessment roll was given defendant personally," is sufficient.⁶ An allegation that the notice was published is sufficient to admit evidence that it was published with authority.⁷ The complaint need not aver that a notice of the assessment of benefits was recorded in the recorder's office.⁸

§ 1238. Averments as to apportionment.

The complaint must show that the assessment was apportioned in substantial compliance with the provisions of the statute.¹ An averment that the proper official "made in the manner and form required by law an assessment upon the lots or lands fronting thereon, each lot, or a portion of a lot, being separately assessed in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work," sufficiently shows that the assessment for the entire work was at a uniform rate and on all the property fronting on the improvement.² The complaint must show whether the assessment made was one

² *Jackson v. State for use of Lindley*, 103 Ind. 250, 2 N. E. 742 [1885].

³ *Washburn v. Lyons*, 97 Cal. 314, 32 Pac. 310 [1893]; *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891]; *Deane v. Indiana Macadam & Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903].

⁴ *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886].

⁵ *Hackett v. State for use of Martindale*, 113 Ind. 532, 15 N. E. 799 [1887].

⁶ *Town of Tumwater v. Pix*, 15 Wash. 324, 46 Pac. 388 [1896].

⁷ *Dyer v. North*, 44 Cal. 157 [1872].

⁸ *Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28 [1896].

¹ *Mendenhall v. Cluggish*, 84 Ind. 94 [1882]; *Overshiner v. Jones*, 66 Ind. 452 [1879]; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559 [1900].

² *Treanor v. Houton*, 103 Cal. 53, 36 Pac. 1081 [1894].

of benefits or injuries.³ It has been held necessary to show that the amount assessed does not exceed the cost of the improvement,⁴ although it has been held that a petition is not demurrable because such an averment is wanting, since it will be assumed that some amount is necessary; and if any amount is necessary at all, the amount cannot be reached by demurrer, but must be reached by answer.⁵

§ 1239. Averments as to property assessed.

Facts must be alleged to show that the property assessed is within the classes fixed by statute as subject to assessments.¹ Under a statute providing that property fronting on the improvement is to be assessed, it is not sufficient to allege that the property is benefited by the improvement.² Since it is not necessary to negative defenses,³ it is not necessary to allege that the improvement had not already been constructed in front of the property assessed.⁴ The complaint must describe the land assessed with sufficient definiteness to enable the purchaser under a decree for its sale to obtain possession thereof.⁵ A description of a tract of land as "a certain lot . . . bounded north by Sanders and Self, east by Self, south by Self and west by Euclid Avenue," without averments to show what is meant by "Self" or "Sanders" is insufficient.⁶ If the description in the assessment is defective, a correct description in the complaint cannot cure such defect.⁷ The complaint may, however, explain abbreviations in the assessment.⁸ The complaint must aver that the defendants are owners of, or have some interest in, the land

³ *Echison Ditching Association v. Jarrell*, 33 Ind. 131 [1870].

⁴ *Smith v. Duck Road Ditching Association*, 54 Ind. 235 [1876].

⁵ *Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28 [1896].

¹ *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891].

² *Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891].

³ See § 1229 *et seq.*

⁴ *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422, 772 [1900]; *Spades v. Phillips*, 9 Ind. App. 487, 37 N. E. 297 [1893].

⁵ For illustrations of descriptions

held to be sufficient, see *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. Rep. 283 [1895], (by reference to diagram). *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904]; *Echison Ditching Association v. Jarrell*, 33 Ind. 131 [1870].

⁶ *Bell v. Johnson*, 207 Mo. 281, 105 S. W. 1039 [1907].

⁷ *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. O'Brien*, 24 Ind. App. 547, 57 N. E. Rep. 47 [1899].

⁸ *Echison Ditching Association*, 33 Ind. 131 [1870].

assessed,⁹ but it is not necessary to show the amount of the interest of each of two or more co-tenants.¹⁰ Under some statutes it is not necessary to describe the land or the interest of the owner therein.¹¹ If the statute does not require the formation of an assessment district, it is not necessary to allege such formation.¹²

§ 1240. Averments as to demand and notice of payment.

If it is necessary to give to the property owner ten days' notice before suit is brought, it has been held that the giving of such notice need not be averred in the complaint.¹ In some jurisdictions it is not necessary that the demand for the payment of the assessment be averred.² Under other statutes it is necessary that the demand be averred in such form as to show the substantial compliance with the statutes.³ An averment showing substantial compliance is sufficient.⁴ If the averment shows a demand made by an agent, it is not necessary to set forth the terms of the agency, or to allege specifically that the plaintiff had authorized such person to make the demand.⁵ If the statute requires a demand on the premises where the property is assessed to unknown owners, it is necessary in such case to aver the demand upon the premises.⁶ An allegation that "due demand" was made has been held to be insufficient, if the statute requires the party to be notified by means of a bill of the amount of the assessment, and to be warned that if the bill is not paid in sixty days from the date thereof, his property would be sold, or he would be sued.⁷ A complaint which alleges that "more than ten days before the bringing of this suit the plaintiffs notified said defendant in writing of such assessment and the amount thereof

⁹ *The People of the City and County of San Francisco v. Doe* 48 Cal. 560 [1874].

¹⁰ *Whiting v. Townsend*, 57 Cal. 515 [1881].

¹¹ *Bate v. Sheets*, 50 Ind. 329 [1875].

¹² *White v. Harris*, 103 Cal. 528, 37 Pac. 502 [1894].

¹ *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047 [1907].

² *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899].

³ *Williams v. Bergin*, 127 Cal. 578, 60 Pac. 164 [1900]; *McBean v. Martin*, 96 Cal. 188, 31 Pac. 5 [1892].

⁴ *Conklin v. Seamen*, 22 Cal. 546 [1863]; *Daly v. Gubbins*, — Ind —, 82 N. E. 659 [1907].

⁵ *Williams v. Bergin*, 127 Cal. 578, 60 Pac. 164 [1900].

⁶ *Engelbrecht v. McElwee*, 122 Cal. 284, 54 Pac. 900 [1898].

⁷ *Philadelphia, Wilmington & Baltimore R. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890].

with interest, and where the same is payable'' is sufficient without further averring a demand prior to the bringing of the suit.⁸

§ 1241. Averment of special contract to pay assessment.

A complaint framed on the theory that a special contract exists whereby the property owner is bound to pay the assessment must contain averments showing a promise by the property owner. A complaint in assumpsit upon an assessment is insufficient, if it is not averred that the defendant requested the work done, or that he promised to pay therefor.¹ A declaration in assumpsit which contains an *insimul computassent* count, is sufficient, if the contractor and the property owner agree upon the amount which is fairly due upon the assessment.²

§ 1242. Other averments.

If the allegations of the petition show that the time fixed for the payment of the assessment has passed, it is not necessary to aver specifically that the assessment is due.¹ An allegation that the assessment was "due and unpaid" was held to be sufficient.² It is not necessary to allege that defendants did not elect to pay in installments, but defendant must set up such election to show that the assessment is not yet due.³ A complaint which shows on its face that the lien has expired by lapse of time is insufficient.⁴ If the averments show a lapse of time but are consistent with facts which would keep such lapse from amounting to a bar, it will not be presumed that such facts are a bar.⁵ If the plaintiff is unable to show a compliance with the statutory provisions, but intends to rely upon a waiver of the defects by the defendant, the facts which amount to waiver or estoppel must be pleaded fully.⁶ An averment that defendant executed a written waiver of irregularities, saw the work done without objection and

⁸ Low v. Dallas, 165 Ind. 392, 75 N. E. 822 [1905].

¹ Boatman v. Macy, 82 Ind. 490 [1882].

² Clemens v. Mayor and City Council of Baltimore to use of Volkmar, 16 Md. 208 [1860].

³ Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071 [1899].

⁴ Jaicks v. Merrill, 201 Mo. 91, 98 S. W. 753 [1906].

⁵ Low v. Dallas, 165 Ind. 392, 75 N. E. 822 [1905].

⁶ Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290 [1903].

⁷ Williams v. Bergin, 116 Cal. 56, 47 Pac. 877 [1897].

⁸ Town of Greendale v. Suit, 163 Ind. 282, 71 N. E. 658 [1904]; Taylor v. Patton, 160 Ind. 4, 66 N. E. 91 [1902]; Scudder v. Jones, 134 Ind. 547, 32 N. E. 221 [1893].

promised to pay therefor, is sufficient.⁷ If the transcript shows a complete and final estimate made by the engineer, and adopted by the council, instead of the partial estimates theretofore made, the omission of such partial estimates does not render invalid the transcript which stands as a complaint.⁸ If a warrant is signed by an acting mayor, it is not necessary that the complaint should aver the proceedings of the city council, whereby the acting mayor came to occupy such position.⁹ If the petition shows that two assessments were levied for the same improvement, and that action is brought upon the second, it has been held not necessary to aver the facts which render the first assessment invalid, as it will be presumed that the re-assessment was made properly.¹⁰ A different view has been entertained in some jurisdictions, and in an action on a re-assessment it has been held that an averment that in the original assessment, the assessment diagram, warrant, and engineer's certificate, were "never duly or properly or legally recorded," is insufficient, since it implies that they were recorded and does not point out the defect in the record which is relied upon by the plaintiff.¹¹ In an action to enforce the lien of an assessment brought by holders of improvement bonds, the averment that the city has failed or refused to pay the amount of the assessment, is a formal averment requiring no proof.¹²

§ 1243. Statutory provisions as to contents of complaint.

By some statutes express provision is made as to the contents and form of the petition or complaint in an action to enforce the assessment. Such provisions are valid, and must be complied with substantially,¹ and such substantial compliance is sufficient.²

§ 1244. Exhibits.

It is not necessary to attach exhibits or copies of documents to the complaint, unless it is specifically required by statute.¹ Un-

⁷ *Flora v. Cline*, 89 Ind. 208 [1883].

⁸ *McGill v. Bruner*, 65 Ind. 421 [1879].

⁹ *Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266 [1895].

¹⁰ *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872].

¹¹ *Ede v. Cuneo*, 126 Cal. 167, 58 Pac. 538 [1899].

¹² *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

¹ *Gallagher v. Bartlett*, 64 Mo. App. 258 [1895]; *Vieths v. Planet Property & Financial Co.*, 64 Mo. App. 207 [1895].

² *Krutz v. Gardner*, 18 Wash. 332, 51 Pac. 397 [1897].

¹ *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930 [1901]; *Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 305 [1891]; *Baltimore & Ohio Railroad Co. v. Daegling*, 30 Ind. App. 180, 65 N. E. 761 [1902].

der some statutes it is specifically provided that copies of certain records or documents in the assessment proceedings, must be filed as exhibits.² Thus, under some statutes a copy of the assessment must be attached to the declaration as an exhibit, or the assessment must be set out therein.³ Under such statutes a copy of an assessment other than the one prescribed by statute is insufficient, even though it is made in the same proceeding as one of the necessary steps thereto.⁴ A defective schedule of assessments which does not on its face purport to be such schedule, and is neither signed nor sworn to, is insufficient.⁵ If the exhibit is filed with the complaint, it is not necessary that it be attached to the complaint physically.⁶ The omission to file a copy of the resolution of the acceptance of the improvement, does not defeat the plaintiff's right to recover if the allegations with reference to such acceptance are not put in issue.⁷ The complaint and the exhibit may be considered together in determining whether the assessment describes the land which is assessed.⁸ If a statute requires a copy of a specified part of the proceedings to be filed as an exhibit, it is not necessary to file copies of any other part of the proceedings.⁹

§ 1245. Amendment.

If the court in which the proceedings to enforce an assessment are pending, grants leave to amend, such action on the part of the court is proper, and the plaintiff may amend.¹ Thus, the

² *Ross v. State for the use of Zenor*, 119 Ind. 90, 21 N. E. 345 [1888].

³ *Ross v. State for the use of Zenor*, 119 Ind. 90, 21 N. E. 345 [1888]; *Pickering v. State for use of Dyar*, 106 Ind. 228, 6 N. E. 611 [1885]; *Jackson v. State for use of Lindley*, 103 Ind. 250, 2 N. E. 742 [1885]; *State for use of Bringham v. Turvey*, 99 Ind. 599 [1884]; *State ex rel. Mayfield v. Myers*, 100 Ind. 487 [1884]; *Crist v. State ex rel. Whitmore*, 97 Ind. 389 [1884]; *Busenbark v. Etchison Ditching Association*, 62 Ind. 314 [1878]; *Sloan v. Faurot*, 11 Ind. App. 689, 39 N. E. 539 [1894].

⁴ *Crist v. State ex rel. Whitmore*, 97 Ind. 389 [1884]; (citing *Busenbark v. Etchison, etc., Co.*, 62 Ind. 314 [1878]; *Alkire v. Timmons, etc.,*

Co., 51 Ind. 71 [1875]; *West v. Bullskin Prairie Ditching Co.*, 19 Ind. 458 [1862]).

⁵ *Thompson v. Honey Creek Draining Co.*, 33 Ind. 268 [1870].

⁶ *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Porter*, 38 Ind. App. 226, 74 N. E. 260 [1905].

⁷ *Cabell v. City of Henderson*, 28 Ky. Law Rep. 89, 88 S. W. 1095 [1905].

⁸ *Helm v. Witz*, 35 Ind. App. 131, 73 N. E. 846 [1904].

⁹ *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930 [1901]; *Van Sickle v. Belknap*, 129 Ind. 558, 28 N. E. 305 [1891]; *Baltimore & Ohio Railroad Co. v. Daegling*, 30 Ind. App. 180, 65 N. E. 761 [1902].

¹ *Doane v. Houghton*, 75 Cal. 360, 17 Pac. 426 [1888].

plaintiff may amend by omitting certain defendants who are shown to have no interest in the property.² In such case leave should be given to the remaining defendants to amend their answers.³ Objection to the amendment, if made at all, should be made at the trial, and cannot be urged for the first time in a proceeding in error.⁴ A court of error may assume that the complaint was amended to conform to the evidence.⁵ It is not possible by amendment to introduce new defendants, or a new cause of action, after the period of limitations has expired, even if such period had not expired when the original action was brought.⁶

§ 1246. Prayer.

The prayer of a petition or complaint is usually not regarded as an essential part thereof. Accordingly, if the prayer seeks to enforce the assessment against more land than is within the taxing district, such prayer does not invalidate the complaint.¹ The amount for which recovery is prayed, may, however, be considered as supplying omissions or deficiencies in the petition.² Under a general prayer for relief, the plaintiff may receive any relief to which he is entitled by reason of the facts pleaded and proved.³

§ 1247. Averments as to petition for improvement.

If the judgment of the authorities acting upon a petition for improvement, is conclusive, it is not necessary to allege that the signers of the petition were land owners when it was signed,¹ or that the petition was verified,² or that the defendant's land was described in the petition,³ or that he was named therein.⁴

² Doane v. Houghton, 75 Cal. 360, 17 Pac. 426 [1888].

³ Harney v. Appelgate, 57 Cal. 205 [1881].

⁴ Riley v. Stewart, 50 Mo. App. 594 [1892].

⁵ First Presbyterian Church v. City of Lafayette, 42 Ind. 115 [1873]; (as by changing the plaintiff from the city to the contractor).

⁶ Eyermann v. Scollay, 16 Mo. App. 498 [1885].

¹ Holt v. Figg, 94 S. W. 34, 29 Ky. Law Rep. 613 [1906].

² Dixon v. Labry, — Ky. —, 69 S. W. 791, 24 Ky. L. R. 697 [1902].

³ Speet v. Barber Asphalt Paving Co., — Ky. —, 80 S. W. 1106, 26 Ky. Law Rep. 193 [1904].

⁴ Johnson v. State for use of Davidson, 116 Ind. 374, 19 N. E. 298 [1888].

⁵ Kennedy v. State ex rel. Dorsett, 124 Ind. 239, 24 N. E. 748 [1890].

⁶ Deegan v. State for use of Stoddard, 108 Ind. 155, 9 N. E. 148 [1886].

⁷ Deegan v. State for use of Stoddard, 108 Ind. 155, 9 N. E. 148 [1886].

§ 1248. Averments as to order or resolution.

It has been held not necessary to allege that an order establishing the improvement was made.¹ An averment that the council "duly gave and made its determination to order the work done," has been held to be sufficient as an averment that such work was ordered, without setting forth the steps required by statute to give to the council jurisdiction to order the work to be done.² A complaint which shows that the resolution for the improvement does not describe the improvement with sufficient certainty, is insufficient,³ even if it is averred that the resolution was "duly made and passed."⁴ The averment that the board of supervisors "duly made and passed" a resolution, setting the assessment aside and ordering a new assessment, has been held to be sufficient.⁵ If the resolution must receive a two-thirds vote unless a petition for the improvement is presented, the complaint must aver, either the presentation of a petition, or that the resolution for the improvement received a two-thirds vote.⁶

§ 1249. Averments as to ordinance.

If a special tax bill is the basis of the action, it has been held not necessary to aver that the work was done by virtue of an ordinance.¹ If an ordinance must receive a greater vote than a majority, such as a two-thirds vote, the complaint must allege that the ordinance received the required vote. The omission of such averment is cured if the answer expressly admits that the ordinance was enacted by the council.² An averment that an ordinance was enacted "by a two-thirds vote of the common council," is sufficient.³ An averment that an ordinance was read and passed on a certain day is sufficient, without an averment that it was twice read publicly and passed at two sessions held

¹Smith v. Clifford, 99 Ind. 113 [1884].

²The Pacific Paving Co. v. Bolton, 97 Cal. 8, 31 Pac. 625 [1892].

³Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290 [1903]; Grant v. Barber, 135 Cal. 188, 67 Pac. 127 [1901].

⁴Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445 [1903].

⁵Williams v. Bergin, 127 Cal. 578, 60 Pac. 164 [1900].

⁶Burris v. Baxter, 25 Ind. App. 536, 58 N. E. Rep. 733 [1900].

¹City of Joplin ex rel. Kee v. Freeman, 125 Mo. App. 717, 103 S. W. 130 [1907]; Kansas City to the use, etc. v. American Surety Co., 71 Mo. App. 315 [1897].

²Lux & Talbot Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903].

³City of Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112 [1895].

on different days, although such procedure is required by statute.⁴ The complaint need not state whether the proceedings were had at a regular or special meeting of the city council.⁵ If it is necessary that the ordinance be passed by the mayor and the city council, a complaint which omits to aver that it was so passed, is insufficient.⁶ The steps leading to the enactment of the ordinance need not be pleaded unless they constitute jurisdictional facts.⁷ In some jurisdictions it is said not to be necessary to set out the details of the ordinance ordering the street improvement.⁸ It is sufficient to plead its substance and effect.⁹ In some cases it is said that an ordinance cannot be pleaded by its title and the date of its passage, but that it must be set out in full, or at least must be pleaded with sufficient certainty of description.¹⁰ If, by statute, the courts are to take judicial notice of city ordinances, it is sufficient to refer to the ordinance by its title and its date.¹¹ Both general and special ordinances must be pleaded.¹² An averment that the council duly passed and published an ordinance, has been held to be sufficient as against a general demurrer.¹³ An averment that an ordinance was passed on the recommendation of the board of public works, has been held to be sufficient to show such recommendation.¹⁴

§ 1250. Averments as to procedure.

If, by statute, a lien of an assessment does not attach until the notice of the establishment of the work has been recorded, the complaint must aver that such notice was recorded.¹ If an as-

⁴ *Cabell v. City of Henderson*, — Ky. —, 88 S. W. 1095, 28 Ky. L. R. 89 [1905].

⁵ *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899].

⁶ *Irvin v. Devors*, 65 Mo. 625 [1877].

⁷ *Heman v. Payne*, 27 Mo. App. 481 [1887].

⁸ *Dugger v. Hicks*, 11 Ind. App. 374, 36 N. E. 1085 [1894]; *Eyerma v. Payne*, 28 Mo. App. 72 [1887].

⁹ *Moberly v. Hogan*, 131 Mo. 19, 32 S. W. 1014 [1896].

¹⁰ *City of St. Louis v. Stoddard*, 15 Mo. App. 173 [1884]; *Keane v. Klausman*, 21 Mo. App. 485 [1886].

¹¹ *Gaertner v. Louisville Artificial*

Stone Co., 114 Ky. 160, 70 S. W. 293 [1902]; (following *Dumesnil v. Hexagon Tile Walk Co.*, — Ky. —, 58 S. W. 705, 23 Ky. L. R. 144, and overruling *Nevin v. Gaertner*, — Ky. —, 48 S. W. 153, 20 Ky. L. R. 1022).

¹² *Stephens v. Guthrie*, 67 Ky. (4 Bush.) 462 [1868]; *Babbitt v. Woolley*, 66 Ky. (3 Bush.) 703 [1868].

¹³ *City of St. Louis v. Lang*, 131 Mo. 412, 33 S. W. 54 [1895]; *Jessing v. City of Columbus*, 1 Ohio C. C. 90, 22 W. L. B. 453 [1885].

¹⁴ *Gleason v. Barnett*, 106 Ky. 125, 50 S. W. 67 [1899].

¹ *Scott v. State for use of Busenburg*, 89 Ind. 368 [1883].

assessment can be enforced only by precept issued upon an affidavit embodying the substantial requirements of the statute which provides for such affidavit, a complaint which shows an insufficient affidavit is bad on demurrer.² Under some statutes, it has been held to be necessary to aver the qualifications of the appraisers,³ as that they were disinterested freeholders of the county, and not of kin to the parties.⁴ If confirmation is necessary to make the assessment valid, the complaint must show that the assessment was confirmed.⁵

§ 1251. Averments as to making assessment.

The complaint must aver the fact that the assessment was made.¹ A general averment that the assessment was duly made, has been held to be sufficient,² at least in the absence of any objection to such form of averment.³ Under some statutes a copy of the assessment must be made a part of the complaint, or the complaint will be demurrable.⁴ An averment showing that the steps necessary to the levy of an assessment were taken, is sufficient as an allegation of the making of such assessment.⁵ The fact that the amount of the assessment is left blank, does not render the complaint a nullity if the prayer of the petition shows the amount claimed, and no motion is filed to the petition.⁶

² *Clements v. Lee*, 114 Ind. 397, 16 N. E. 799 [1887].

³ *Laughlin v. Ayers*, 66 Ind. 445 [1879]; *Seits v. Sinel*, 62 Ind. 253 [1878]; *Combs v. Etter*, 49 Ind. 535 [1875].

⁴ *Laughlin v. Ayers*, 66 Ind. 445 [1879]; *Seits v. Sinel*, 62 Ind. 253 [1878]; *Combs v. Etter*, 49 Ind. 535 [1875].

⁵ *Neiman v. State ex rel. Dickey*, 98 Ind. 58 [1884]. For a sufficient averment of approval by the court, see *Albertson v. State ex rel. Wells*, 95 Ind. 370 [1883].

¹ *Neiman v. State ex rel. Dickey*, 98 Ind. 58 [1884].

² *Jonesboro, L. C. & E. R. Co. v. Board of Directors of St. Francis Levee District*, 80 Ark. 316, 97 S. W. 281 [1906]; *Himmelmann v. Woolrich*, 45 Cal. 249 [1873].

³ *Jonesboro, L. C. & E. R. Co. v.*

Board of Directors of St. Francis Levee District, 80 Ark. 316, 97 S. W. 281 [1906].

⁴ *State ex rel. Mayfield v. Myers*, 100 Ind. 487 [1884]; *State for use of Bingham v. Turvey*, 99 Ind. 599 [1884]; *Alkire v. Timmons Ditching Co.*, 51 Ind. 71 [1875]; *Jerrell v. Etchison Ditching Association*, 62 Ind. 200 [1878]; *Busenbark v. Etchison Ditching Association*, 62 Ind. 314 [1878]; *Alsbaugh v. Ben Franklin Draining Association*, 51 Ind. 271 [1875].

⁵ *Laverty v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774; *Pickering v. State for use of Dyar*, 106 Ind. 228, 6 N. E. 611 [1885]; *Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28 [1896].

⁶ *Dixon v. Labry*, — Ky. —, 69 S. W. 791, 24 Ky. L. R. 697 [1902].

§ 1252. Necessity of answer.

Under the provisions of some statutes it is not necessary that an answer should be filed, but all defenses may be made without filing any formal answer.¹ In the absence of a statutory provision expressly dispensing with an answer, it is necessary that an answer be filed, where the assessment is to be enforced by a formal suit or action. The facts set forth in the complaint must be regarded as true, if no answer is filed denying such facts.² Averments in the complaint or petition which are not denied in the answer are to be regarded as true.³ If the defendant wishes to rely upon new facts to avoid the legal effect of the facts which are pleaded in the complaint, such new matter must be set up in the answer.⁴ In some jurisdictions a default admits all the averments of the complaint, except as to the amount due, and as to that it admits that something is due, but leaves the amount to be established by proof.⁵ An answer which sets up facts which, if true, would prevent the recovery of the assessment, is sufficient.⁶ If the ordinance is void on its face, as where it provides for levying an assessment for a purpose not authorized by statute,⁷ its invalidity is a matter of law and need not be pleaded specially.

§ 1253. Method of averring facts.

Facts, and not conclusions, must be stated in the answer.¹ The answer must set forth the interest which the defendants have, if the petition merely alleges that they have, or claim to have, some

¹ *Baker v. Arctic Ditchers*, 54 Ind. 310 [1876]; *Arctic Ditchers v. Coon*, 47 Ind. 201 [1874].

² *Santa Cruz Rock Pavement Co. v. Bowie*, 104 Cal. 286, 37 Pac. 934 [1894]; *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788 [1888]; *Clements v. Lee*, 114 Ind. 397, 16 N. E. 799 [1887]; *Hoefgen v. State ex rel. Brown*, 17 Ind. App. 537, 47 N. E. 28 [1897].

³ *English v. Territory*, — Ariz. —, 89 Pac. 501 [1907].

⁴ *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893]; *Commissioners of Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891]; *Bradley v. City of Frankfort*, 99 Ind. 417 [1884];

Hays v. City of Vincennes, 82 Ind. 178 [1882]; *Kansas City v. Block*, 175 Mo. 433, 74 S. W. 993 [1903].

⁵ *McKinney v. State for use of Nixon*, 101 Ind. 355 [1884].

⁶ *Drake v. Grout*, 21 Ind. App. 534, 52 N. E. 775 [1898].

⁷ *Weaver v. Canon Sewer Company*, 18 Colo. App. 242, 70 Pac. 953 [1902].

¹ *Spaulding v. Wesson*, 84 Cal. 141, 24 Pac. 377 [1890]; *Willard v. Albertson*, 23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403 [1899]; *City of Erie City for use v. Brady*, 127 Pa. St. 169, 17 Atl. Rep. 885 [1889]; *Erie City for use v. Butler*, 120 Pa. St. 374, 14 Atl. 153 [1888].

interest in the premises.² If the answer contains two or more defenses, such defenses must, under modern practice, be consistent with each other. However, a denial of the assessment, an averment of a pending suit upon the prior assessment, and a plea of special limitation by the lapse of three months after final judgment was rendered in the Supreme Court before the new assessment was made, are all consistent each with the other.³ Under the procedure adopted in some jurisdictions, an answer directed to the entire complaint, but which presents a defense only to a part of the sum which it is sought to collect, is bad on demurrer.⁴ A private statute must be pleaded.⁵ This must be done at least by giving its title and the day upon which it became a law.⁶

§ 1254. Answer not setting up valid defense.

The answer is insufficient, if the facts set up therein do not, in law, constitute a good defense to the assessment.¹ A plea that a certain court set an assessment aside, is insufficient without showing an appeal to such court, or other facts which would give it jurisdiction.² An averment of a prior assessment which does not set up the facts to show that such assessment was valid, is insufficient.³ An averment that the improvement is not completed, is not a sufficient defense, if the public authorities have power to levy an assessment before the improvement is completed.⁴ An averment that the defendant did not receive notice of the assessment proceedings is insufficient if it does not appear that he had the legal title to the land when the proceedings were instituted.⁵ An allegation to the effect that no statement of the election of

² *Himmelmann v. Spanagel*, 39 Cal. 389 [1870].

³ *Westall v. Altschul*, 126 Cal. 164, 58 Pac. 458 [1899].

⁴ *Fellenkamp v. City of Lafayette*, 30 Ind. 192 [1868].

⁵ *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891].

⁶ *Zable v. Louisville Baptist Orphans' Home*, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891].

¹ *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885]; *Racer v. State for use of Rhine*, 131 Ind. 393, 31 N. E. 81 [1891]; *Indianapolis &*

Cumberland Gravel Road Co. v. State ex rel. Flack, 105 Ind. 37, 4 N. E. 316 [1885]; *McKinney v. State for use of Nixon*, 101 Ind. 355 [1884]; *Nevins and Otter Creek Township Draining Co. v. Alkire*, 36 Ind. 189 [1871].

² *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

³ *Nevins and Otter Creek Township Draining Co. v. Alkire*, 36 Ind. 189 [1871].

⁴ *Racer v. State for use of Rhine*, 131 Ind. 393, 31 N. E. 81 [1891].

⁵ *Chaney v. State ex rel. Ely*, 118 Ind. 494, 21 N. E. 45 [1888].

any member of the board of trustees of a town had been filed in the office of the clerk of the circuit court of the county, is insufficient in the absence of averments as to the date of the incorporation of the town and the date of election of the trustees, since without such averments it does not appear that it is necessary to file such certificate.⁶ An allegation that the amounts of some of the assessments were altered without authority, is insufficient, if it does not appear that the defendant has been injured thereby.⁷

§ 1255. General denial.

Under the procedure in some jurisdictions, a general denial is insufficient in an assessment proceeding, but the defects which are claimed must be alleged specifically.¹ Thus, *nil debet* is not a good answer to an action on an appeal bond.² In some jurisdictions a general denial is sufficient, and if such an answer is filed, the plaintiff must make out at least a *prima facie* case.³ Thus, in an action on a tax bill, the defendant under a general denial may show that such bill never had a legal existence.⁴ If, however, the complaint need only set up facts which make a *prima facie* case, a general denial controverts only the averments of the petition; and other facts must be specially pleaded.⁵ Where the tax bill or assessment makes out a *prima facie* case, failure to give notice that the suit is to be brought must be pleaded specially, and cannot be established under a general denial.⁶ If the complaint may aver in general terms the performance of conditions precedent in a contract, such averment cannot be controverted by a general denial, but the answer must show in what respect it is claimed the contract was not performed.⁷

§ 1256. Nul tiel record.

If, by statute, the pleadings recognized are the petition, answer, cross petition, reply and demurrer, a formal plea of *nul tiel*

⁶ *Daly v. Gubbins*, — Ind. —, 82 N. E. 659 [1907].

⁷ *Bannister v. Grassy Fork Ditching Association*, 52 Ind. 178 [1875].

¹ *People v. Hagar*, 52 Cal. 171 [1877]; *Preston v. Roberts*, 75 Ky. (12 Bush.) 570 [1877].

² *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

³ *City of St. Louis v. Brinckwirth*, 204 Mo. 280, 102 S. W. 1091 [1907].

⁴ *State v. Rau*, 93 Mo. 126, 5 S. W. 697; *Cushing v. Powell*, — Mo. App. —, 109 S. W. 1054 [1908].

⁵ *Vieths v. Planet Property and Financial Company*, 64 Mo. App. 207 [1895]; *Menefee v. Bell*, 62 Mo. App. 659 [1895].

⁶ *Menefee v. Bell*, 62 Mo. App. 659 [1895].

⁷ *Preston v. Roberts*, 75 Ky. (12 Bush.) 570 [1877].

record cannot be made as distinct from the answer.¹ In Indiana, under the restrictions imposed upon defenses, a plea of *nul tiel record* cannot put in issue any fact which preceded the making of the contract.²

§ 1257. Special denials.

The answer may make specific denial of one or more averments of the complaint. A denial of certain specified facts is not a denial of other facts which are not specifically denied.¹ Thus, a denial that sealed bids were delivered to the clerk, and an averment that the plaintiff's bid was not accompanied by a bond, do not amount to a denial that plaintiff's bid was signed.² An averment of facts which are inconsistent with the truth of the facts alleged in the complaint, is equivalent to a special denial, and is not an averment of new matter.³ Thus, an averment that one who is not made a defendant owns an interest in the land, is, in fact, a denial of the averments of the complaint with reference to ownership.⁴

§ 1258. Admissions.

An admission in the answer, that the taxing district by which the suit was brought was duly organized, is an admission of all the steps necessary to such organization.¹ Facts which are admitted in the answer are to be regarded as true for the purpose of that case as between the parties thereto. Accordingly, if some certain defendants admit the truth of certain allegations, and other defendants deny them, such facts are regarded as true as to the defendants who admit them, although upon trial it may be found that they are not true as to the defendants who denied them.² The averments of the answer may be used to supply deficiencies in the petition.³

¹ Preston v. Roberts, 75 Ky. (12 Bush.) 570 [1877].

² Martindale v. Palmer, 52 Ind. 411 [1875].

³ City Street Improvement Co. v. Rontet, 140 Cal. 55, 73 Pac. 729 [1903].

² City Street Improvement Co. v. Rontet, 140 Cal. 55, 73 Pac. 729 [1903].

³ Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162 [1890].

⁴ Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162 [1890].

¹ The Wabash Eastern Railway Company of Illinois v. The Commissioners of East Fork Special Drainage District, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891].

² Crane v. Forth, 95 Cal. 88, 30 Pac. 193 [1892].

³ Lux & Talbot Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903]; (as to passage of ordinance); Girvin v. Simon, 116 Cal. 604, 48 Pac. 720 [1897]; (as to material parts of improvement contract.)

§ 1259. Plea of payment.

A plea of payment must show that payment was made to the person authorized to receive it.¹ If it is claimed that payment was made to the original holder of an assessment certificate, and it is shown in the petition that such assessment certificate has been assigned, the answer must allege payment before such assignment.² If a presumption of payment from lapse of time is relied upon, payment and not the statute of limitations should be pleaded.³

§ 1260. Verification.

It is generally provided that the answer must be sworn to.¹ In some jurisdictions an answer which is not sworn to is held not to raise an issue, and the plaintiff is entitled to judgment on the pleadings.²

§ 1261. Cross petition.

What questions may be raised between two defendants upon a cross petition depends upon the principles of procedure which are in force in the respective jurisdictions. In an action to enforce an assessment, a cross petition for an accounting between the city and a contractor cannot be entertained.¹ In an action to enforce assessment bonds, a party who claims that his land is not subject to assessment may intervene, and upon proper showing obtain a judgment relieving his land from the liability asserted against it.² In a suit by property owners to enjoin the collection of a tax which has been levied to pay the interest on bonds of an irrigation district, the bondholders cannot, on cross petition, obtain an adjudication of the validity of the bonds.³

§ 1262. Reply.

If the answer contains new matter, a reply is necessary, or the new matter alleged in the answer will be regarded as admitted.¹

¹ Farmer's Bank v. Orr, 25 Ind. App. 71, 55 N. E. 35 [1900].

² Farmer's Bank v. Orr, 25 Ind. App. 71, 55 N. E. 35 [1900].

³ Fisher v. Mayor, etc., of the City of New York, 3 Hun (N. Y.) 648 [1875].

¹ City of Stockton v. Dahl, 66 Cal. 377, 5 Pac. 682 [1885].

² City of Stockton v. Dahl, 66 Cal. 377, 5 Pac. 682 [1885].

³ United States Fidelity & Guar-

anty Co. v. City of Newark, — N. J. Eq. —, 66 Atl. 904 [1907].

² Nevada National Bank v. Poso Irrigation District, 140 Cal. 344, 73 Pac. 1056 [1903].

³ Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 [1904]. (The fact that the irrigation district, whose bonds were brought into question, was not a party to this action was regarded as controlling.)

¹ City of St. Louis to use of McGrath v. Clemens, 36 Mo. 467 [1865].

The reply may contain new matter which will defeat the legal effect of the facts set up in the answer. If certain irregularities, which would defeat the assessment, are alleged in the answer, a reply which alleges facts showing an estoppel is sufficient.² A reply which shows that the improvement is constructed under a prior statute which has been repealed before the assessment proceedings were begun, is insufficient.³ An averment inserted in a reply by a mistake, may be corrected by another averment in such reply.⁴ Thus, an averment inserted by a mistake, that the plaintiff "did not enter into the contract," is corrected by another averment which shows that the plaintiff began the improvement under his contract at a specified time.⁵

§ 1263. Demurrer.

If a pleading is insufficient on its face, the adversary party may demur thereto,¹ except under statutes which dispense altogether with formal pleadings.² Striking objections to an application for a judgment from the files as insufficient, is equivalent to sustaining a demurrer thereto.³ Judgment on demurrer should be rendered if the demurrer is sustained only in favor of the party who demurs.⁴ Under the procedure in some jurisdictions, where a transcript of the proceedings takes the place of a complaint, a general demurrer cannot be filed, but the demurrer must point out specifically the defects relied upon.⁵

§ 1264. Demurrer does not lie, if pleading equivocal.

A demurrer should be sustained only if a material allegation is entirely wanting, or if the pleading shows unequivocally that facts essential to the cause of action, or defense, as the case may be, are lacking.¹ If a complaint shows a delay in posting notices,

² Nevins & Otter Creek Township Draining Co. v. Alkire, 36 Ind. 189 [1871]; Willard v. Albertson, 23 Ind. App. 162, 54 N. E. 446 [1899]; Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071 [1899].

³ Phillips v. Lewis, 109 Ind. 62, 9 N. E. 395 [1886].

⁴ Willard v. Albertson, 23 Ind. App. 162, 54 N. E. 446 [1899].

⁵ Willard v. Albertson, 23 Ind. App. 162, 54 N. E. 446 [1899].

¹ Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445 [1903]; Clements v. Lee, 114 Ind. 397, 16 N. E. 799 [1887];

Jerrell v. Etchison Ditching Association, 62 Ind. 200 [1878].

² Arctic Ditchers v. Coon, 47 Ind. 201 [1874].

³ Glover v. People ex rel. Raymond, 201 Ill. 545, 66 N. E. 820 [1903].

⁴ Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290 [1903].

⁵ Hays v. City of Vincennes, 82 Ind. 178 [1882].

¹ Williams v. Bergin, 116 Cal. 56, 47 Pac. 877 [1897]; Porphyrus Paving Company v. Ancker, 104 Cal. 340, 37 Pac. 1050 [1894].

such delay cannot be reached by demurrer unless it affirmatively appears that the delay was unreasonable. If this fact does not appear affirmatively, the objection must be made by answer.² A demurrer may be filed on the ground of the statute of limitations, if it affirmatively appears from the complaint that the plaintiff's cause of action is barred; but if the complaint is equivocal in this respect, this objection must be made by answer.³ If sufficient facts are stated, but in a defective manner, this must be reached by a motion, or special demurrer, according to the procedure there in force, but cannot be reached by general demurrer.⁴ If the petition does not affirmatively show the legal capacity of the plaintiff to sue, but does not affirmatively show a want of capacity, this objection must be reached by answer and not by demurrer.⁵ Demurrer will not lie to averments which do not properly form a part of the pleadings;⁶ such as the articles of associations of a drainage district, even if a copy thereof is filed with the complaint.⁷

§ 1265. Demurrer lies if pleading clearly defective.

Demurrer will lie if the pleading shows affirmatively a lack of certain essential facts.¹ If the petition shows, on its face, that the improvement was not described in the proceedings with sufficient certainty, and in that jurisdiction such want makes the assessment invalid,² or if the petition shows that the lien has been allowed to lapse,³ or if it does not show that the necessary demand has been made,⁴ or if it shows that an insufficient affidavit for a precept was filed,⁵ or if it does not show that notice of the establishment of the work has been recorded where this is essential to the lien of the assessment,⁶ or if it shows that the bids

² *Porphyrus Paving Co. v. Ancker*, 104 Cal. 340, 37 Pac. 1050 [1894].

³ *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897].

⁴ *Schmidt v. Market St. & Willow Glenn R. R. Co.*, 90 Cal. 37, 27 Pac. 61 [1891].

⁵ *District No 110 v. Feek*, 60 Cal. 403 [1882].

⁶ *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872].

⁷ *Etchison Ditching Association v. Busenback*, 39 Ind. 362 [1872]; *Excelsior Draining Co. v. Brown*, 38 Ind. 384 [1871].

¹ *Buckman v. Hatch*, 139 Cal. 53, 72 Pac. 445 [1903].

² *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290 [1903]; *Buckman v. Hatch*, 139 Cal. 53, 72 Pac. 445 [1903].

³ *Williamson v. Joyce*, 140 Cal. 669, 74 Pac. 290 [1903].

⁴ *Englebrecht v. McElwee*, 122 Cal. 284, 54 Pac. 900 [1898].

⁵ *Clement v. Lee*, 114 Ind. 397, 16 N. E. 799 [1887].

⁶ *Scott v. State for use of Busenburg*, 89 Ind. 368 [1883].

were opened before the time fixed by the notice calling for bids;⁷ a demurrer will lie in each case. If, by statute, the assessment must be set out in the complaint, its omission renders the complaint demurrable.⁸

§ 1266. Demurrer as admission.

A demurrer admits the truth of the facts which are properly pleaded, but it admits the truth of ~~of~~ such facts only.¹ A demurrer to a plea in which it is alleged that a certain petition was presented, setting forth the same in full, admits the fact that such petition was presented, but does not admit the truth of the statements which are alleged to have been made in such petition.²

§ 1267. Effect of subsequent facts on right to demur.

An error of the court in overruling a demurrer is cured if the defendant answers, setting up in detail the same facts as those relied on by demurrer, and a trial is had upon such issue.¹ So an answer which supplies the missing averments of the petition cures the defect therein whether a demurrer has been filed² or not.³

§ 1268. Motions.

If the case is tried on the transcript of the proceedings had before the assessing body, and such transcript is incomplete or indefinite, the remedy is a motion to have the clerk of such body ordered to supply such omission, and not a motion to make defin-

⁷ A complaint to foreclose a street assessment lien, which shows that bids were to be received until 4 p. m. of a certain day and that the bids were opened, examined and declared by the board on the day preceding and that, in pursuance thereof, the board awarded the contract to the plaintiff, shows on its face that the proceedings of the board in awarding the contract were void, and a general demurrer to such complaint is well taken, and if no evidence is received or introduced inconsistent with the averment as to the date when the proposals were opened, or showing that they were in fact opened and canvassed at the expiration of the time allowed for bids, the error in overruling the demurrer to

the complaint is not cured. *N. P. Perine Contracting Co. v. Quackenbush*, 104 Cal. 684, 38 Pac. 533 [1894].

⁸ *Jerrell v. Etchison Ditching Association*, 62 Ind. 200 [1878].

¹ *Philadelphia, Wilmington & Baltimore R. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890].

² *Philadelphia, Wilmington & Baltimore R. R. Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890].

³ *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897].

⁴ *Lux & Talbot Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903].

⁵ *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720 [1897].

ite and certain.¹ If a motion to a pleading is filed to make such pleading definite and certain, the motion should show wherein it is claimed that the pleading is not definite and certain.² A motion to strike out a number of objections which does not refer to each separately, is properly overruled, if any of such objections present valid defenses.³ An objection to the jurisdiction of the court over the subject matter may be taken by a motion to dismiss, as well as by a plea.⁴ A complaint may be insufficient as against demurrer, and yet if such defects are cured by the verdict, it may be sufficient as against a motion in arrest of judgment.⁵

§ 1269. Motions for new trial, to set aside judgment and to set aside stipulation.

Motions for new trial and to set aside stipulations and judgments in assessment cases are controlled by the general principles of law applicable to such applications for relief. Objections to the sufficiency of the pleading, except possibly such objections as could be raised by a general demurrer, cannot be raised for the first time upon a motion for a new trial, or upon an appeal therefrom.¹ If a new trial is sought on grounds outside the record, such grounds must be set forth in affidavits.² The fact that the attorney had not examined the ordinance, plans, specifications and estimates so as to learn what changes had been made, is not such surprise as is ground for a new trial where such changes could have been learned by the exercise of slight diligence;³ nor is ignorance of the existence of a general ordinance authorizing the improvement in question;⁴ nor is a mistaken view of the law such surprise.⁵ The entry of a judgment in favor of the plain-

¹ McGill v. Bruner, 65 Ind. 421 [1879].

² Gilmore v. Norton, 10 Kan. 491 [1872].

³ The City of Bloomington v. The Chicago and Alton Railroad Company, 134 Ill. 451, 26 N. E. 366 [1891].

⁴ Village of Hammond v. Leavitt, 181 Ill. 416, 54 N. E. 982 [1899].

⁵ Beck v. Tolen, 62 Ind. 469 [1878].

¹ Mason v. Austin, 46 Cal. 385 [1873].

² Blemel v. Shattuck, 133 Ind. 498, 33 N. E. 277 [1892]; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860 [1898].

³ Farrell v. West Chicago Park Commissioners, 182 Ill. 250, 55 N. E. 325 [1899].

⁴ Babbitt v. Woolley, 66 Ky. (3 Bush.) 703 [1868].

⁵ Santa Cruz Rock Pavement Co. v. Bowie, 104 Cal. 286, 37 Pac. 934 [1894].

tiff and erroneous in form after a demurrer to the complaint has been sustained, is surprise for which the defendant may have the judgment vacated.⁶ Ignorance of the pendency of the action is ground for the vacation of a judgment by default.⁷ An affidavit of the merits made in a motion to set aside a default judgment cannot be contradicted in some jurisdictions.⁸ If an apportionment is too high, it is ground for a new trial but not for a motion to modify.⁹ In some jurisdictions a motion for a new trial can not be granted.¹⁰ In some jurisdictions a motion made by one defendant to set aside a judgment enures, if granted, to the benefit of the other defendants.¹¹ If a stipulation has been made to the effect that the suit upon the assessment in question shall abide the event of another suit, such stipulation will not be set aside where no application therefor has been made until such other case has been decided adversely, and no affidavit of merits was filed at the hearing of the motion, and the only ground for setting aside the stipulation was that since making it the applicant had discovered that the land described in the complaint was not the land described in the assessment, but such application did not claim that the amount sought to be recovered was not due upon the assessment on the land described, and it did not show that such defect could not be cured by an amendment.¹²

§ 1270. Continuances.

The court has the same power to continue an assessment case that it has to continue any other case.¹ An application for a continuance on the ground of the absence of witnesses may be denied if no diligence in preparing for trial is shown, and it is not shown why the absent witnesses were not present.² A motion to vacate a default judgment, made at the term at which such default was entered may be continued to the next term and then granted.³

⁶ *City Street Improvement Company v. Emmons*, 138 Cal. 297, 71 Pac. 332 [1902].

⁷ *Reclamation District No. 124 v. Coghill*, 56 Cal. 607 [1880].

⁸ *Reclamation District No. 124 v. Coghill*, 56 Cal. 607 [1880].

⁹ *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893].

¹⁰ *City of St. Paul v. Rogers*, 22 Minn. 492 [1876].

¹¹ *Bitzer v. O'Bryan*, 107 Ky. 590, 54 S. W. 951 [1900].

¹² *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900].

¹ *Gibson v. City of Chicago*, 22 Ill. 567 [1859].

² *Village of Franklin Park v. Franklin*, 231 Ill. 380, 83 N. E. 214 [1907].

³ *People ex rel. Johnson v. Springer*, 106 Ill. 542 [1883].

CHAPTER XXIV.

EVIDENCE IN ACTIONS TO ENFORCE ASSESSMENT.

§ 1271. Evidence must correspond to pleadings.

The general principles of the law of evidence determine questions of the admissibility of evidence in proceedings to enforce an assessment, although these general principles are modified in part by special statutory provisions applicable to assessments, and, in part, by the general principles underlying the law of assessments. The evidence offered must conform to the pleadings, and must be confined to the point in issue.¹ Evidence cannot be offered as to facts which are not alleged in the pleadings.² Since the evidence must correspond to the pleadings, it follows that the pleading of certain facts precludes the parties so pleading them from offering in evidence inconsistent facts, although such inconsistent facts might have been admissible had they been pleaded.³ Thus, if a city pleads that it acted under a certain ordinance, no room is left for a presumption that it acted under a resolution and not an ordinance.* If one who objects to an assessment

¹ *Wells v. City of Chicago*, 202 Ill. 448, 66 N. E. 1056 [1903]; *Commissioners of Big Lake Special Drainage Dist. v. Comrs. of Highways of Sand Ridge*, 199 Ill. 132, 64 N. E. 1094 [1902]; *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *Farrel v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E. 325 [1899]; *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. 602 [1890]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *Cook v. City of Independence*, 133 Iowa, 582, 110 N. W.

1029 [1907]; *Township of Deerfield v. Harper*, 115 Mich. 678, 74 N. W. 207 [1898]; *State of Minnesota ex rel. Powell v. District Court of Ramsey County*, 47 Minn. 406, 50 N. W. 476 [1891]; *Amberson Ave., Appeal of Childs*, 179 Pa. St. 634, 35 Atl. 354 [1897]; *Sterrett School Sub-District v. City of Pittsburg*, 183 Pa. St. 225, 38 Atl. 1103 [1897]; *Boyd v. Borough of Wilkinsburg*, 183 Pa. St. 198, 38 Atl. 592 [1897].

² *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889].

³ *State of Minnesota ex rel. Powell v. District Court of Ramsey County*, 47 Minn. 406, 50 N. W. 476 [1891].

⁴ *Cook v. City of Independence*, 133 Iowa, 582, 110 N. W. 1029 [1907].

pleads that it was made under a mistake of fact, he cannot show fraud or the adoption of an illegal principle of assessment.⁵

§ 1272. Evidence must be confined to issue.

If certain facts are admitted by the pleadings, or by the parties, it is not necessary to introduce evidence tending to prove the truth of such facts.¹ On the other hand, the party who has made such admissions cannot introduce evidence tending to controvert their truth; and a party who has not denied certain facts by his pleading, will not be allowed to introduce evidence to controvert them.² Evidence of private contracts between the plaintiff and the defendants which included additional work which was never performed, is inadmissible in a proceeding to enforce an assessment.³ Evidence which does not tend to establish the point in issue is inadmissible. Thus, if the issue to be submitted to the jury is whether the property is assessed for more than its benefit, and whether it is assessed for more than its share of the costs, evidence is inadmissible tending to show that a street railway company is liable for a part of the cost of the improvement.⁴ If the amount to be raised by assessment is determined by the cost of the improvement, the evidence must be restricted to the cost at which the improvement could have been constructed at the time and place at which it was constructed, and not to its cost in other cities and at different times.⁵ Since the benefit to be considered is ordinarily the benefit caused by the improvement as a whole, evidence tending to show that certain parts of the improvement did not benefit the property assessed,⁶ or tending to show the cost of that portion of the improvement upon which part of the property in question abutted,⁷ is immaterial. If the proper basis of

⁵ State of Minnesota ex rel. Powell v. District Court of Ramsey County, 47 Minn. 406, 50 N. W. 476 [1891].

¹ City of Stockton v. Dahl, 66 Cal. 377, 5 Pac. 682 [1885]; Elgin, Joliet & Eastern Railway Co. v. Hohenshell, 193 Ill. 159, 61 N. E. 1102 [1901]; Jenkins v. Stetler, 118 Ind. 275, 20 N. E. 788 [1888]; Lufkin v. City of Galveston, 58 Tex. 545 [1883].

² Jerome v. City of Chicago, 62 Ill. 285 [1871]; South Bethlehem Borough v. Laufer, 1 Penn. Dist. Ct. 756 [1892].

³ San Francisco Paving Co. v. Dubois, 2 Cal. App. 42, 83 Pac. 72 [1905]. See also as to contract between contractor and other property owners, Fralich v. Barlow, 25 Ind. App. 383, 58 N. E. 271 [1900].

⁴ Wells v. City of Chicago, 202 Ill. 448, 66 N. E. 1056 [1903].

⁵ Amberson Ave., Appeal of Childs, 179 Pa. St. 634, 35 Atl. 354 [1897].

⁶ Boyd v. Borough of Wilkinsburg, 183 Pa. St. 198, 38 Atl. 592 [1897].

⁷ Farrel v. West Chicago Park Commissioners, 182 Ill. 250, 55 N. E. 325 [1899].

apportionment is the frontage of the property, evidence tending to show that the assessment is not levied upon the basis of value or area, is immaterial.⁸ If an assessment is levied for improving a ditch, evidence tending to show that property benefited by the original construction of the ditch was omitted from the assessment for the improvement, is immaterial, if it is not shown that such property is benefited by the improvement.⁹

§ 1273. Evidence must support issue on part of party offering it.

To be admissible, evidence must tend to make out the issue on the part of the party who offers it.¹ Thus, if the issue is whether the amount assessed against the particular property is a proportionate share of the amount assessed against all the property, the property owner cannot show that the amount assessed against his property is not a proportionate share of the cost of that particular block;² nor can he show that his property is assessed at a higher relative rate than some other specific tract of realty.³ If an assessment cannot be levied against property of a married woman because she was not a member of the drainage association, the assessment being limited to the lands of members of the association, the question of the benefits which her land received is immaterial.* Evidence tending to prove the case of the party who offers it, is admissible if not barred upon some specific ground of objection.⁵ Evidence offered by a party, and which is admitted, must be regarded, even though it tends to support the case of the party who did not offer it, and is unfavorable to the case of the party who offered it.⁶ Thus, if defendants rely on a former judgment in such proceeding as a bar, and if they offer such judgment in evidence, together with the opinion of the Supreme Court holding the ordinance upon which the assessment was based, to be void, such parties will be regarded as having themselves proved

*Green v. City of Springfield, 130 Ill. 515, 22 N. E. 602 [1890].

¹Goodrich v. City of Minonk, 62 Ill. 121 [1871].

²Watson v. City of Chicago, 115 Ill. 78, 3 N. E. 430 [1886]; Bigelow v. Chicago, 90 Ill. 49 [1878]; Liberty Twp. Draining Assoc. v. Watkins, 72 Ind. 459 [1880].

³Watson v. City of Chicago 115 Ill. 78, 3 N. E. 430 [1886].

*Bigelow v. City of Chicago, 90 Ill. 49 [1878].

⁴Liberty Twp. Draining Assoc. v. Watkins, 72 Ind. 459 [1880].

⁵Commissioners of Big Lake Special Drainage Dist. v. Comrs. of Highways of Sand Ridge, 199 Ill. 132, 64 N. E. 1094 [1902]; Badger v. Inlet Drainage District 141 Ill. 540, 31 N. E. 170 [1893].

⁶City of Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39 [1903].

the invalidity of such ordinance.⁷ In admitting evidence a court is not bound to decide what effect it shall have at a subsequent stage of the trial.⁸

§ 1274. Necessity of offering evidence.

In order to enable a party to rely in appeal or error proceedings upon questions of the sufficiency or admissibility of evidence, it is necessary that such party should offer such evidence for the consideration of the court.¹ If, however, certain documents and exhibits are treated by all the parties as being in evidence, formal introduction of them may be regarded as being waived.² Evidence need not be offered in support of allegations which are purely formal.³ Thus, in a suit upon bonds secured by assessments, the allegation that the city has failed or refused to pay such bonds is purely formal and requires no proof.⁴ Facts established by credible evidence on one side and not denied by any evidence upon the other, and which are not supported by any presumptions, are to be regarded as true for the purpose of the case.⁵

§ 1275. Who may offer evidence.

Ordinarily, only a party to a given proceeding may offer evidence therein. In some proceedings, however, property owners who are not parties to the proceeding but whose interests may be affected thereby, may offer evidence. On motion of the city in a confirmation proceeding, one who owns property which is not assessed may appear and offer evidence to show that such property would not be benefited, in order to contradict evidence offered by an owner of property which is assessed, tending to show that such unassessed property is, in fact, benefited and is omitted improperly.¹

§ 1276. Competency and interest of witnesses.

Even if those who are directly interested in the result of the proceedings are not competent as witnesses, persons who are in-

⁷ *City of Chicago v. Nodeck*, 202 Ill. 257, 67 N. E. 39 [1903].

⁸ *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

¹ *Steidl v. People ex rel. Alexander*, 173 Ill. 29, 50 N. E. 129 [1898]; *Adeock v. City of Chicago*, 172 Ill. 24, 49 N. E. 1008 [1898].

² *McChesney v. City of Chicago*, 152 Ill. 543, 38 N. E. 767 [1894].

³ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

⁴ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

⁵ *Pinkstaff v. Allison Ditch Dist. No. 2 of Lawrence County*, 213 Ill. 186, 72 N. E. 715 [1904].

¹ *Jones v. City of Chicago*, 206 Ill. 374, 69 N. E. 64 [1903].

terested in the question involved, but are not directly interested in the outcome of the proceedings, are competent witnesses;¹ and the affidavits of such persons may be used as evidence where affidavits may be employed.² Interest or bias of witnesses may be shown. Accordingly, if witnesses are introduced on behalf of the city in a confirmation proceeding; to show that the property is benefited to the amount of the assessment, and it is shown that such witnesses are employed by the city in special assessment proceedings to give their opinion as to the amount of the benefits, the property owners should be allowed on cross examination to inquire as to the amount which witnesses received for their service, their interest in the suit, and their means of knowledge and information.³

§ 1277. Burden of proof.

The term, burden of proof, is unfortunately used with two well recognized meanings; and is sometimes employed with a third meaning, distinct from the other two. In one sense of the term, it means the duty of supporting the issue on the part of the party in question by a preponderance of the evidence. In another sense, of the term it means the duty of opening the case and making out a *prima facie* case, in order to have questions of fact submitted to the tribunal by which such questions are to be determined. Both of these meanings are well recognized, and they are usually coincident in practical results; that is, the party who has the duty of making out a *prima facie* case in order to recover, generally has, also, the duty of supporting the issue upon his side by a preponderance of the evidence in order to recover. In the third meaning, the term, burden of proof, is regarded as corresponding to the weight of the evidence, and the party who, at any particular stage of offering evidence, finds the weight of the evidence against him, is said to have the burden of proof; which term, as thus used, means that he must introduce enough additional evidence to establish a preponderance on his side, in order to recover. The use of this term with this third meaning is to be regretted, as it introduces an additional element of confusion as to the meaning of the necessary term which is already, unfortunate-

¹ In the Matter of Flatbush Avenue in the City of Brooklyn, 1 Barb. 286 [1847].

in the City of Brooklyn, 1 Barb. (N. Y.) 286 [1847].

² Kerfoot v. City of Chicago, 195

³ In the Matter of Flatbush Ave., Ill. 229, 63 N. E. 101 [1902].

ly, ambiguous. In ordinary actions the question of the burden of proof in either of the first two meanings of the term, depends upon the pleadings, and rests upon the party who holds the affirmative. In actions to enforce assessments, if the making of the same is denied, the party who seeks to enforce the assessment, is bound to make out at least a *prima facie* case, showing that the assessment was, in fact, made.¹ If the regularity of the assessment is conceded, the party seeking to enforce such assessment need not offer evidence as to the details thereof.² If the defendant denies that he is the owner of the land assessed, the burden of proof of such issue is upon the party seeking to enforce the assessment.³ If the defendant concedes the validity of the assessment, and that his land comes within the class of property subject to such assessment, but he claims some special exemption, the burden of proof as to such exemption is upon the party claiming it.⁴ If the making of an assessment is conceded, but its validity is attacked, the burden of proof is, in the absence of statutory provision, upon the party who claims that the assessment was valid, and he is bound to establish the facts alleged by himself and denied by the adversary party which tend to show that the assessment is, in fact, valid.⁵ The burden of proof rests upon the party who claims that a lien exists, and who is trying to enforce it, even if, by statute, land is to be sold for the non-payment of assessments in the same manner as it is sold for taxes, and if, by statute, tax sales are presumptive evidence of the validity of the tax.⁶ Under some statutes, however, the existence of an assessment is said to be *prima facie* evidence of its validity, or, as it is sometimes stated, the assessment is presumptive evidence of its validity. Under such statute, if the fact of the existence of an as-

¹ Etchison Ditching Association v. Hillis, 40 Ind. 408 [1872].

² Lufkin v. City of Galveston, 58 Tex. 545 [1883].

³ Robinson v. Merrill, 87 Cal. 11, 25 Pac. 162 [1890].

⁴ Lima v. Cemetery Association, 42 O. S. 128, 51 Am. Rep. 809 [1884].

⁵ Petaluma Paving Co. v. Singley, 136 Cal. 616, 69 Pac. 426 [1902]; Little v. City of Chicago, 46 Ill. App. 534 [1892]; Pittsburgh, Cincinnati. Chicago and St. Louis Ry. Co. v. Fish, 158 Ind. 525, 63 N. E. 454

[1901]; Bate v. Sheets, 64 Ind. 209 [1878]; M'Comb v. Bell, 2 Minn. 295 [1858]; Grant v. Bartholomew, 58 Neb. 839, 80 N. W. 45 [1899]; Hart-suff v. Hall, 58 Neb. 417, 78 N. W. 716 [1899]; Merrill v. Shields, 57 Neb. 78, 77 N. W. 368 [1898]; Equitable Trust Co. v. O'Brien, 55 Neb. 735, 76 N. W. 417 [1898]; Smith v. City of Omaha, 49 Neb. 883, 69 N. W. 402 [1896].

⁶ Dederer v. Voorhies, 81 N. Y. 154 [1880].

assessment is shown, the party who resists the assessment and claims it to be invalid, is bound to show the invalidity of such assessment by a preponderance of the evidence.⁷ This rule is sometimes stated in the form that, in such cases, the burden of proof is on the party who attacks the validity of the assessment.⁸ Thus, if the sole issue is as to the correctness of the amount of the assessment, the burden is said to be upon the property owner to show that such amount is incorrect.⁹ Statutes which impose the burden of proof in such cases upon the property owner, do not violate any provision of the Fourteenth Amendment, or of the United States Constitution, and, accordingly, no federal question is presented, if the validity of such statutes is attacked, and they are held by the state courts to be valid.¹⁰ In some cases it has been said that the burden of proof as to the validity of the assessment rests upon the city in the first instance, that the report of the commissioners showing the amount and apportionment of the assessment is *prima facie* evidence that it is correct, and that the burden of proof is then shifted to the property owners, and that they are bound to show by a preponderance of evidence that one or more of the lots is assessed more or less than its proportionate share of the cost of the improvement.¹¹ This form of statement is subject to objection, because, in the proper sense of the term, the burden of proof never shifts. As used in this form of statement, burden of proof is regarded as corresponding to preponderance of the evidence. The burden of proof as to questions involving the amount of the assessment, is upon the party at-

⁷ Board of Improvement District Number Five of Texarkana v. Offenhauser, 84 Ark. 257, 105 S. W. 265 [1907]; Raisch v. Hildebrandt, 146 Cal. 721, 81 Pac. 21 [1905]; Porter v. City of Chicago, 176 Ill. 605, 52 N. E. 318 [1893]; Bruning v. Chadwich, 109 La. 1067, 34 So. 90 [1903]; Mayor and City Council of Baltimore v. Smith & Schwartz Brick Company, 80 Md. 458, 31 Atl. 423 [1894]; Philadelphia to use v. MacPherson, 140 Pa. St. 5, 21 Atl. 227 [1891].

⁸ Memphis Land & Timber Company v. St. Francis Levee District, 64 Ark. 258, 42 S. W. 763 [1895]; People ex rel. Funk v. Keener, 194

Ill. 16, 61 N. E. 1069 [1901]; State, Delaware, Lackawanna & Western Railroad Company, Pros. v. Village of Passaic, 37 N. J. L. (8 Vr.) 137 [1874].

⁹ Rogers v. Venis, 137 Ind. 221, 36 N. E. 841 [1893]; Conwell v. Tate, 107 Ind. 171, 8 N. E. 36 [1886]; State, Delaware, Lackawanna and Western Railroad Co., Pros. v. Village of Passaic, 37 N. J. L. (8 Vr.) 137 [1874].

¹⁰ Security Trust and Safety Vault Co. v. City of Lexington, 203 U. S. 323 [1906].

¹¹ Fagan v. City of Chicago, 84 Ill. 227 [1876].

tacking it; or, as substantially the same idea is expressed by other courts, the assessment is *prima facie* correct as to the amount thereof, if its validity is conceded or shown.¹² It has been said that the burden of proof is upon the party attacking the amount of the assessment, and that upon this question the assessment is not evidence, either *prima facie* or in any other way.¹³ If the validity of condemnation proceedings is attacked in a proceeding to levy an assessment for paving, the burden of proof is upon the party attacking it, assuming that it can be attacked in such proceeding.¹⁴ If the validity of the assessment is conceded, and the issue is as to the apportionment thereof, the burden of proof is upon the property owner.¹⁵ If the city has regarded a petition for an improvement as valid, and has acted thereon, the burden of proof as to the validity of such petition is upon the property owner.¹⁶ If the city accepts the performance of an improvement contract, the burden on questions of performance is upon the property owner who claims that it was not performed.¹⁷ If the record of the assessment shows on its face that the proceedings were irregular or invalid, the burden is not upon the property owner to show its invalidity, even if such burden would have rested upon him if the proceeding had been regular on its face.¹⁸ If it is shown that the improvement as constructed deviates from the line provided for by the ordinance, the burden is upon the party seeking to enforce the assessment to show that such deviation was not prejudicial to the property owners.¹⁹ Un-

¹² Lower Kings River Reclamation District No. 531 v. Phillips, 108 Cal. 305, 39 Pac. 630, 41 Pac. 335 [1895]; Pinkstaff v. Allison Ditch District No. 2 of Lawrence County, 213 Ill. 186, 72 N. E. 715 [1904]; State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark, 48 N. J. L. (19 Vroom) 101, 2 Atl. Rep. 627 [1886]; State, Skinkle, Pros. v. Inhabitants of the Township of Clinton in the County of Essex, 39 N. J. L. (10 Vroom) 656 [1877]; State, Hunt, Pros. v. Mayor and Common Council of the City of Rahway, 39 N. J. L. (10 Vroom) 646 [1877]; State, Wilkinson, Pros. v. Inhabitants of the City of Trenton, 36 N. J. L. (7 Vroom) 499 [1873].

¹³ Beals v. Inhabitants of Brook-

line, 174 Mass. 1, 54 N. E. 339 [1899].

¹⁴ Dashiell v. Mayor and City Council of Baltimore for use of Hax, 45 Md. 615 [1876].

¹⁵ Wilson v. Talley, 144 Ind. 74, 42 N. E. 362 [1895]; Dickson v. City of Racine, 65 Wis. 306, 27 N. E. 58 [1886].

¹⁶ Lenon v. Brodie, 81 Ark. 208, 98 S. W. 979 [1906].

¹⁷ Gulick v. Connely, 42 Ind. 134 [1873].

¹⁸ Bacon v. Mayor and Aldermen of Savannah, 91 Ga. 500, 17 S. E. 749 [1893].

¹⁹ Church v. People ex rel. Kochersperger, 179 Ill. 205, 53 N. E. 554 [1899].

der some statutes, the filing of formal written objections by the owners of a certain amount of the property, displaces the *prima facie* proof of the validity of the assessment made by offering so much of the record as is required by statute, and casts upon the party seeking to enforce the assessment the burden of proving its validity.²⁰

§ 1278. Failure of proof.

An allegation of fact in a pleading, not supported by evidence, is not proof of its own truth.¹ The facts which are in issue must be proved, and a failure to prove them results in the defeat of the party upon whom the burden of proof as to such facts, rests.² Thus, if it is necessary to prove that notice was given,³ or that the award of a contract was published,⁴ or that a special tax list was made and filed,⁵ or that special tax bills were issued,⁶ or if it is necessary to show the purpose for which the assessment was to be levied,⁷ or if it is necessary to show the residence of the defendant,⁸ failure on the part of the party seeking to enforce the assessment to prove such facts, will prevent him from recovering. If evidence is offered by the city tending to show that the increased value of the property would be equal to the assessment, or greater than it, and the property owner does not offer evidence

²⁰ *Dougherty v. Harrison*, 54 Cal. 428 [1880].

¹ *Lane v. Burnap*, 39 Mich. 736 [1878]; (citing *Dupont v. Highway Commrs. of Hamtramck*, 28 Mich. 362 [1873]; *People ex rel. Livermore v. Burnap*, 38 Mich. 350 [1878]; *Dickinson v. Van Wormer*, 39 Mich. 141 [1878]).

² *Santa Cruz Rock Pavement Co. v. Bowie*, 104 Cal. 286, 37 Pac. 934 [1894]; *Shepard v. Colton*, 44 Cal. 628 [1872]; *Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285 [1888]; *Chicago Union Traction Co. v. City of Chicago*, 215 Ill. 410, 74 N. E. 449 [1905]; *People ex rel. Jeffries v. Record*, 212 Ill. 62, 72 N. E. 7 [1904]; *Brewster v. City of Peru*, 180 Ill. 124, 54 N. E. 233 [1899]; *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367 [1898]; *Winklemann v. Moredock and Ivy Landing Drainage Dist.*, 170 Ill. 37, 48 N. E.

715 [1897]; *Beygeh v. City of Chicago*, 65 Ill. 189 [1872]; *Tillman v. Kircher*, 64 Ind. 104 [1878]; *City of St. Louis v. Brinckwirth*, 204 Mo. 280, 102 S. W. 1091 [1907]; *Redding v. Esplen Borough*, 207 Pa. St. 248, 56 Atl. 431 [1903]; *Alexandria v. Hunter*, 16 Va. (2 Munf.) 228 [1811].

³ *Bensinger v. District of Columbia*, 6 Mackey (D. C.) 285 [1888]; *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367 [1898].

⁴ *Shepard v. Colton*, 44 Cal. 628 [1872].

⁵ *People ex rel. Jeffries v. Record*, 212 Ill. 62, 72 N. E. 7 [1904].

⁶ *City of St. Louis v. Brinckwirth*, 204 Mo. 280, 102 S. W. 1091 [1907].

⁷ *Winklemann v. Moredock and Ivy Landing Drainage Dist.*, 170 Ill. 37, 48 N. E. 715 [1897].

⁸ *Mayor and Commonalty of Alexandria v. Hunter*, 16 Va. (2 Munf.) 228 [1811].

on this point he cannot object that the property was assessed for more than the benefits.⁹ Facts which constitute an estoppel may, if properly alleged and proved, dispense with the necessity of offering evidence as to the ultimate facts with reference to which such estoppel operates.¹⁰

§ 1279. Presumption as to propriety of official action.

A strong presumption exists in favor of the propriety and validity of the action of public officers levying an assessment if such presumption is consistent with the record, at least in cases where jurisdictional facts are shown to exist.¹ Thus, if the power of a public corporation depends upon extrinsic facts,² such as the fact that the street was graded before,³ or that a sewer system has been established,⁴ the presumption as to such facts will be that

⁹ *Chicago Union Traction Co. v. City of Chicago*, 215 Ill. 410, 74 N. E. 449 [1905].

¹⁰ *Gibson v. Zimmerman*, 27 Mo. App. 90 [1887].

¹ *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301 [1901]; *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262 [1901]; *Fanning v. Bohme*, 76 Cal. 149, 18 Pac. Rep. 158 [1888]; *Clark v. City of Chicago*, 229 Ill. 363, 82 N. E. 370 [1907]; *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127 [1907]; *Otis v. Sullivan*, 219 Ill. 365, 76 N. E. 487 [1906]; *Guyer v. City of Rock Island*, 215 Ill. 144, 74 N. E. 105 [1905]; *Gage v. City of Chicago*, 207 Ill. 56, 69 N. E. 588 [1904]; *People ex rel. Funk v. Keener*, 194 Ill. 16, 61 N. E. 1069 [1901]; *Philadelphia & Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Waggeman v. Village of North Peoria*, 155 Ill. 545, 40 N. E. 485 [1895]; *Sargent v. City of Evanston*, 154 Ill. 268, 40 N. E. 440 [1894]; *Low v. Dallas*, 165 Ind. 392, 75 N. E. 822 [1905]; *Etchison Ditching Association v. Hillis*, 40 Ind. 408 [1872]; *City of Lexington v. Headley*, 68 Ky. (5 Bush.) 508 [1869]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895];

Dollar Savings Bank v. Ridge, 183 Mo. 506, 82 S. W. 56 [1904]; *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903]; *Sorehan v. City of Brooklyn*, 62 N. Y. 339 [1875]; *Ireland v. City of Rochester*, 51 Barb. 414 [1868]; *In the Matter of the Petition of Corwin to Vacate an Assessment*, 14 Hun 34 [1878]; *People ex rel. Brooklyn Park Commissioners v. City of Brooklyn*, 3 Hun (N. Y.) 596 [1875]; *In the Matter of the Petition of Phillips to Vacate an Assessment for Flagging Twenty-Ninth Street Between Tenth and Eleventh Avenues v. Mayor, Aldermen and Commonalty of the City of New York*, 2 Hun (N. Y.) 212 [1874]; *Reynolds v. Schweinfus*, 27 O. S. 311 [1875]; *Clinton v. City of Portland*, 26 Ore. 410, 38 Pac. 407 [1894]; *Dowell v. City of Portland*, 13 Or. 248, 10 Pac. 308 [1886]; *Davie's Executors v. City of Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145 [1897].

² *Fanning v. Bohme*, 76 Cal. 149, 18 Pac. Rep. 158 [1888]; *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127 [1907].

³ *Fanning v. Bohme*, 76 Cal. 149, 18 Pac. Rep. 158 [1888].

⁴ *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127 [1907].

they are such as will sustain the official acts based thereon. In case of ambiguity, it will be presumed that the items which are included in the total of the assessment are proper.⁵ If the existence of a power of a park board over certain streets depends upon proceedings taken by them to obtain control thereof, such proceedings need not be shown, if it is proved that they have, in fact, been exercising control over the street in question;⁶ although such proceedings must be shown in the case of the first exercise of such power.⁷

§ 1280. Presumption as to validity of ordinance.

Every fair presumption will be in favor of the validity of the ordinance in question.¹ A duly certified copy of the ordinance is *prima facie* evidence that every necessary step has been taken to make it a valid ordinance.² If the facts which are established, or the record which is produced, are susceptible of two constructions, one of which will support the ordinance, and the other of which will render it invalid, the construction which will support the ordinance will be adopted.³ It will be presumed that the ordinance was passed in a proper manner,⁴ and at a regular meeting,⁵ if such presumptions are consistent with the record. If the unanimous consent of the mayor and the council is necessary to give them authority to make certain orders, and such orders are made, it will be presumed that they are made by unanimous consent, though such fact does not appear of record.⁶ If, however, an ordinance must be passed by a two-thirds vote, and the record shows a *viva voce* vote, it will not be presumed that a two-thirds majority was secured.⁷ It will be presumed that an ordinance published in book form was signed by the mayor, if such books

⁵In the Matter of the Petition of Johnson to Vacate an Assessment, 103 N. Y. 260, 8 N. E. 399 [1886].

⁶Royal Insurance Co. v. South Park Commissioners, 175 Ill. 491, 51 N. E. 558 [1898]; Bass v. South Park Commissioners, 171 Ill. 370, 49 N. E. 549 [1898]; West Chicago Park Commissioners v. Sweet, 167 Ill. 326, 47 N. E. 728 [1897].

⁷Thorn v. West Chicago Park Commissioners, 130 Ill. 594, 22 N. E. 520 [1890].

¹Dollar Savings Bank v. Ridge, 183 Mo. 506, 82 S. W. 56 [1904].

²Lindsay v. City of Chicago, 115 Ill. 120, 3 N. E. 443 [1886]. See § 1301.

³Berry v. City of Chicago, 192 Ill. 154, 61 N. E. 498 [1901].

⁴City of Lexington v. Headley, 68 Ky. (5 Bush.) 508 [1869].

⁵People ex rel. Locke v. Common Council of the City of Rochester, 5 Lans. (N. Y.) 11 [1871].

⁶City of Lexington v. Headley, 68 Ky. (5 Bush.) 508 [1869].

⁷Buckley v. City of Tacoma, 9 Wash. 269, 37 Pac. 446 [1894].

are admissible in evidence to prove the ordinances therein.⁸ No presumption, however, exists contrary to the pleadings of the party who seeks to rely upon the presumption.⁹ Thus, if the city claims that it has done work under a certain ordinance, and such ordinance is, in fact, invalid, it will not be presumed that such work was done under a resolution and that the proper resolution therefor was passed.¹⁰ In opposition to the general views already set forth, it has been said that the presumption of the performance of official duties does not apply to the proceedings of legislative bodies of municipalities.¹¹

§ 1281. Presumption as to validity of assessment.

By statute in many states it is provided that an assessment shall be presumed to be valid, either if the levying of the assessment is shown, or if the assessment is shown in evidence in connection with certain specified documents or records.¹ Under some

* *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

⁹ *Cook v. City of Independence*, 133 Iowa, 582, 110 N. W. 1029 [1907].

¹⁰ *Cook v. City of Independence*, 133 Iowa, 582, 110 N. W. 1029 [1907].

¹¹ *Granger v. City of Buffalo*, 6 Abb. N. C. 238 [1879].

¹ *Memphis Land and Timber Co. v. St. Francis Levee District*, 64 Ark. 258, 42 S. W. 763 [1895]; *Raisch v. Hildebrandt*, 146 Cal. 721, 81 Pac. 21 [1905]; *Dowling v. Hibernian Savings & Loan Society*, 143 Cal. 425, 77 Pac. 141 [1904]; *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492 [1901]; *Reid v. Clay*, 134 Cal. 207, 66 Pac. 262 [1901]; *San Francisco Paving Co. v. Bates*, 134 Cal. 39, 66 Pac. 2 [1901]; *Williams v. Bergin*, 129 Cal. 461, 62 Pac. 59 [1900]; *Warren & Malley v. Russell*, 129 Cal. 381, 62 Pac. 75 [1900]; *Moffitt v. Jorden*, 127 Cal. 622, 60 Pac. 173 [1900]; *Pacific Paving Co. v. Mowbray*, 127 Cal. 1, 59 Pac. 205 [1899]; *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899]; *California Improvement Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 86 [1898]; *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896]; *Buckman v.*

Landers, 111 Cal. 347, 43 Pac. 1125 [1896]; *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337 [1895]; *Dowling v. Conniff*, 103 Cal. 75, 36 Pac. 1034 [1894]; *Perine v. Erzgraber*, 102 Cal. 234, 36 Pac. 585 [1894]; *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Williams v. Savings and Loan Society*, 97 Cal. 122, 31 Pac. 908 [1893]; *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943 [1892]; *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860 [1892]; *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891]; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127 [1889]; *Jennings v. LeRoy*, 63 Cal. 397 [1883]; *The City of Napa v. Easterby*, 61 Cal. 509 [1882]; *Dorland v. McGlynn*, 47 Cal. 47 [1873]; *Himmelman v. Carpentier*, 47 Cal. 42 [1873]; *Himmelman v. Danos*, 35 Cal. 441 [1868]; *Cone v. City of Hartford*, 28 Conn. 363 [1859]; *Speakman v. Speakman*, 1 Washington Law Reporter (D. C.) 214; *Wiemers v. People ex rel. Price*, 225 Ill. 82, 80 N. E. 68 [1907]; *Chicago Union Traction Co. v. City of Chicago*, 207 Ill. 544, 69 N. E. 849 [1904]; *Trigger v. Drainage District No. 1, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *Illinois Central Rail-*

statutes, the recommendation of an improvement by the board of local improvements is *prima facie* evidence of the validity of proceedings up to that point.² The certificate of the clerk is thus made *prima facie* evidence of the existence and validity of an ordinance,³ even if such certificate does not show that the ordinance was passed.⁴ No presumption, however, exists if the assessment roll is not properly authenticated and certified,⁵ or if the record shows on its face that the superintendent of streets did not sign the record of the return as required by law,⁶ or if the description is insufficient.⁷ In the absence of a statute making the assessment conclusive evidence of its validity, it is *prima facie* evidence only, and may be rebutted.⁸ If the filing of a remonstrance signed by owners of a majority of the frontage prevents the assessment from being valid *prima facie*, the mere fact that a remonstrance was filed will not have this effect unless it is shown to have been signed by the requisite number of owners.⁹

road Co. v. People ex rel. Alexander, 161 Ill. 244, 43 N. E. 1107 [1896]; City of Chicago v. Sherwood, 104 Ill. 549 [1882]; McAuley v. City of Chicago, 22 Ill. 563 [1859]; Scott v. Stringley, 132 Ind. 378, 31 N. E. 953 [1892]; Albertson v. State ex rel. Wells, 95 Ind. 370 [1883]; Barfield v. Gleason, 111 Ky. 491, 23 Ky. Law Rep. 128, 63 S. W. 964 [1901]; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901]; Bitzer v. O'Bryan, 107 Ky. 590, 54 S. W. 951 [1900]; McHenry v. Selvaage, 99 Ky. 232, 35 S. W. 645 [1896]; Heerman's Heirs v. Municipality No. Two, 15 La. 597 [1840]; Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339 [1899]; Dollar Savings Bank v. Ridge, 183 Mo. 506, 82 S. W. 56 [1904]; State, Moran, Pros. v. Mayor and Aldermen of Jersey City, 58 N. J. L. (29 Vr.) 144, 35 Atl. 284 [1895]; Davis v. City of Newark, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891]; State, Youngster, Pros. v. Mayor and Aldermen of Paterson, 40 N. J. L. (11 Vr.) 244 [1878]; Rumsev v. City of Buffalo, 97 N. Y. 114 [1884]; Clinton v. City of Portland, 26 Ore. 410,

38 Pac. 407 [1894]; Philadelphia to Use v. MacPherson, 140 Pa. St. 5, 21 Atl. 227 [1891]; Watson v. City of Philadelphia to Use of Adams, 93 Pa. St. (11 Norris) 111 [1880]; Smith v. City of Allegheny, 92 Pa. St. (11 Norris) 110 [1879]; Pittsburgh v. Walter, 69 Pa. St. (19 P. F. Smith) 365 [1871]; City of Seattle v. Smith, 8 Wash. 387, 36 Pac. 280 [1894].

² Richards v. City of Jerseyville, 214 Ill. 67, 73 N. E. 370 [1905].

³ McChesney v. City of Chicago, 159 Ill. 223, 42 N. E. Rep. 894 [1896]; Lindsay v. City of Chicago, 115 Ill. 120, 3 N. E. 443 [1886].

⁴ Gage v. City of Chicago, 162 Ill. 313, 44 N. E. 729 [1896].

⁵ Town of Hamilton v. Chopard, 9 Wash. 352, 37 Pac. 472 [1894].

⁶ Witter v. Bachman, 117 Cal. 318, 49 Pac. 202 [1897].

⁷ Hoover v. People ex rel. Peabody, 171 Ill. 182, 49 N. E. 367 [1898].

⁸ Wathen v. Allison Ditch Dist. No. 2, 213 Ill. 138, 72 N. E. 781 [1904]; Beveh v. City of Chicago, 65 Ill. 189 [1872].

⁹ Pacific Paving Co. v. Mowbray, 127 Cal. 1, 59 Pac. Rep. 205 [1899].

§ 1282. What presumption as to validity of assessment includes.

The presumption as to the validity and propriety of the assessment includes the presumption that the improvement was a proper one,¹ and that the assessment is correct as to the amount of benefits,² and as to the apportionment of the assessment.³ It will be presumed that a petition for an improvement which has been acted upon by the public corporation which constructs the improvement, was sufficient to justify such action,⁴ and that if two or more petitions for the same improvement have been signed by different owners, filed, and not withdrawn, the signers of the petition first filed continued to be petitioners when the order was made on the second petition.⁵ With reference to the question as to who owns property so as to consent to an improvement, the presumption that a deed was executed on its date is overcome by positive averments in the acknowledgment that it was executed afterwards.⁶ Under a statute making certain documents *prima facie* evidence of the validity of the assessment, and requiring

¹ *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896]; *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114 [1900]; *Eyer mann v. Blakesley*, 9 Mo. App. 231 [1880].

² *Pinkstaff v. Allison Ditch District No. 2 of Lawrence County*, 213 Ill. 186, 72 N. E. 715 [1904]; *Chicago Union Traction Co. v. City of Chicago*, 207 Ill. 544, 69 N. E. 849 [1904]; *Peyton v. Village of Morgan Park*, 172 Ill. 102, 49 N. E. 1003 [1898]; *Shimmons v. City of Saginaw*, 104 Mich. 511, 62 N. W. 725 [1895]; *State, Jelliff, Pros. v. Mayor and Common Council of the City of Newark*, 48 N. J. L. (19 Vroom) 101, 2 Atl. 627 [1886]; *State, New Jersey Midland Railroad Company, Pros. v. Mayor and Aldermen of Jersey City*, 42 N. J. L. (13 Vroom) 97 [1880]; *State, Skinkle, Pros. v. Inhabitants of the Township of Clinton in the County of Essex*, 39 N. J. L. (10 Vroom) 656 [1877]; *State, Hunt, Pros. v. Mayor and Common Council of the City of Rahway*, 39 N. J. L. (10 Vroom) 646 [1877]; *Hassan v. City of Rochester*,

67 N. Y. 528 [1876]; *In re Harvard Avenue North*, — Wash. —, 92 Pac. 410 [1907].

³ *Kizer v. Town of Winchester*, 141 Ind. 694, 40 N. E. 265 [1895]; *Morrow v. Geeting*, 15 Ind. App. 358, 41 N. E. 848 [1896]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *Long Branch Police, Sanitary and Improvement Commission v. Dobbins*, 61 N. J. L. (32 Vr.) 659, 40 Atl. 599 [1898]; *State, Wilkinson, Pros. v. Inhabitants of the City of Trenton*, 36 N. J. L. (7 Vroom) 499 [1873]; *Allen v. Drew*, 44 Vt. 174 [1872].

⁴ *Guyer v. City of Rock Island*, 215 Ill. 144, 74 N. E. 105 [1905]; *McVey v. City of Danville*, 188 Ill. 428, 58 N. E. 955 [1900]; *Webber v. Gottschalk*, 15 La. Ann. 376 [1860]; *State, Day, Pros. v. Mayor and Aldermen of the Borough of Fairview in the County of Bergen*, 62 N. J. L. 621, 43 Atl. Rep. 578 [1898].

⁵ *Campbell v. Park*, 32 O. S. 544 [1877].

⁶ *Henderson v. Mayor and City Council of Baltimore, Use of Eschbach*, 8 Md. 352 [1855].

them to be recorded in order to be valid, it will be presumed that they were recorded, even if they do not show that fact upon their face.⁷ It will be presumed that the documents required by law to be attached together, were so attached; and that the engineer's certificate, referred to in the indorsements upon a package of papers as contained therein, was, in fact, among such papers.⁸

§ 1283. Presumption as to validity of report.

The report of the commissioners appointed to make and apporportion an assessment is, if valid upon its face, regarded as *prima facie* correct,¹ and not to be set aside for a mere difference of opinion between such commissioners and some of the witnesses whose evidence is offered at the trial.² There must be in some states clear proof that the action of the commissioners is erroneous,³ and in some cases it is said that their report is to be regarded as valid in the absence of fraud.* If the land is not as-

⁷ Hadley v. Dague, 130 Cal. 207, 62 Pac. Rep. 500 [1900]; Welch v. Town of Roanoke, 157 Ind. 398, 61 N. E. Rep. 791 [1901].

⁸ Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901].

¹ Chicago Terminal Transfer Railroad Co. v. City of Chicago, 217 Ill. 343, 75 N. E. 499 [1905]; Betts v. City of Naperville, 214 Ill. 380, 73 N. E. 752 [1905]; Allen v. City of Chicago, 176 Ill. 113, 52 N. E. 33 [1898]; Illinois Central Railroad Co. v. City of Kankakee, 164 Ill. 608, 45 N. E. 971 [1897]; Chytraus v. City of Chicago, 160 Ill. 18, 43 N. E. 335 [1896]; Barber v. City of Chicago, 152 Ill. 37, 38 N. E. 253 [1894]; Briggs v. Union Drainage District, No. 1, 140 Ill. 53, 29 N. E. 721 [1893]; Chicago, Rock Island & Pacific Railway Co. v. City of Chicago, 139 Ill. 573, 28 N. E. 1108 [1893]; Bowman v. People ex rel. Baker, 137 Ill. 436, 27 N. E. 598 [1892]; DeKoven v. City of Lake View, 131 Ill. 541, 23 N. E. 240 [1890]; Walter v. Town of Lake, 129 Ill. 23, 21 N. E. 556 [1890]; Fagan v. City of Chicago, 84 Ill. 227 [1876]; Wright v. City of Chicago, 48 Ill. 285 [1867]; City of Chicago v. Burtice, 24 Ill.

489 [1860]; Ricketts v. Spraker, 77 Ind. 371 [1881]; Hendricks v. Gilchrist, 76 Ind. 369 [1881]; Blanchet v. Municipality No. 2, 13 La. 322 [1839]; City of St. Louis v. Excelsior Brewing Co., 96 Mo. 677, 10 S. W. 477 [1888]; State, Butler, Pros. v. City of Passaic, 44 N. J. L. (15 Vr.) 171 [1882]; State, Johnson, Pros. v. Inhabitants of City of Trenton, 43 N. J. L. (14 Vr.) 166 [1881]; State, Pudney, Pros. v. Village of Passaic, 37 N. J. L. (8 Vr.) 65 [1874]; Friedrich v. City of Milwaukee, 118 Wis. 254, 95 N. W. 126 [1903].

² Betts v. City of Naperville, 214 Ill. 380, 73 N. E. 752 [1905]; Tringer v. Drainage District No. 1, etc., 193 Ill. 230, 61 N. E. 1114 [1901]; Allen v. City of Chicago, 176 Ill. 113, 52 N. E. 33 [1898]; Illinois Central Railroad Co. v. City of Kankakee, 164 Ill. 608, 45 N. E. 971 [1897].

³ State, Coward, Pros. v. Mayor, etc. of North Plainfield, 63 N. J. L. (34 Vr.) 61, 42 Atl. 805 [1899]; State, Butler, Pros. v. City of Passaic, 44 N. J. L. (15 Vr.) 171 [1882].

⁴ Wright v. City of Chicago, 48 Ill. 285 [1868].

sessed in the name of the real owner, it has been held that it will not be presumed that no inquiry was made.⁵ Unless the statute makes the report of the commissioners conclusive, such report is *prima facie* evidence only of the validity of the assessment, and it is subject to be rebutted.⁶

§ 1284. Presumption as to validity of tax bill.

Under some statutes, a tax bill which is issued in regular form is *prima facie* evidence of the validity of all steps necessary to the levy of the assessment,¹ such as the computation of the cost and the apportionment thereof,² and the validity of the ordi-

⁵ Paillet v. Youngs, 6 N. Y. Sup. Ct. Rep. 50 [1850].

⁶ Bowman v. People ex rel. Baker, 137 Ill. 436, 27 N. E. 598 [1892]; Eel River Draining Association v. Topp, 16 Ind. 242 [1861]; Friedrich v. City of Milwaukee, 118 Wis. 254, 95 N. W. 126 [1903].

¹ Jaicks v. Merrill, 201 Mo. 91, 98 S. W. 753 [1906]; Haag v. Ward, 186 Mo. 325, 85 S. W. 391 [1904]; Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014 [1895]; Wolfort v. City of St. Louis, 115 Mo. 139, 21 S. W. 912 [1892]; City of St. Joseph to Use of Gibson v. Farrell, 106 Mo. 437, 17 S. W. 497 [1891]; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683 [1889]; Eyerman v. Blaksley, 78 Mo. 145 [1883]; Ess v. Bouton, 64 Mo. 105 [1876]; Seibert v. Allen, 61 Mo. 482 [1876]; Neenan v. Smith, 60 Mo. 292 [1875]; Kafferstein v. Knox, 56 Mo. 186 [1874]; Haegle v. Mallinckrodt, 46 Mo. 577 [1870]; City of St. Louis to use of Creamer v. Bernoudy, 43 Mo. 552 [1869]; City of St. Louis to use of Cornelli v. Armstrong, 38 Mo. 167 [1866]; City of St. Louis to the use of Lakrum v. Coons, 37 Mo. 44 [1865]; City of St. Louis to use of Creamer v. Oeters, 36 Mo. 456 [1865]; City of Joplin ex rel. Carthage Dimension & Flag Stone Co. v. Hollingshead, 123 Mo. App. 602, 100 S. W. 506 [1907]; City of Excelsior Springs, to use of McCormick v. Ettenson, —

Mo. App. —, 96 S. W. 701 [1906]; City of St. Joseph ex rel. Gibson v. Forsee, 110 Mo. App. 237, 84 S. W. 1138 [1905]; City of St. Joseph ex rel. Swenson v. Forsee, 110 Mo. App. 127, 84 S. W. 98 [1904]; Perkinson v. Schnaake, 108 Mo. App. 255, 83 S. W. 301 [1904]; Heman v. Farish, 97 Mo. App. 393, 71 S. W. 382 [1902]; City of Carthage ex rel. Carthage National Bank v. Badgley, 73 Mo. App. 123 [1897]; Heman Construction Co. v. Loevy, 64 Mo. App. 430 [1895]; Farrell v. Rammelkamp, 64 Mo. App. 425 [1896]; Gallagher v. Bartlett, 64 Mo. App. 258 [1896]; City of Springfield to the use of Tuttle v. Baker, 56 Mo. App. 637 [1894]; City of Nevada to the use of Gilfillan v. Morris, 43 Mo. App. 586 [1891]; Heman v. Wolff, 33 Mo. App. 200 [1888]; Heman v. Payne, 27 Mo. App. 481 [1887]; Gibson v. Zimmerman, 27 Mo. App. 90 [1887]; Eyermann v. Blakesley, 9 Mo. App. 231 [1880]; Seibert v. Tiffany, 8 Mo. App. 33 [1879]; Wand v. Green, 7 Mo. App. 82 [1879]; Stifel v. Dougherty, 6 Mo. App. 441 [1879]; Schultze v. DeMenil, 4 Mo. App. 595 [1877].

² Keith v. Bingham, 100 Mo. 300, 13 S. W. 683 [1889]; Ess v. Bouton, 64 Mo. 105 [1876]; Seibert v. Allen, 61 Mo. 482 [1876]; Neenan v. Smith, 60 Mo. 292 [1875]; City of St. Louis to Use Stadler v. Armstrong, 38 Mo. 29 [1866]; Gallagher v. Bartlett, 64 Mo. App. 258 [1896]; City of Spring-

nance.³ There is, however, no presumption that the tax bill was issued, and if its existence is denied, it must be proved.⁴ A special tax bill is admissible in evidence, and is *prima facie* evidence of its validity, even if an immaterial alteration appears on its face to have been made.⁵

§ 1285. Presumption as to action of court.

Every presumption consistent with the record will be made in favor of the power of the court to make the orders which it has made in an assessment proceeding.¹ If it is shown that orders were taken in a foreign county on the same day in which they were taken before the resident judge in the county where the improvement was made, it will be presumed that, although the judges sat on the same day, they did not sit at the same time.² It will not be presumed that an order was made at an irregular term.³ If a guardian appears in a proceeding; it will be presumed as against collateral attack that notice was given to the ward of the proceeding, to obtain approval of the guardian's action.⁴ If proceedings for constructing an improvement must be brought before a court, the facts recited in the order establishing such improvement are *prima facie* correct at least.⁵ This presumption extends to the recital that notice of the filing of the viewers' report is given in due time,⁶ and to a finding that the proper number of land owners signed the petition for the creation of a district.⁷ The finding of the court before which assessment proceedings have been conducted, that certain land is liable to assessment, raises a presumption that such land is benefited.⁸ It will

field to the use of *Tuttle v. Baker*, 56 Mo. App. 637 [1894]; *Wand v. Green*, 7 Mo. App. 82 [1879]; *Stifel v. Dougherty*, 6 Mo. App. 441 [1879].

³ *Dollar Savings Bank v. Ridge*, 183 Mo. 506, 82 S. W. 56 [1904].

⁴ *Eyerma v. Payne*, 28 Mo. App. 72 [1887]. See § 1135.

⁵ *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163 [1902].

¹ *Sargent v. City of Evanston*, 154 Ill. 268, 40 N. E. 440 [1894].

² *Sargent v. City of Evanston*, 154 Ill. 268, 40 N. E. 440 [1894].

³ *People ex rel. Brooklyn Park Commissioners v. City of Brooklyn*, 3 Hun (N. Y.) 596 [1875].

⁴ *Ross v. Board of Supervisors of Wright County, Iowa*, 128 Iowa, 427, 1 L. R. A. (N. S.) 431, 104 N. W. 506 [1905].

⁵ *Driver v. Moore*, 81 Ark. 80, 99 S. W. 734 [1906]; *Stiewel v. Fencing District, No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247, [1903].

⁶ *Driver v. Moore*, 81 Ark. 80, 99 S. W. 734 [1906].

⁷ *Stiewel v. Fencing District, No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1903].

⁸ *Stiewel v. Fencing District, No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1903].

be presumed that a court of general jurisdiction acquired jurisdiction by proper service of notice to render a judgment of confirmation which it has, in fact, rendered.⁹

§ 1286. Presumption as to appointment of commissioners.

If consistent with the record, the presumption is that the court or other tribunal empowered by statute to appoint commissioners performed its duty and appointed the proper number of competent persons to act as commissioners.¹ It has been said that there is a presumption that the commissioners who take the oath, and act, are lawfully appointed, even if there is a difference between the Christian name of such commissioner and the one who is appointed.²

§ 1287. Presumption as to order of steps in assessment.

If consistent with the record, it will be presumed that the steps in the assessment proceedings were taken in the order of time required by statutes, and this presumption is not overthrown, although the steps are entered on the record in a different order,¹ or although their date does not appear affirmatively,² or even if the numbers given by the clerk to the ordinance and entries indicate a different order;³ especially if it appears that both steps were taken on the same day.⁴ Accordingly, it will be presumed that city officials did not certify an assessment to the county officials prematurely.⁵

§ 1288. Presumption as to re-assessment.

If it appears that two assessments have been levied, it will be presumed that the second assessment was a re-assessment, made under statutory authority.¹ It will be presumed that the re-as-

⁹ Illinois Central Railway Co. v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901]; Hartig v. People ex rel. Kochersperger, 159 Ill. 237, 50 Am. St. Rep. 162, 42 N. E. 879 [1896].

¹ Philadelphia & Reading Coal & Iron Co. v. City of Chicago, 158 Ill. 9, 41 N. E. 1102 [1895].

² Fisher v. Mayor, etc., of the City of New York, 6 Hun 64 [1875]. See, however, § 903.

³ Davie's Executors v. City of Galveston, 16 Tex. Civ App. 13, 41 S. W. 145 [1897].

² Madderom v. City of Chicago, 194 Ill. 572, 62 N. E. 846 [1902]; Yaggy v. City of Chicago, 192 Ill. 104, 61 N. E. 494 [1901].

⁴ Wadlow v. City of Chicago, 159 Ill. 176, 42 N. E. Rep. 866 [1896].

⁴ Davie's Executors v. City of Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145 [1897].

⁵ Beck v. Holland, 29 Mont. 234, 74 Pac. 410 [1903].

¹ Etchison Ditching Association v. Hillis, 40 Ind. 408 [1872].

assessment was made in accordance with the order which requires such re-assessment.²

§ 1289. Presumption as to action of board.

If the report of a specified board is one of the essential steps in levying an assessment, it will be presumed that such report and recommendation was properly made,¹ and that the action of the board was properly communicated to the council.² If the council has ordered the board to prepare an improvement ordinance, and by statute the initiative is to be taken by the board, it will be presumed that the board in preparing such ordinance did so on its own motion, and regarded the order of the council as a mere petition.³ By statute, in some jurisdictions the recommendation of the specified board is *prima facie* evidence of the validity of prior steps in the assessment proceedings.⁴

§ 1290. Presumption as to contract.

There is a presumption that a contract which is apparently valid and regular upon its face is made out in legal form.¹ Accordingly, it will be presumed that the first step in letting the contract was taken within the time fixed by statute,² that the contract was let upon competitive bidding, if the statute does not require this fact to appear affirmatively upon the record,³ that the president of a corporation who signs an improvement contract on behalf of the corporation has authority to make such contract,⁴

² Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901].

¹ Reynolds v. Schweinefus, 27 O. S. 311 [1875].

² Sorchan v. City of Brooklyn, 62 N. Y. 339 [1875].

³ Gage v. City of Chicago, 207 Ill. 56, 69 N. E. 588 [1904].

⁴ McChesney v. City of Chicago, 205 Ill. 611, 69 N. E. 82 [1903]; Madderom v. City of Chicago, 194 Ill. 572, 62 N. E. 846 [1902]; Yaggy v. City of Chicago, 192 Ill. 104, 61 N. E. 494 [1901].

¹ City Street Improvement Co. v. Laird, 138 Cal. 27, 70 Pac. 916 [1902]; San Francisco Paving Co. v. Bates, 134 Cal. 39, 66 Pac. 2 [1901]; Dunne v. Altschul, 57 Cal. 472 [1881]; Gage v. People ex rel.

Hanberg, 213 Ill. 468, 72 N. E. 1108 [1905]; Gray v. People ex rel. Raymond, 194 Ill. 486, 62 N. E. 894 [1902]; City of Marshall to the Use of Jacoby v. Rainey, 78 Mo. App. 416 [1898]; Gilmore v. Utica, 131 N. Y. 26, 29 N. E. 841 [1892].

² Gage v. People ex rel. Hanberg, 213 Ill. 468, 72 N. E. 1108 [1905]. See also, Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301 [1901].

³ City of Marshall to the Use of Jacoby v. Rainey, 78 Mo. App. 416 [1898].

⁴ City Street Improvement Co. v. Laird, 138 Cal. 27, 70 Pac. 916 [1902]. The same presumption arises where the secretary signs the contract. San Francisco Paving Co. v. Bates, 134 Cal. 39, 66 Pac. 2 [1901].

that the use of patented material does not invalidate the contract, if such material is not expressly required by the terms of the contract,⁵ and that a general ordinance requiring the employment of union labor by bidders on public works was ignored by bidders in computing their bids, such ordinance being invalid,⁶ if such presumptions are consistent with the record, and are necessary to the validity of the contract. Acceptance of the work by the public officials who are authorized to pass upon such question is *prima facie* evidence that the contract has been performed substantially.⁷ The presumption that the assessment is valid includes the presumption that the contract has been duly performed,⁸ even if the engineer has certified that the work was not done to the official line and grade.⁹

§ 1291. Presumption as to location of improvement.

It will be presumed, in the absence of evidence to the contrary, that land upon which the public improvement is constructed is subject to a public use for an improvement of that character,¹ that an improvement constructed by a city is within the territorial jurisdiction of such city,² that an improvement constructed by a special board is one of which it has jurisdiction,³ and that, if an ordinance establishing a grade refers to a certain level as already determined, such level has, in fact, been determined, although no evidence is offered to show what such level is.⁴

§ 1292. Presumption as to notice and hearing.

The presumption that public officials have discharged their duty, is held in some cases to include the presumption that no-

⁵ *Dunne v. Altschul*, 57 Cal. 472 [1881].

⁶ *Grey v. People ex rel. Raymond*, 194 Ill. 486, 62 N. E. 894 [1902].

⁷ *Gulick v. Connely*, 42 Ind. 134 [1873].

⁸ *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127 [1889].

⁹ *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896].

¹ *Prescott v. City of Chicago*, 60 Ill. 121 [1871]; *State, Society for Establishing Useful Manufactures, Pros. v. City of Paterson*, 40 N. J. L. (11 Vr.) 250 [1878]; *Mayor and Common Council of Newark v. State*,

Batten, Pros., 32 N. J. L. (3 Vr.) 453 [1865].

² *West Chicago Street Railroad Co. v. People ex rel. Kern*, 156 Ill. 18, 40 N. E. Rep. 605 [1895]; *Wheeler v. People ex rel. Kern*, 153 Ill. 480, 39 N. E. 123 [1894]; *Kansas City v. Block*, 175 Mo. 433, 74 S. W. 993 [1903].

³ *Aldis v. South Park Commissioners*, 171 Ill. 424, 49 N. E. 565 [1898].

⁴ *Chicago Consolidated Traction Co. v. Village of Oak Park*, 225 Ill. 9, 80 N. E. 42 [1907]; *Chicago Terminal Transfer Railroad Co. v. City of Chicago*, 184 Ill. 154, 56 N. E. 410 [1900].

tices have been given as required by statute.¹ If it is shown that a notice was given, although the giving of the details of such notice are not shown, it will be presumed that such notice was valid.² The presumption that a public officer performed his duty, overcomes the presumption that due notice was given.³ Thus, if the record which was read to the council contains the name of a certain newspaper, it will be presumed that the clerk read to the council the name of the newspaper therein given, and not the name of a different newspaper, although the notice was published in the latter newspaper, and although the record was subsequently altered by inserting the name of such latter newspaper.⁴ In the absence of a statute making the assessment *prima facie* evidence of the validity of all prior steps, it has been said that there is no presumption of the publication of an ordinance,⁵ or of a notice calling for bids,⁶ or of a notice to pay an assessment.⁷ If provision is made for filing objections which the council is to consider, it will be presumed that the council gave a hearing, even though the statute does not specifically require it.⁸

§ 1293. Return of demand for payment as *prima facie* evidence.

Under statutory authority a return of demand for payment made in the manner required by statute, is *prima facie* evidence of such demand,¹ including the authority of affiant to make the demand as agent of the contractor.² Such return is, of course, insufficient if on its face it does not show that proper demand was

¹ Brown v. City of Chicago, 117 Ill. 21, 7 N. E. 108 [1887]; White v. Fleming, 114 Ind. 560, 16 N. E. 487 [1887]; Page v. Mayor and City Council of Baltimore, 34 Md. 558 [1871]; Beale v. James, 173 Mass. 591, 54 N. E. 245 [1899]; Seattle v. Smith, 8 Wash. 387, 36 Pac. 280 [1894].

² Himmelman v. Carpentier, 47 Cal. 42 [1873]; Jenks v. City of Chicago, 48 Ill. 296 [1868]; Montgomery v. Wasem, 116 Ind. 343, 15 N. E. 795, 19 N. E. 184 [1888]; Arnold v. City of Ft. Dodge, Iowa, 111 Ia. 152, 82 N. W. 495 [1900].

³ California Improvement Co. v. Moran, 128 Cal. 373, 60 Pac. 969 [1900].

⁴ California Improvement Co. v.

Moran, 128 Cal. 373, 60 Pac. 969 [1900].

⁵ City of Napa v. Easterby, 61 Cal. 509 [1882].

⁶ Shepard v. Colton, 44 Cal. 628 [1872]; Van Sant v. City of Portland, 6 Ore. 395 [1877].

⁷ Hayes v. State ex rel. Murray, 96 Ind. 284 [1884].

⁸ Auditor General v. Hoffman, 132 Mich. 198, 93 N. W. 259 [1903].

¹ Ede v. Knight, 93 Cal. 159, 28 Pac. 860 [1892]; Deady v. Townsend, 57 Cal. 298 [1881]; Dyer v. Brogan, 57 Cal. 234 [1881]; Himmelmann v. Hoadley, 44 Cal. 213 [1872].

² Whiting v. Townsend, 57 Cal. 515 [1881].

made.³ Where a certificate is *prima facie* evidence of the truth of the facts therein stated, such certificate is inadmissible and of no effect if it is not signed by an officer authorized by law to sign such certificate,⁴ or if it shows on its face that it was made up from hearsay, and not from the official records, or the knowledge of the officer making such certificate.⁵

§ 1294. Presumption as to description and ownership of land.

A description of the property assessed, which is copied from the tax duplicate, is said to be *prima facie* correct.¹ If it is shown that that land is conveyed to a corporation in the corporation name, it will be presumed in the absence of proof that it was capable of taking and holding real estate.² Actual possession is *prima facie* evidence of title, good until rebutted by showing a better title.³

§ 1295. Improvement certificate.

It is provided by some statutes, that a certificate issued as evidence of the amount due on a street improvement contract is *prima facie* evidence of all facts necessary to make the assessment valid.¹ Under such statutes, every presumption consistent with the record must be made in favor of the validity of the assessment proceedings.

§ 1296. Delinquent tax list.

By statute a delinquent tax list may be *prima facie* evidence of the fact that the amounts are due as stated therein.¹ A statute

³ *Bennett v. Mayor, etc.*, of the City of New York, 3 N. Y. Sup. Ct. Rep. 485 [1848].

⁴ *Warren v. Ferguson*, 108 Cal. 535, 41 Pac. 417 [1895]. A deputy cannot be appointed unless authority to make the appointment has been conferred by law, and a mere clerk or employee cannot be empowered by an officer to perform official acts. *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. Rep. 337 [1895].

⁵ *Obermeyer v. Patterson*, 130 Cal. 531, 62 Pac. 926 [1900].

¹ *Sample v. Carroll*, 132 Ind. 496, 32 N. E. 220 [1892].

² *Hagar v. Board of Supervisors of Yolo Co.*, 47 Cal. 222 [1874].

³ *Gilmore v. Norton*, 10 Kan. 491 [1872].

¹ *Tuttle v. Polk & Hubble*, 92 Ia. 433, 60 N. W. 733 [1894]; *Taylor v. Boyd*, 63 Tex. 533 [1885]. "Where recovery is sought upon an assessment certificate which appears to be regular and valid, the burden is not upon the holder to show in the first instance that it was properly issued for the sum named, but it will be treated as at least *prima facie* evidence of indebtedness, and the burden is upon the party resisting payment to show that the certificate is invalid or defective." *Tuttle v. Polk & Hubble*, 92 Ia. 433, 60 N. W. Rep. 733 [1894].

¹ *Brackett v. People of Weinnett*, 115 Ill. 29, 3 N. E. 723 [1886].

providing that a delinquent tax list shall be evidence to prove all antecedent steps does not make it conclusive evidence, but it may be rebutted.²

§ 1297. Tax deed or certificate of sale as presumptive evidence.

In the absence of a statute making a deed given on a sale for a delinquent assessment *prima facie* evidence of the regularity of the proceedings, such deed is not *prima facie* evidence, but the proceedings under which the deed is given must be shown to be regular.¹ If a tax deed is not of itself *prima facie* evidence of its own validity, it is, at least, necessary to show a judgment for the sale of the land, and a precept for such sale, in order to make such tax deed admissible.² Under some statutes a deed is made *prima facie* evidence of the regularity of the antecedent proceedings.³ Under such statutes, a deed, while *prima facie* evidence, is not conclusive.⁴ Under some statutes, where land is sold for a term of years at an assessment sale, and a lease therefor is given, such lease is conclusive evidence of the regularity of the sale, but is not evidence of the power to sell.⁵ Under some statutes, certificates are given to the purchaser of land at a sale for delinquent assessments, and such certificates are *prima facie* evidence of the validity of the taxes and assessments which they represent.⁶ The recitals in a deed cannot be presumed to be true, if it is shown to be incorrect in its recital as to the lot for which the precept issued.⁷

§ 1298. Presumption as to omission of land from assessment.

If land is omitted from the assessment, it has been held that a presumption arises that such land was properly omitted, and that accordingly, it must have been exempt from assessment,¹ or not

² City of Stockton v. Creanor, 45 Cal. 643 [1873].

¹ Bucknall v. Story, 36 Cal. 67 [1868]; Holbrook v. Dickinson, 46 Ill. 265 [1867]; Nichols v. Voorhis, 18 Hun (N. Y.) 33 [1879].

² Pardridge v. Village of Hyde Park, 131 Ill. 537, 23 N. E. 345 [1890].

³ United States Security and Bond Co. v. Wolfe, 27 Colo. 218, 60 Pac. 637 [1900].

⁴ Clarke v. Mead, 102 Cal. 516, 36 Pac. 862 [1894]; Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535 [1903].

⁵ Striker v. Kelley, 2 Denio. 323 [1845]; (reversing Striker v. Kelley, 7 Hill 9 [1844]).

⁶ Wales v. Warren, 66 Neb. 455, 92 N. W. 590 [1902].

⁷ Langhor v. Smith, 81 Ind. 495 [1882].

¹ Smith v. City of Buffalo, 90 Hun, 118, 35 N. Y. S. 635 [1895].

benefited by the improvement.² If certain lots only are assessed for a sidewalk, it will be presumed that sidewalks were laid in front of such lots only.³ If a street railway is omitted from an assessment and it is shown to be its duty to improve part of the street, it has been held that it will be presumed that the cost of improving such part of the street has not been included in the cost assessed against the property owners.⁴ On the other hand, it has been held that if a street railway has been omitted from assessments, there is no presumption that such railway was exempt, and that in the absence of such evidence such assessment is *prima facie* erroneous.⁵

§ 1299. Admissibility of certificates.

Under many statutes formal certificates or returns of certified facts are required to be made. Under such statutes, such certificates, or official returns, are at least admissible in evidence to establish the truth of the facts therein stated.¹ Under some statutes, they are *prima facie* evidence of the truth of the facts necessary to their validity.² Under some statutes, they are made conclusive evidence of the truth of the facts therein stated, as far as that particular action is concerned.³ A street improvement certificate may be *prima facie* evidence of every fact necessary to be proved to recover thereon.⁴ A certificate of the county surveyor to the effect that he has examined the curbs and macadam on a specified street, and that he finds the curbs on the official grade and line is sufficient to prove that the official grade of the street has been established.⁵ The certificate of the city clerk, under his official seal, is *prima facie* evidence of the passage of the ordinance thus certified,⁶ even if no effort is made to produce the

² Wright v. City of Chicago, 48 Ill. 285 [1868]; Ricketts v. Spraker, 77 Ind. 371 [1881].

³ McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010 [1894].

⁴ McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885 [1891].

⁵ Page v. City of Chicago, 60 Ill. 441 [1871].

¹ O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020 [1904]; Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537 [1889]; People of the State of California v. Hagar, 52 Cal. 171 [1877]; Taylor v. Boyd, 63 Tex. 533 [1885].

² O'Dea v. Mitchell, 144 Cal. 374.

77 Pac. 1020 [1904]; Taylor v. Boyd, 63 Tex. 533 [1885].

³ See § 765, 766, 1298.

⁴ Taylor v. Boyd, 63 Tex. 533 [1885].

⁵ Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537 [1889].

⁶ McChesney v. City of Chicago, 159 Ill. 223, 42 N. E. Rep. 894 [1896]; Lindsay v. City of Chicago, 115 Ill. 120, 3 N. E. 443 [1886]; Pleasants v. City of Shreveport, 110 La. 1046, 35 So. 283 [1903]; City of New Whatcom v. Bellingham Bay Improvement Co., 16 Wash. 131, 41 Pac. 236 [1896].

originals⁷ or if the ordinance might, by statute, have been proved by the printed book of ordinances.⁸ The fact that the name of the property owner is given correctly in the delinquent list, is sufficient evidence that the collector knew his name, and that, accordingly, he had no authority to describe such property in the advertised list as belonging to an unknown owner.⁹ However, the fact that the name of the owner is given correctly in the original assessment roll, does not charge the collector with notice of such name, if it is not given in the advertised list or the delinquent list.¹⁰ Under many statutes, a certificate of publication is required, and is made evidence of the fact of such publication.¹¹ The fact that such affidavit contains a copy of the notice, which copy is insufficient, does not render the affidavit inadmissible, if such copy is a mere surplusage.¹² Such an affidavit has been held sufficient though it gives the wrong date in the published notice, if such mistake is apparent on the face of the affidavit, and the affidavit taken as a whole shows the true date.¹³ A formal certificate of publication has been held sufficient, if the facts stated therein may constitute a good publication, and the court before which the case is tried finds that the publication was duly made.¹⁴ An affidavit of the service of notice of posting notices, and the like, is, under many statutes, admissible as evidence to show the facts stated therein.¹⁵ The adversary party may show that the person who swears to an affidavit of publication is not the printer or publisher of such paper, as required by statute.¹⁶ A formal certificate of the service of notice given by an authorized officer is evidence of the facts stated therein.¹⁷ Such a certifi-

⁷ *City of New Whatcom v. Bellingham Bay Improvement Co.*, 16 Wash. 131, 47 Pac. 236 [1896].

⁸ *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443 [1886].

⁹ *Gage v. People ex rel.*, 205 Ill. 547, 69 N. E. 80 [1903].

¹⁰ *Gage v. People ex rel.*, 205 Ill. 547, 69 N. E. 80 [1903].

¹¹ *McChesney v. The People ex rel. Kern*, 145 Ill. 614, 34 N. E. 431 [1893]; *Griffin v. City of Chicago*, 57 Ill. 317 [1870]; *Allen v. City of Chicago*, 57 Ill. 264 [1870].

¹² *Schemick v. City of Chicago*, 151 Ill. 336, 37 N. E. 888 [1894].

¹³ *Town of Muskego v. Drainage*

Commissioners, 78 Wis. 40, 47 N. W. 11 [1890].

¹⁴ *Perry v. People ex rel. Kern*, 155 Ill. 307, 40 N. E. 468 [1895].

¹⁵ *Linck v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893]; *Evans v. The People ex rel. Kern*, 139 Ill. 552, 28 N. E. 1111 [1893]; *Goodrich v. City of Minonk*, 62 Ill. 121 [1871]; *Jenks v. City of Chicago*, 48 Ill. 296 [1868]; *Falch v. People ex rel.*, 8 Bradwell (Ill.) 351 [1880].

¹⁶ *Armstrong v. City of Chicago*, 61 Ill. 352 [1871].

¹⁷ *Grand Rapids School Furniture Co. v. City of Grand Rapids*, 92 Mich. 564, 52 N. W. 1028 [1892].

cate showing correct service, may supplement defective affidavits of service of such notices.¹⁸ A certificate showing that the property has been assessed in proportion to benefits is, under some statutes, conclusive as to such fact.¹⁹ The return of the assessments as unpaid is held to be conclusive evidence of the fact of non-payment.²⁰ The official authorized to receive payments may give oral testimony on the question whether such assessment has been paid after the return has been made.²¹ A certificate which does not show the facts required by statute, is inadmissible.²² A defective certificate of publication may be supplemented by extrinsic evidence in the absence of a statute making the certificate jurisdictional.²³ In the absence of statute a certificate of an official showing service of notice, is not evidence, but the fact of such service must be proved under oath as other facts are proved.²⁴ Statutes are found occasionally which require assessments to be recorded in the mortgage record.²⁵ Under such statute a certified copy of an assessment as recorded in the miscellaneous records is inadmissible.²⁶

§ 1300. Admissibility of affidavits.

Affidavits may, by statute, be admissible in evidence,¹ such as affidavits showing the facts which constitute demand.² Under some statutes affidavits cannot be considered by the court unless they are first filed with the commissioners, who are thus given an opportunity to consider the facts stated therein, and to modify their report if they see fit.³

¹⁸ *The People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872 [1893].

¹⁹ *Walker v. City of Detroit*, 136 Mich. 6, 98 N. W. 744 [1904].

²⁰ *Goodrich v. City of Minonk*, 62 Ill. 121 [1871].

²¹ *Goodrich v. City of Minonk*, 62 Ill. 121 [1871].

²² *Beygeh v. City of Chicago*, 65 Ill. 189 [1872]; *Brown v. City of Chicago*, 62 Ill. 289 [1871]; *Marsh v. City of Chicago*, 62 Ill. 115 [1871]; *Butler v. City of Chicago*, 56 Ill. 341 [1870].

²³ *Rue v. City of Chicago*, 66 Ill. 256 [1872]; *State v. Several Parcels of Land*, — Neb. —, 107 N. W. 566

[1906]; *City of Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002 [1893].

²⁴ *Municipality No. 1 Praying for the Opening of Orleans Avenue*, 8 La. Ann. 377 [1853].

²⁵ *Beck v. Tolen*, 62 Ind. 469 [1878].

²⁶ *Beck v. Tolen*, 62 Ind. 469 [1878].

¹ *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893].

² *Partridge v. Lucas*, 99 Cal. 519, 33 Pac. 1082 [1893].

³ *Case of Mayor, Aldermen and Commonalty of the City of New York in the Matter of Enlarging and Extending Harman Street in the City of New York*, 16 John Sup. Ct. 231 [1819].

§ 1301. Statutes as evidence of facts recited therein.

A statute which recognizes an assessment district as a valid corporation, is said to be evidence of its existence.¹ While such statute establishes the existence of the district, it is possibly more correct to say that the statute creates the district, than to say that the statute proves its existence.

§ 1302. Ordinance as evidence of facts recited therein.

A recital contained in an improvement ordinance to the effect that the owners of a majority of the land fronting upon the improvement signed a petition for such improvement, which was presented to the city, is sufficient *prima facie* evidence of the existence of such fact, even if it is jurisdictional.¹ In an assessment levied under the police power in which the cost and not the benefit is the measure of recovery, the recital of such cost in the ordinance is *prima facie* evidence thereof.²

§ 1303. Admissibility of record to prove truth of statements contained therein.

If the acts of the council or other official body are material in the proceeding to enforce the assessment, such acts may be shown by the record of the proceedings of such body, duly kept by competent authority.¹ Such records are not evidence of facts stated therein, other than acts of such body, if such facts are not those whose existence the council or other body has power to determine.² Thus, a recital in an ordinance of the fact that a new street is open to public travel, is not competent evidence to show the jurisdiction of the city council to levy a special tax therefor.³ Records are not evidence of the facts therein stated, if not kept

¹Swamp Land District No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866 [1893]; Reclamation District No. 124 v. Gray, 95 Cal. 601, 30 Pac. 779 [1892].

²Cummings v. West Chicago Park Commissioners, 181 Ill. 136, 54 N. E. 941 [1899].

³Village of St. Marys v. Lake Erie & Western R. R. Co., 60 O. S. 136, 53 N. E. 795 [1899].

¹Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901]; Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530 [1886]; Fralich v. Bar-

low, 25 Ind. App. 383, 58 N. E. 271 [1900]; Fruin-Bambrick Construction Co. v. Geist, 37 Mo. App. 509 [1889]; Kennedy v. Newman, 3 N. Y. Sup. Ct. Rep. 187 [1848]; Waln's Heirs v. City of Philadelphia to use of Armstrong, 99 Pa. St. 330 [1882]; City of New Whatcom v. Bellingham Bay Improvement Co., 16 Wash. 131, 47 Pac. 236 [1896].

²Merrill v. Shields, 57 Neb. 78, 77 N. W. 368* [1898].

³Merrill v. Shields, 57 Neb. 78, 77 N. W. 368 [1898].

by competent authority as the official evidence of the acts of such body.⁴ Thus, the county tax list is not competent evidence that the assessment shown thereon has been levied in the absence of a statute making such list *prima facie* evidence of the assessment.⁵ If it is not necessary to offer the report of the committee apportioning the assessment, it is harmless error to admit it along with the record of the assessment proceedings, if, indeed, it is error at all.⁶ If an appointment of assessors is offered in evidence, signed by the judge, and not filed in court, such record is inadmissible without proof of its genuineness.⁷ In a proceeding to confirm the organization of an assessment district, its records are not evidence of the facts leading to its organization, but the execution of the petition for the district must be shown and the petition itself is not admissible in evidence without proof of its execution.⁸ The plans and specifications prepared by a city engineer are admissible in an action to collect a street assessment.⁹ Different documents and entries in an assessment proceeding may be considered together, to explain ambiguities.¹⁰ Thus, if the estimate and order to levy an assessment show the amount of the estimate in dollars, and the same figures are found as the sum total of the assessments in the assessment roll, without anything to indicate what denomination of money is intended, the other records may be used to show that the figures indicated dollars.¹¹ So, an engineer's plat, which is subsequently adopted by the council, may be used to show who the property owner is, although the recorded resolution showing an assessment against such property does not show who the property owner is.¹² The trial court does not commit error by refusing to permit the official records of the commissioners to be taken to the jury room.¹³

⁴City of Muscatine v. Chicago, Rock Island & Pacific Railway Co., 88 Ia. 291, 55 N. W. 100 [1893].

⁵City of Muscatine v. Chicago, Rock Island & Pacific Railway Co., 88 Ia. 291, 55 N. W. 100 [1893].

⁶Manor v. Board of Commissioners of Jay Co., 137 Ind. 367, 34 N. E. 959, 36 N. E. 1101 [1893].

⁷Bannister v. Grassy Fork Ditching Association, 52 Ind. 178 [1875].

⁸In the Matter of the Bonds of Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 23 Pac. 675 [1891].

⁹Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723 [1886].

¹⁰Linck v. City of Litchfield, 141 Ill. 469, 31 N. E. 123 [1893].

¹¹Linck v. City of Litchfield, 141 Ill. 469, 31 N. E. 123 [1893].

¹²Edwards & Walsh Construction Co. v. Jasper County, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902].

¹³The Mayor and City Council of Baltimore v. Smith & Swartz Brick Company, 80 Md. 458, 31 Atl. 423 [1894].

§ 1304. Necessity of record.

If it is not required by statute that certain acts must be recorded as a condition precedent to their validity, the acts of the council may be shown, although they do not appear of record, and extrinsic evidence is necessary to show such acts.¹ Thus, a resolution may be shown to have been passed, although such resolution does not appear of record.² Under this theory the court may admit evidence outside of the record, to determine what was, in fact, done in the proceedings which resulted in the assessment.³ The adoption of a certain newspaper as the official paper need not be proved by showing the record of its appointment, but may be proved by showing that official notices were regularly published in such paper, and that it was recognized by the officials of the city as the official paper.⁴ If the official records are not introduced in evidence, and no other evidence is offered of the acts of the public corporation by which the assessment is levied, there is a total failure of evidence upon such points, and if the corporation has the burden of proof upon such issue, it must fail.⁵ If the acts of the public corporation are required by statute to be entered upon the record, extrinsic evidence is insufficient to add to the record facts which should appear there, but which are wanting.⁶ It may be necessary that the fact of giving notice should appear of record.⁷ Whether due notice of the introduction of a private bill has been given is to be determined solely by the journals of the legislature, and extrinsic evidence is inadmissible.⁸

¹ *Edwards v. Berlin*, 123 Cal. 544, 56 Pac. 432 [1899]; *Ayers v. Toledo*, 26 Ohio C. C. 767 [1904].

² *Darlington v. Commonwealth for the Use of City of Allegheny*, 41 Pa. St. (5 Wright) 68 [1861].

³ *New Whatcom v. Bellingham Bay Improvement Co.*, 8 Wash. 639, 38 Pac. 163.

⁴ *Rich v. City of Chicago*, 59 Ill. 286 [1871].

⁵ *Beygeh v. City of Chicago*, 65 Ill. 189 [1872].

⁶ *People of the State of California v. Hastings*, 34 Cal. 571 [1868]; *Gilbert v. City of New Haven*, 40 Conn. 102 [1873]; *People ex rel. v. Glenn*, 207 Ill. 50, 69 N. E. 568 [1903]; *Higman v. City of Sioux City*, 129 Ia. 291, 105 N. W. 524 [1906]; *City of*

Lexington v. Headley, 5 Bush. (Ky.) 508 [1869]; *Whitney v. Common Council of the Village of Hudson*, 69 Mich. 189, 37 N. W. 184 [1888]; *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877]; *Copcutt v. City of Yonkers*, 83 Hun, 178, 31 N. Y. S. 659 [1894]; *People ex rel. Kerber v. City of Utica*, 7 Abb. N. C. 414 [1879]; *Waln's Heirs v. City of Philadelphia to use of Armstrong*, 99 Pa. St. 330 [1882]; *Saunderson v. Herman*, 95 Wis. 48, 69 N. W. 977 [1897].

⁷ *VanSant v. City of Portland*, 6 Ore. 395 [1877].

⁸ *Speer v. Mayor and Council of Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802 [1890].

Extrinsic evidence is inadmissible to show in accordance with which of two plans the improvement is laid out.⁹ If it is desired to prove that an ordinance was not duly passed by a majority vote on the call of the ayes and noes, the journal of the council must be produced.¹⁰ If the duplicate assessment roll can be corrected only from data contained in the original roll, extrinsic evidence to correct such duplicate roll is inadmissible.¹¹ If the description of the property in the resolution levying an assessment for a local improvement is insufficient, extrinsic evidence cannot be used to supplement such description.¹² If the record shows that an ordinance was passed with the unanimous consent of the mayor and councilmen in council, extrinsic evidence is not admissible to show whether the mayor consented thereto or not.¹³ If the property which is assessed is not described, and if the proceedings contain no reference to a map of such property, such map cannot be introduced to explain and supplement the defective description, although it can be shown that the report was made with reference to such map.¹⁴ If, by statute, the record must show that there was a bidder for the construction of the improvement, an assessment cannot be established by a record which does not show such fact.¹⁵ The record must show upon its face a substantial compliance with the mandatory requirements of the statute.¹⁶ The question whether an assessment has been confirmed or not must be determined by the production of the record of such confirmation proceedings.¹⁷ An agreed statement of facts made by the parties to a proceeding may cure defects in a record without a direct proceeding to amend such record.¹⁸ If it is required that notice be given, either by publication or in some other way, and it is not required that the facts of giving such notice be entered of record, extrinsic evidence is admissible to establish the fact of publication of such notice.¹⁹

⁹ *Copeutt v. City of Yonkers*, 83 Hun, 178, 31 N. Y. S. 659 [1894].

¹⁰ *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443 [1886].

¹¹ *People of the State of California v. Hastings*, 34 Cal. 571 [1868].

¹² *Higman v. Sioux City*, 129 Ia. 291, 105 N. W. 524 [1906].

¹³ *City of Lexington v. Headley*, 5 Bush. (Ky.) 508 [1869].

¹⁴ *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877].

¹⁵ *Whitney v. Common Council of*

the Village of Hudson, 69 Mich. 189, 37 N. W. 184 [1888].

¹⁶ *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866 [1900]; *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524 [1898]; *Smith v. City of Omaha*, 49 Neb. 883, 69 N. W. 402 [1896].

¹⁷ *Dempster v. People ex rel. Kern*, 158 Ill. 36, 41 N. E. 1022 [1895].

¹⁸ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

¹⁹ *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057 [1896];

§ 1305. Evidence explaining record.

Extrinsic evidence is admissible in some cases to explain a record, even though it may not be admissible to add terms thereto.¹ Extrinsic evidence may be admissible to show that an interlineation in a certificate not made by the officers signing such certificate, was made in the presence of such officer, with his consent, and before he signed it.² Abbreviations in an assessment may be explained by parol evidence if such evidence is not inconsistent with the writing, and does not add new terms thereto.³ If the term "flat stones" is used in an improvement ordinance, and is not of itself sufficiently definite to make the assessment valid, it may be shown that such term has a well known and commercial meaning among those who are engaged in constructing such improvements.⁴ Evidence tending to show that such description has a well known meaning among contractors, and conveys to them a correct idea as to the size and cost, is held to be insufficient, since it does not show that such term has a precise and well established meaning.⁵ It has been said that it will not be presumed on error, in the absence of a bill of exceptions, that the court heard evidence to explain the meaning of such term.⁶ Evidence to identify the resolution of intention, which is found among the files and is numbered, but is not entered on the minutes of the board, is admissible.⁷ Under guise of explanation, extrinsic evidence can not, however, add to the terms of the record. If the commissioners in their assessment roll do not show what units of value are intended by the figures in the column headed "valuation," extrinsic evidence is not admissible to show their actual intention.⁸ The

Lingle v. City of Chicago, 172 Ill. 170, 50 N. E. 192 [1898]; *Rue v. City of Chicago*, 66 Ill. 256 [1872]; *City of Bloomington v. Phelps*, 149 Ind. 596, 49 N. E. 581 [1897]; *City of Nevada to the use of Gilfillan v. Morris*, 43 Mo. App. 586 [1891]; *State v. Several Parcels of Land*, — Neb. —, 107 N. W. 566 [1906]; *City of Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002 [1893].

¹ *Sargeant v. City of Evanston*, 154 Ill. 268, 40 N. E. Rev. 440 [1894].

² *Sargeant v. City of Evanston*, 154 Ill. 268, 40 N. E. Rev. 440 [1894].

³ *Lake Erie and Western Railroad*

Co. v. Bowker, 9 Ind. App. 428, 36 N. E. 864 [1893].

⁴ *Holden v. City of Chicago*, 212 Ill. 289, 72 N. E. 435 [1904]; *City of Chicago v. Holden*, 194 Ill. 213, 62 N. E. 550 [1902].

⁵ *City of Chicago v. Sherman*, 192 Ill. 576, 61 N. E. 850 [1901].

⁶ *Kelly v. City of Chicago*, 193 Ill. 324, 61 N. E. 1009 [1901]; *Kuester v. City of Chicago*, 187 Ill. 21, 58 N. E. 307 [1900].

⁷ *Dowling v. Hibernia Savings & Loan Society*, 143 Cal. 425, 77 Pac. 141 [1904].

⁸ *City of Chicago v. Walker*, 24 Ill. 494 [1860].

entire roll may, however, be looked to to determine their intention, and if it appears from the roll without extrinsic evidence, such omission does not render the assessment invalid.⁹ Oral evidence is admissible to show that the resolution of intention already introduced in evidence was the only one passed.¹⁰ Oral evidence may be received to identify an informal report as the one which was, in fact, acted upon.¹¹ A resolution book in which resolutions and notices are pasted may be used in connection with the minutes of the board in which such resolutions are referred to by number merely; and in connection with a paper in the files of the office of the clerk which purports to be the original resolution and which bears the same number, and the identity of number may be regarded as identifying the resolution.¹²

§ 1306. Evidence contradicting record.

If the statute requires certain facts to appear of record, evidence is ordinarily inadmissible to contradict the facts shown by such record, if the record itself is genuine.¹ Thus, an assessment report signed by the commissioners cannot be impeached by the evidence,² or by the affidavit,³ of one of such commissioners. Oral evidence of the secret motives of officials is inadmissible to contradict the legal effect of a record.⁴ Thus, if the record shows that an improvement is a continuous one, costing over one hundred thousand dollars, and it has been divided by the board into smaller improvements, each costing

⁹ *Linck v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893]. See as to similar correction of error in direction of arrow. *Blanchard v. Ladd*, 135 Cal. 214, 67 Pac. 131 [1901].

¹⁰ *Pacific Paving Co. v. Gallett*, 137 Cal. 174, 69 Pac. 985 [1902].

¹¹ *Smith v. Abington Savings Bank*, 171 Mass. 178, 50 N. E. 545 [1898].

¹² *Dowling v. Hibernian Savings & Loan Society*, 143 Cal. 425, 77 Pac. 141 [1904].

¹ *Dorland v. McGlynn*, 47 Cal. 47 [1873]; *Chambers v. Satterlee*, 40 Cal. 497 [1871]; *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898]; *Brethold v. Village of Wilmette*, 168 Ill. 162, 48 N. E. 38 [1897]; *Quick v. Village of River*

Forest, 130 Ill. 323, 22 N. E. 816 [1890]; *Bowen v. Hestor*, 143 Ind. 511, 41 N. E. 330 [1895].

² *Ryder's Estate v. City of Alton*, 175 Ill. 94, 51 N. E. 821 [1898]; *Brethold v. Village of Wilmette*, 166 Ill. 162, 48 N. E. 38 [1897]; *Lathem v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311 [1897]; *Quick v. Village of River Forest*, 130 Ill. 323, 22 N. E. 816 [1890]; *Wright v. City of Chicago*, 48 Ill. 285 [1868].

³ *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895].

⁴ *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101 [1902]; *State, Hageman, Pros. v. Mayor and City Council of Passaic*, 51 N. J. L. (22 Vr.) 109 [1888].

less than one hundred thousand dollars, and that if such division is upheld, certain formalities necessary in case of improvements costing over hundred thousand dollars will not be necessary, evidence of a member of such board to the effect that the board had no improper motive in dividing such improvement, is inadmissible.⁵ Members of a city council cannot impeach their proceedings by evidence of their secret opinions in opposition to their votes.⁶ A public corporation cannot contradict the facts set forth upon its record, even if a property owner might contradict such facts.⁷ If a record is, by statute, *prima facie* evidence only of the facts contained therein, the averments of such record may be contradicted by extrinsic evidence.⁸ Oral evidence is admissible to show that the alleged record offered in evidence is not the genuine record of the body whose record it purports to be,⁹ unless it is certified as correct by its official custodian.¹⁰ Evidence that a record was examined at a certain time, and that the record of a given action did not then appear, is immaterial if it is shown that such action was in fact had, and was subsequently recorded in due form.¹¹ A copy of an act certified by the chief clerks of the two houses of the legislature cannot be received to show that a mistake was made in engrossing the act after its final passage and before it was examined by the committee on engrossed bills, had the great seal affixed, was signed by the governor and recorded.¹²

§ 1307. Admissibility of record of court.

If a judgment rendered by the court in a prior proceeding is material, such judgment may be shown by the record of the court.¹ Thus, in a re-assessment proceeding, the record of judicial proceedings under the former assessment may be used to

⁵ Kerfoot v. City of Chicago, 195 Ill. 229, 63 N. E. 101 [1902].

⁶ State, Hageman, Pros. v. Mayor and City Council of Passaic, 51 N. J. L. (22 Vr.) 109 [1888].

⁷ City of Sedalia ex rel. Gilsonite Construction Company v. Scott, 104 Mo. App. 595, 78 S. W. 276 [1903].

⁸ State of Minnesota ex rel. Cunningham v. District Court of Ramsey Co., 29 Minn. 62, 11 N. W. 133 [1882].

⁹ Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589 [1886].

¹⁰ People of the State of California v. Hagar, 52 Cal. 171 [1877].

¹¹ Ryder's Estate v. City of Alton, 175 Ill. 94, 51 N. E. 821 [1898].

¹² Mayor, Recorder and Aldermen of the City of Annapolis v. Harwood, 32 Md. 471, 3 Am. Rep. 151 [1870].

¹ City of New Whatcom v. Bellingham Bay Improvement Co., 16 Wash. 131, 47 Pac. 236 [1896].

show that such assessment was invalid.² If the former judgment was rendered in an action between the same parties, concerning the same subject matter, and is thus operative as an estoppel, the record of such judgment is admissible.³ Thus, a judgment showing that property is assessed in its proper proportion for a given improvement, is admissible in a proceeding to levy a supplemental assessment for the same improvement.⁴ The record of a judgment rendered between different parties is inadmissible, even if it involves the same question.⁵

§ 1308. Primary evidence.

The contents of written instruments cannot be proved by oral evidence unless the non-production of the written instruments is first explained.¹ If the validity of an assessment depends upon the contents of certain documents, the court will not pass upon the validity of the assessment unless the documents are in evidence, and will not accept the conclusions of counsel as a substitute therefor.²

§ 1309. Lost and destroyed records.

The loss or destruction of the record of an assessment does not preclude the rights of either party based on such record, if it is possible to show the existence and contents thereof.¹ In some cases, parol evidence has been admitted to show the existence and contents of a lost or destroyed record, without any proceedings before the tribunal whose record it was, in order to restore the same.² Thus, if the original ordinance has been de-

² *City of New Whatcom v. Bellingham Bay Improvement Co.*, 16 Wash. 131, 47 Pac. 236 [1896].

³ *Wickett v. Town of Cicero*, 152 Ill. 575, 38 N. E. 909 [1894].

⁴ *Wickett v. Town of Cicero*, 152 Ill. 575, 38 N. E. 909 [1894]; *Greeley v. Town of Cicero*, 148 Ill. 632, 36 N. E. 603 [1894].

⁵ *Keith v. City of Philadelphia*, 126 Pa. St. 575, 17 Atl. 883 [1889].

¹ *Petition of property owners, Farrell v. West Chicago Park Commissioners*, 182 Ill. 250, 55 N. E. 325 [1899]. *Deed. Shreve v. Town of Cicero*, 129 Ill. 226, 21 N. E. 815 [1890].

² *Wilkins v. City of Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427 [1881]. (Decree reversed and remanded to enable such documents to be put in evidence.)

³ *Scott v. People ex rel. Lewis*, 120 Ill. 129, 11 N. E. 408 [1889].

⁴ *Edwards & Walsh Construction Co. v. Jasper County*, 117 Ia. 365, 94 Am. St. Rep. 301, 90 N. W. 1006 [1902]; *Smith v. Abington Savings Bank*, 171 Mass. 178, 50 N. E. 545 [1898]; *Fisher v. Mayor, Aldermen and Commonalty of the City of New York*, 67 N. Y. 73 [1876].

stroyed by fire, and the record of the ordinance in the ordinance book does not show that the mayor signed it, extrinsic evidence is admissible to show the fact of such signature.³ The office plan of the engineer, a copy of which he testifies was given to the town, and which was referred to in his report, may be introduced to explain the report.⁴ If the original schedule is lost, the record of such schedule in the county recorder's office may be given in evidence.⁵ Under some statutes provision is made for restoring an assessment roll which is lost or destroyed, and for obtaining an order of the court making such restored copy the assessment roll in the case.⁶ Where such procedure is resorted to, the restored roll is admissible as far as the original roll would have been.⁷ Under such statutes, a copy of the assessment roll cannot be introduced in a confirmation proceeding until an order of the court in making such copy of the assessment roll in that proceeding has been made.⁸

§ 1310. Evidence as to necessity of improvement.

If the public corporation which constructed the improvement has authority to make a final determination as to the necessity of the improvement in the particular case, evidence tending to show that such improvement is not necessary is admissible.¹ If, on the other hand, the public corporation has not the power to determine the necessity of the improvement of the type in question, evidence as to its necessity is admissible.²

§ 1311. Evidence as to existence of contract.

Evidence is admissible to show that the purported contract, to pay the contract price whereof it is sought to levy the assessment, was never, in fact, entered into. Evidence that the contract was not signed by the superintendent as required by statute, and that the bond which was required by statute was signed

³City of Seattle v. Doran, 5 Wash. 483, 32 Pac. 105, 1002 [1893].

⁴Smith v. Abington Savings Bank, 171 Mass. 178, 50 N. E. 545 [1898].

⁵Bate v. Sheets, 50 Ind. 329 [1875].

⁶Thomas v. City of Chicago, 152 Ill. 292, 38 N. E. Rep. 923 [1894].

⁷Thomas v. City of Chicago, 152 Ill. 292, 38 N. E. Rep. 923 [1894].

⁸Morrison v. City of Chicago, 142 Ill. 660, 32 N. E. 172 [1893].

¹Gordon v. City of Chicago, 201 Ill. 623, 66 N. E. 823 [1903]; Houston v. City of Chicago, 191 Ill. 559, 61 N. E. 396 [1901].

²Craig v. City of Philadelphia, 89 Pa. St. 265 [1879].

in blank, is admissible to show that no contract has in fact been entered into.¹ No prejudicial error is committed by admitting a written statement signed by defendant, showing his willingness that the contractor should perform the work.²

§ 1312. Evidence as to performance of contract.

Extrinsic evidence is admissible to show that the contract was not performed if the decision of the public corporation upon the question of such performance is not conclusive.¹ If the determination of the public corporation is conclusive in a proceeding of the kind in which the evidence is offered, evidence of defective performance is inadmissible.² Extrinsic evidence may be used to show that the city accepted the work, if the statute does not require such acceptance to be entered of record.³ If the question of the performance of the contract is in issue, samples of the stone taken from the quarry and shown to be stone of the same kind as that used in the paving, are admissible, and the jury should not be told that failure to produce samples of the very materials used raised an inference that such samples, if produced, would have been evidence against the party who offered such samples of stone of the same kind.⁴ If the value of the work is not in issue, the fact that the street commissioners refuse to allow the property owners to take up a part of the street for an examination thereof, does not prevent recovery by the city, especially if it is not shown that the street commissioners had authority to bind the city by such refusal.⁵

§ 1313. Evidence as to benefits.

If the question of benefits is in issue,¹ as upon an original

¹ *Manning v. Den*, 90 Cal. 610, 27 Pac. 435 [1891].

² *King v. Lamb*, 117 Cal. 401, 49 Pac. 561 [1897].

³ *Taylor v. Brown*, 127 Ind. 293, 26 N. E. 822 [1890]; *Corry v. Campbell*, 25 O. S. 134 [1874].

⁴ *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750 [1894].

⁵ *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957, 23 Ky. Law Rep. 917 [1901].

⁴ *City of Philadelphia to use of Johnson v. Rule*, 93 Pa. St. (12 Norristown) 15 [1880].

⁵ *Schenley v. Commonwealth for Use of City of Allegheny*, 36 Pa. St. (12 Casey) 64 [1859].

¹ *City of Seattle v. Board of Home Missions of Methodist Protestant Church*, 138 Fed. 307, 70 C. C. A. 597 [1905]; *Drainage Comrs. of Drainage District No. 2 v. Drainage Comrs. of Union Drain Dist. No. 3*, 211 Ill. 328, 71 N. E. 1007 [1904]; (affirming, 113 Ill. App. 114); *Fahnestock v. City of Peoria*, 171 Ill. 454, 49 N. E. 496 [1898]; *Harris v. City of Chicago*, 162 Ill. 288, 44 N. E. 437 [1896]; *Pike v. City of Chicago*,

hearing as to the amount of such benefits, such as confirmation,² or upon a hearing to revise an assessment,³ evidence as to the amount of such benefits is admissible. In an action upon an assessment, evidence as to the amount of benefits is admissible if the action of the public authorities in determining such amount is not conclusive.⁴ Thus, evidence of the location and condition of the property as affecting the benefits thereto, is admissible.⁵ In such cases, however, the benefit from the improvement as a whole must be shown, and not the benefit or want of benefit from some part thereof.⁶ If the determination of taxing officials is conclusive as to the fact of benefits, extrinsic evidence upon such subject is inadmissible.⁷ Whether evidence of increased facility of access is admissible upon the question of the benefits, depends upon whether such facility of access is a legitimate element of benefit. Such evidence is admissible where facility of access is regarded as a special benefit,⁸ but not where facilities of travel enjoyed by the property owner in common with the community in general, are not regarded as special benefits.⁹ Evidence of the prices paid for similar land in the vicinity at voluntary sales, within a reasonable time, is admissible.¹⁰ Photographs of the land taken before the improvements are made, are, if properly identified, admissible in evidence to show the condition of such land.¹¹ Evidence that the improvement has already been paid for by the public corporation is inadmissible.¹²

155 Ill. 656, 40 N. E. 567 [1895]; *Watson v. City of Chicago*, 115 Ill. 78, 3 N. E. 430 [1886]; *Spear v. Drainage Commissioners*, 113 Ill. 632 [1886]; *Bigelow v. City of Chicago*, 90 Ill. 49 [1878]; *Fagan v. City of Chicago*, 84 Ill. 227 [1876]; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Machler*, 158 Ind. 159, 63 N. E. 210 [1901]; *Mayor and City Council of Baltimore v. Smith & Schwartz Brick Company*, 80 Md. 458, 31 Atl. 423 [1894-5].

² See § 922.

³ *Patton v. City of Springfield*, 99 Mass. 627 [1868].

⁴ *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895].

⁵ *Spear v. Drainage Commissioners*, 113 Ill. 632 [1886]; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.*

v. Machler, 158 Ind. 159, 63 N. E. 210 [1901].

⁶ *Alden v. City of Springfield*, 121 Mass. 27 [1876].

⁷ *City of St. Louis v. Excelsior Brewing Company*, 96 Mo. 677, 10 S. W. 477 [1888].

⁸ *Philadelphia & Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895].

⁹ *Friedenwald v. Mayor and City Council of Baltimore*, 74 Md. 116, 21 Atl. 555 [1891].

¹⁰ *Mayor and City Council of Baltimore v. Smith & Swartz Brick Co.*, 80 Md. 458, 31 Atl. 423 [1894-5].

¹¹ *Beals v. Inhabitants of Brookline*, 174 Mass. 1, 54 N. E. 339 [1899].

¹² *Sweet v. West Chicago Park Commissioners*, 177 Ill. 492, 53 N. E. 74 [1899].

§ 1314. Evidence as to apportionment.

If the question of the apportionment is not determined by the action of the city, evidence tending to show that such apportionment is not in accordance with the provisions of the statute, or of the constitution, is admissible.¹ Evidence which leaves it ambiguous whether an apportionment is properly made or not, is not admissible if offered by one who is attempting to show that the apportionment is invalid.² Thus, evidence that certain property was not assessed is admissible if it is not shown that such property is benefited.³

§ 1315. Evidence as to execution of protest.

If a protest against an improvement has been filed, and such protest if valid deprives the city of power to order the improvement, the city may introduce evidence tending to show that the persons signing such protest were not property owners, or were not authorized by property owners to sign.¹

§ 1316. Evidence as to interest of officials.

The pecuniary interest of officers may be shown where such interest would render the assessment invalid, and no provision is made for having the question of the competency of such officers determined in advance by the city.¹

§ 1317. Judicial notice.

The principles of judicial notice which are recognized in ordinary cases, apply in proceedings to enforce assessments. Thus, courts will take notice of the fact that in large cities most payments are made by check.¹ The court will take judicial notice of the city charter, whether it is regarded as a private or a public statute,² of the powers of public officers,³ of their identity,⁴

¹ *Creote v. City of Chicago*, 56 Ill. 422 [1870].

² *Snydacker v. Village of West Hammond*, 225 Ill. 154, 80 N. E. 93 [1907].

³ *Snydacker v. Village of West Hammond*, 225 Ill. 154, 80 N. E. 93 [1907].

⁴ *City of Sedalia ex rel. Gilsonite Construction Co. v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014 [1904].

¹ *Murr v. City of Naperville*, 210 Ill. 371, 71 N. E. 380 [1904]; *Hunt*

v. City of Chicago, 60 Ill. 183 [1871].

¹ *Indiana Bond Co. v. Bruce*, 13 Ind. App. 550, 41 N. E. 958 [1895].

² At least when sitting as a special tribunal on appeal from a sewer assessment. *Clapp v. City of Hartford*, 35 Conn. 66 [1868].

³ *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894].

⁴ *Himmelmann v. Hoadley*, 44 Cal. 213 [1872]; *Brackett v. People of Weinnett*, 115 Ill. 29, 3 N. E. 723 [1886].

and of the genuineness of their signatures.⁵ Unless the statute provides for a deputy, the court cannot take judicial notice of the right of a deputy to act.⁶ The court will take judicial notice of the change of organization of a city or town, if it may organize under one of two or more statutes;⁷ and of its organization under general laws.⁸ A court will take judicial notice of the general topography of the country, to determine the effect of the drainage of swamps upon the general health.⁹ If realty is shown to be in a certain city, the court will take judicial notice of the county in which it is located.¹⁰ In the absence of statute a court will not take judicial notice of city ordinances,¹¹ even if, by statute, a printed volume of ordinances, published by authority of the corporation is evidence thereof.¹² Under some statutes the courts must take judicial notice of city ordinances,¹³ of the articles of association of a drainage district,¹⁴ and of the location of streets in a city, as shown by the official map,¹⁵ or as established by act of the legislature,¹⁶ their relation to each other, and the direction in which they run.¹⁷

§ 1318. Opinions.

If the question of value is material, the opinions of witnesses who are shown to be competent to entertain and express an

⁵ *Himmelmann v. Hoadley*, 44 Cal. 213 [1872].

⁶ *Eyerman v. Payne*, 28 Mo. App. 72 [1887]; (as in signing a tax bill).

⁷ *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894].

⁸ *Potwin v. Johnson*, 108 Ill. 70 [1883].

⁹ *State ex rel. Utick v. Board of County Commissioners of Polk County*, 87 Minn. 325, 60 L. R. A. 161, 92 N. W. 216 [1902].

¹⁰ *Linck v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893].

¹¹ *Central Savings Bank of Baltimore v. Mayor and City Council of Baltimore*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283 [1889].

¹² *Central Savings Bank of Baltimore v. Mayor and City Council of Baltimore*, 71 Md. 515, 18 Atl. 809, 20 Atl. 283 [1889]. (However, the existence of such ordinance would not have affected the case, the court ob-

serving, "it would be an unjust surprise to the appellant to deprive him of the benefit of the ordinance in question, and if it would have made any difference in our opinion, we should have ordered a re-argument.")

¹³ *Dumesnil v. Hexagon Tile Walk Co.*, — Ky. —, 58 S. W. 705, 23 Ky. L. R. 144 (overruling *Nevin v. Gaertner*, — Ky. —, 48 S. W. 153, 20 Ky. L. R. 1022).

¹⁴ *Eel River Draining Association v. Topp*, 16 Ind. 242 [1861].

¹⁵ *Williams v. Savings & Loan Society*, 97 Cal. 122, 31 Pac. 908 [1893]; *Whiting v. Quackenbush*, 54 Cal. 306 [1880].

¹⁶ *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 [1895].

¹⁷ *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Brady v. Page*, 59 Cal. 52 [1881]; *Whiting v. Quackenbush*, 54 Cal. 306 [1880].

opinion upon such subject, may be introduced in evidence.¹ Opinions as to the amount of benefits arising from facts already established, may be received in evidence.² The weight to be given to such opinions is, of course, for the jury,³ and if unreasonable may be disregarded by the jury if they see fit.⁴ A question asking for the opinion of the witness as to the limits of the land specially benefited is too general. He should be asked whether certain specified land was benefited.⁵ Opinions cannot be offered in evidence, if not based upon existing facts.⁶ Thus, an opinion that certain land will be benefited by an improvement, is inadmissible, if it is based on the assumption that the land will be used in the future for depôts or freight houses.⁷ An opinion that land has increased in value, without even an approximate statement of the amount of such increase, is inadmissible.⁸ A witness should not be asked whether the assessment is levied on each tract in proportion to the benefits, since this is the very question at issue; but if such question is permitted, the adversary party should be permitted to ask him on cross examination on what facts his opinion was based.⁹

§ 1319. Admissions.

An admission against interest of one of the parties to a suit to enforce an assessment may be admitted against such party.¹ Thus, an admission by a railway company that it is a resident land owner, made by its objection that it was not notified as resident land owners should be notified,² or an admission that a report

¹ *Jones v. City of Chicago*, 206 Ill. 374, 69 N. E. 64 [1903]; *Pike v. City of Chicago*, 155 Ill. 656, 40 N. E. 567 [1895]; *Spear v. Drainage Commissioners*, 113 Ill. 632 [1886]; *Mayor and City Council of Baltimore v. Smith & Swartz Brick Company*, 80 Md. 458, 31 Atl. 423 [1894].

² *Spear v. Drainage Commissioners*, 113 Ill. 632 [1886].

³ *Pike v. City of Chicago*, 155 Ill. 656, 40 N. E. 567 [1895].

⁴ *City of St. Louis v. Ranken*, 95 Mo. 189, 8 S. W. 249 [1888].

⁵ *Fagan v. City of Chicago*, 84 Ill. 227 [1876].

⁶ *Hook v. Chicago & Alton Rail-*

road Co., 133 Mo. 313, 34 S. W. 549 [1895].

⁷ *Village of River Forest v. Chicago & Northwestern Railway Co.*, 197 Ill. 344, 64 N. E. 364 [1902].

⁸ *Anderson v. Wharton County*, 27 Tex. Civ. App. 115, 65 S. W. 643 [1901].

⁹ *Reclamation District No. 537 of Yolo County v. Burger*, 122 Cal. 442, 55 Pac. 156 [1898].

¹ *Clemens v. Mayor and City Council of Baltimore, use of Volkmar*, 16 Md. 208 [1860].

² *Elgin, Joliet & Eastern Railway Co. v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102 [1901].

was indefinite in description,³ or an admission in an agreed state of facts that certain assessments were set aside and vacated by an authorized board, and new assessments made,⁴ or an admission in a written remonstrance that the report of the commissioners was on file,⁵ were all admissible in evidence to establish the truth of the facts thus admitted. A promise to pay a charge for paving is an admission that the necessary steps to impose such charge have been taken.⁶ An admission in a different proceeding between one of the parties to the litigation in question and another party is not, however, conclusive upon the party making such admission, in such litigation.⁷

§ 1320. Declarations.

Declarations in favor of the party making them are not admissible in evidence in favor of such party.¹ Thus, entries in books of general taxation, showing that certain land is assessed as urban property, is not admissible in a proceeding to enforce a local assessment, in order to prove that such property is urban in character.² A public map does not, of itself, show the dedication of the streets laid down thereon.³

§ 1321. Hearsay.

The ordinary rules against hearsay evidence are admissible in proceedings to enforce assessments.¹ Thus, evidence as to the declarations of the individual members of the board of public works, and of their clerk, with reference to the manner in which the assessment was made, is hearsay and inadmissible.²

§ 1322. View of premises.

The court may, in its discretion, permit the jury to view the premises upon which the assessment has been levied.¹ If the

^{*} *Ager v. State ex rel. Heaston*, 162 Ind. 538, 70 N. E. 808 [1903].

⁴ *Mayor, etc., of Jersey City v. Green*, 42 N. J. L. (13 Vr.) 627 [1880].

⁶ *State, Hand, Pros. v. City Council of the City of Elizabeth*, 31 N. J. L. (2 Vr.) 547 [1864].

⁶ *Clemens v. Mayor and City Council of Baltimore, use of Volkmar*, 16 Md. 208 [1860].

⁷ *Haven v. Mayor, Aldermen and Commonalty of the City of New York*, 173 N. Y. 611, 66 N. E. 1110 [1903] (affirming *Havens v. City of*

New York, 73 N. Y. S. 678, 67 App. Div. 90 [1901]).

¹ *Philadelphia to use v. Gowen*, 202 Pa. St. 453, 52 Atl. 3 [1902].

² *Philadelphia to use v. Gowen*, 202 Pa. St. 453, 52 Atl. 3 [1902].

³ *Cook v. Sudden*, 94 Cal. 443, 29 Pac. 949 [1892].

¹ *Rue v. City of Chicago*, 66 Ill. 256 [1872].

² *Rue v. City of Chicago*, 66 Ill. 256 [1872].

³ *Pike v. City of Chicago*, 155 Ill. 656, 40 N. E. 567 [1895].

court permits the jury to view the premises in an assessment proceeding, the jury may consider the facts learned by them from such view, in order to enable them to understand and apply the evidence, but such view, and the facts learned thereby, are not of themselves evidence.² The jury cannot, therefore, be permitted to disregard the evidence and to base their verdict upon the facts learned by a view of the premises.³ However, the probative force of the actual view of the premises, taken by the court under agreement of the parties should be considered in determining the sufficiency of the evidence on behalf of the assessment.⁴

§ 1323. Order of introducing evidence and repetition.

The order of introducing evidence is in the discretion of the trial court.¹ The fact that evidence cumulative to that in chief is admitted in rebuttal is not error.² Whether further evidence may be introduced after the evidence has once been closed and the case argued rests in the discretion of the trial court.³ Refusal to admit further evidence after the case is closed is not reversible error.⁴ No error is committed by excluding evidence which is a mere repetition of that which has already been offered.⁵ Thus, if the relative position of the assessed property and the improvement has been shown, it is not error to exclude a plat, not an exact copy of the original record, which is offered to show such relative positions.⁶

§ 1324. Sufficiency of evidence.

Evidence which does not fairly tend to establish the facts as alleged by the party who offers such evidence, should not be admitted, or, if admitted, should be regarded as of no legal effect. Proof that a member of the board was absent does not sustain the objection that the assessment was not confirmed legally, if it is not necessary that all of the members of the board should be

²Rich v. City of Chicago, 187 Ill. 396, 58 N. E. 306 [1900].

³City of Kansas v. Hill, 80 Mo. 523 [1883].

⁴Chytraus v. City of Chicago, 160 Ill. 18, 43 N. E. 335 [1896].

¹Seibert v. Allen, 61 Mo. 482 [1876].

²Chytraus v. City of Chicago, 160 Ill. 18, 43 N. E. 335 [1896].

³Goodrich v. City of Minonk, 62 Ill. 121 [1871].

⁴Betts v. City of Naperville, 214 Ill. 380, 73 N. E. 752 [1905].

⁵Thomas v. City of Chicago, 152 Ill. 292, 38 N. E. 923 [1894]; McChesney v. People ex rel. Johnson, 99 Ill. 216 [1881].

⁶McChesney v. People ex rel. Johnson, 99 Ill. 216 [1881].

present.¹ A record which shows that at one meeting six councilmen were present, and does not show that any were absent, and at another meeting shows that five members were present and one absent, shows that the council consisted of six members.² Where an assessment roll is evidence of the width of the street which has been improved, such evidence is not overcome by the testimony of a witness as to the width of the street, which testimony is based in part upon maps which are not shown to be correct.³ Evidence that a notice was sent by mail is insufficient without showing when it was sent, to whom it was addressed, and its contents.⁴ Evidence which shows that no order for advertisement for bids was made for a certain time after a judgment of confirmation, does not show that there was no previous step taken toward letting the contract.⁵ If an assignment of an assessment is sufficient to protect the property owner against the assignor, and the assignor and the assignee both acquiesce in its validity, such evidence of the assignment is sufficient.⁶ Evidence of an assignment made by the general manager of a corporation, who is in the habit of entering into contracts and making assignments on behalf of the corporation with the acquiescence thereof,⁷ or made by the president of the corporation whose authority is not shown,⁸ is sufficient. The fact that the record does not show the exact date at which an assessment roll and judgment were certified to the collector, does not show that the land was not delinquent.⁹ Evidence that a contractor has been paid in warrants issued by the city does not show that the original assessment was sufficient to cover all the proper items of the assessment.¹⁰ Other illustrations of the sufficiency of evidence are given in the following note.¹¹

¹ In the Matter of the Petition of Merriam to Vacate an Assessment, 84 N. Y. 596 [1881].

² Fralich v. Barlow, 25 Ind. App. 383, 58 N. E. Rep. 271 [1900].

³ White v. Alton, 149 Ill. 626, 37 N. E. 96 [1894].

⁴ Hayes v. State ex rel. Murray, 96 Ind. 284 [1884].

⁵ Gage v. People ex rel. Hanberg, 213 Ill. 347, 72 N. E. 1062 [1904].

⁶ Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557 [1896].

⁷ Reid v. Clay, 134 Cal. 207, 66 Pac. 262 [1901].

⁸ Bambrick v. Campbell, 37 Mo. App. 460 [1889].

⁹ Walker v. People ex rel. Kochersperger, 166 Ill. 96, 46 N. E. 761 [1897].

¹⁰ Cody v. City of Cicero, 203 Ill. 322, 67 N. E. 859 [1903].

¹¹ That ordinance was not unreasonable. Walker v. City of Chicago, 202 Ill. 531, 67 N. E. 369 [1903]. Fraud and corruption on part of council not shown to exist. Field v. Barber Asphalt Paving Company, 117 Fed. 925 [1902]. That separate estimates were made as to each im-

§ 1325. Weight of evidence.

The weight of the evidence adduced is primarily for the court or jury to which the facts are submitted. Mere numerical equality of witnesses does not necessarily prevent the weight of evidence from being sustained by the affirmative.¹ Even where the decision of public officers as to the necessity of an improvement is not final, it is of great weight.²

§ 1326. Cross examination.

If the fact that a second apportionment was made is shown on examination in chief, it has been held not to be erroneous to permit the defendant on cross examination to introduce such apportionment, if it is introduced simply to establish the fact that it was made.¹ It is improper to prevent cross examination tending to show the interest and bias of the witnesses, and the opportunities which they have for obtaining knowledge of the facts to which they testify.² The party who has called a witness cannot impeach him by showing that he made statements inconsistent with his evidence.³

§ 1327. Rebuttal.

In rebuttal, the party seeking to enforce an assessment, or to have it confirmed, may introduce evidence to meet objections raised by the evidence of the defendant,¹ as that realty which is not assessed is not benefited by the improvement.²

provement district. *Crescent Hotel Co. v. Bradley*, 81 Ark. 286, 98 S. W. 971 [1906]. As to evidence of cost added by covenant that contractor should keep improvement in repair for five years. *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742 [1903]. Apportionment not shown to be unfair. *In re Opening of East 176th Street*, 83 N. Y. S. 433, 85 App. Div. 347 [1903]. As to fact that public has no easement in land on which improvement is located. *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431 [1889]. On the same point see *Cline v. People ex rel. Barlow*, 224 Ill. 360, 79 N. E. 663 [1906]. That notice of ordering the improvement was given. *Walker v.*

City of Detroit, 136 Mich. 6, 98 N. W. 744 [1904].

¹ *Conway v. City of Chicago*, 219 Ill. 295, 76 N. E. 384 [1906].

² *Trigger v. Drainage District No. 1, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *Philadelphia to use v. Monument Cemetery Co.*, 147 Pa. St. 170, 23 Atl. 400 [1892].

¹ *Casey v. City of Leavenworth*, 17 Kan. 189 [1876].

² *Kerfoot v. City of Chicago*, 196 Ill. 229, 63 N. E. 101 [1902].

³ *Griffin v. City of Chicago*, 57 Ill. 317 [1870].

¹ *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896].

² *Jones v. City of Chicago*, 206 Ill. 374, 69 N. E. 64 [1903].

§ 1328. Instructions.

The instructions given by the court to the jury must direct them to the determination of the true issue, and must not state erroneous rules of law for their guidance in determining such issue. A charge which places the burden of proof upon the wrong party is erroneous.¹ An instruction to the effect that, as a matter of law, a particular state of facts constitutes benefits, is erroneous.² An instruction that the jury must consider "whether or not the market value of the property for any legitimate purpose for which the same may be used, will be increased by reason of the improvement," is held to be correct as it is to be understood that such charge relates to the present market value, and not the market value at some other period of time.³ A charge which directs the jury not to take into consideration the present use to which is put the realty which is assessed, has been held to be erroneous.⁴ An instruction which directs the jury to ignore the evidence, or to consider a question upon which there is no evidence, is erroneous.⁵ Thus, a charge which authorizes the jury to disregard the evidence of witnesses, and to base their estimates of value entirely upon their observation of the property, is erroneous.⁶ Since the jury has the power to determine the credibility of the witnesses, a charge which directs them to disregard opinions as to the amount of benefits, if they think such opinions, unreasonable, is not erroneous.⁷ An instruction which requires the jury to find that a railroad track, as well as its right of way, is benefited, is erroneous.⁸ If the issue is as to the correctness of an assessment already levied, a charge directing the jury to find for the public corporation, if they find that the property was not assessed more or less than it was benefited, or more or less than its proportionate share of the cost of the improvement,

¹ *Bacon v. Mayor and Aldermen of Savannah*, 91 Ga. 500, 17 S. E. 749 [1893].

² *Perdue v. Big Four Drainage District of Ford County*, 117 Ill. App. 600 [1905].

³ *Thomas v. City of Chicago*, 152 Ill. 292, 38 N. E. 923 [1894].

⁴ *The Kankakee Stone & Lime Co. v. City of Kankakee*, 128 Ill. 173, 20 N. E. 670 [1890].

⁵ *Bockoven v. Board of Supervisors of Lincoln Township, Clark County*, 13 S. Dak. 317, 83 N. W. 335 [1900].

⁶ *City of Kansas City v. Hill*, 80 Mo. 523 [1883].

⁷ *City of St. Louis v. Ranken*, 95 Mo. 189, 8 S. W. 249 [1888].

⁸ *Drainage Commissioners of District No. 3, etc. v. Illinois Central Railroad Company*, 158 Ill. 353, 41 N. E. 1073 [1895].

is proper,⁹ and the jury need not be required in such case to find specially how much the property of certain named owners will be benefited.¹⁰ If the jury find that the property is not so assessed, it should find how much it should be assessed.¹¹ A charge that the jury is to find if the assessment is "correct and just" is insufficient as it does not give to the jury any instruction as to what is correct and just, but such error may be cured by other language in the charge.¹² It is proper to instruct the jury to consider only such benefits as are "direct, certain and proximate."¹³

§ 1329. Form of verdict.

The form of the verdict in assessment proceedings is governed by the same principles that control in ordinary actions at law. A separate verdict on each count, signed by the foreman of the jury has been said to be "not strictly formal, but sufficient."¹

⁹ Sweet v. West Chicago Park Commissioners, 177 Ill. 492, 53 N. E. 74 [1899].

¹⁰ Walter v. Town of Lake, 129 Ill. 23, 21 N. E. 556 [1890].

¹¹ Goodwillie v. City of Lake View, 137 Ill. 51, 27 N. E. 15 [1892].

¹² Rich v. City of Chicago, 152 Ill. 18, 38 N. E. 255 [1894].

¹³ Kansas City v. Bacon, 157 Mo. 450, 57 S. W. 1045 [1900].

¹ Seibert v. Allen, 61 Mo. 482 [1876].

CHAPTER XXV.

REMEDIES OF PROPERTY OWNERS IN RESISTING ASSESSMENT.

A.—DEFENSES.

§ 1330. Who may object to assessment.

An objection to an assessment, whether made as a defense to an action to enforce an assessment, or whether it is made a basis for the proceedings for obtaining affirmative relief, can be made only by parties who are in some way prejudiced thereby, at least as long as such defects do not go to the jurisdiction of the public corporation to levy the assessment. A party who is not prejudiced in any way by an irregularity in levying an assessment, can not complain thereof, even if other property owners who are prejudiced have a right to complain.¹ Thus, a property owner whose property is not assessed excessively cannot object on the ground that the city's share of the assessment exceeds the limit of indebtedness permitted to it by the statutes or by the constitution.² He cannot complain on the ground that the state had agreed with the United States not to assess property owned by him, as long as he has no contract with the State for such exemption. If the United States does not complain of such violation of the contract, the property owner cannot complain.³ An owner

¹ *City of Alameda v. Cohen*, 133 Cal. 5, 65 Pac. 127 [1901]; *Gage v. People ex rel. Hanberg*, 219 Ill. 634, 76 N. E. 834 [1906]; *The People ex rel. Herman v. Commissioners of Bug River Special Drainage District*, 189 Ill. 55, 59 N. E. 605; *Chicago, Rock Island & Pacific R. R. Co. v. City of Chicago*, 139 Ill. 573, 28 N. E. 1108 [1893]; *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515 [1889]; *Huesman v. Dersch*, — Ky. —, 109 S. W. 319 [1908]; *Langan v. Bitzer*, — Ky.

—, 82 S. W. 280, 26 Ky. L. Rep. 579 [1904]; *Barber Asphalt Paving Co. v. Gaar*, 115 Ky. 334, 73 S. W. 1106, 24 Ky. Law Rep. 2227 [1903]; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900].

² *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895]; *Hughes v. Parker*, 148 Ind. 692, 48 N. E. 243 [1897].

³ *Reclamation District No. 102 v. Hagar*, 66 Cal. 54, 4 Pac. 945 [1884].

of property who is not excessively assessed, cannot complain on the ground that the assessment is excessive or invalid as to other property owners;⁴ nor can he complain because of the omission of property which should have been assessed, if his assessment is not increased by such omission.⁵ The owner of land taken for a public improvement cannot complain because of the irregularity of an assessment levied on the residue of his land.⁶ Such irregularity may be ground for resisting the assessment, but does not affect the proceedings in eminent domain.⁷ An owner of land which is assessed, but no part of which has been appropriated by the city, cannot complain of the method in which the city acquired a public easement to the land upon which the public improvement is constructed, if, in fact, it acquires such easement.⁸ Parties who are prejudiced by an assessment, may complain thereof, whether they are the legal owners of the land which is assessed, or whether they hold equitable interests or incumbrances.⁹

§ 1331. Defenses to assessment.

In the absence of statutes which prevent the property owner from setting up certain classes of irregularities or violations of the statute as defenses in actions to enforce assessments, and in the absence of facts which amount to estoppel or waiver, the general rule as to the defenses which may be made to an assessment is that any defense may be interposed which shows a substantial departure from the provisions of the statute which are mandatory or jurisdictional, or which are made conditions precedent to the exercise of the power of levying assessments, or which are inserted for the benefit of the property owner.¹ The right

⁴ Assessment excessive as to others. *Iroquois & Crescent Drainage District No. 1 v. Harroun*, 222 Ill. 489, 78 N. E. 780 [1906]; *McCarty v. Brick*, 11 N. J. L. (6 Halst.) 27 [1829]. Assessment void as to others. *White v. City of Alton*, 149 Ill. 626, 37 N. E. 96 [1894]; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Kansas City v. Kansas City, Fort Scott & Memphis Railroad Company*, 189 Mo. 245, 88 S. W. 45 [1905]; *Ridenour v. Saffin*, 1 Handy, 464 [1855]. Ordinance oppressive as to others. *Hyman v. City of Chicago*, 188 Ill. 462, 59 N. E. 10 [1900].

⁵ *Bowditch v. City of New Haven*, 40 Conn. 503 [1873].

⁶ *City of Alameda v. Cohen*, 133 Cal. 5, 65 Pac. 127 [1901]. (The assessment here involved was held to be irregular in *Cohen v. City of Alameda*, 124 Cal. 504, 57 Pac. 377).

⁷ *City of Alameda v. Cohen*, 133 Cal. 5, 65 Pac. 127 [1901].

⁸ *City of Toledo for the use of Horan v. Barnes*, 1 Ohio N. P. 187 [1894].

⁹ *City of Chicago v. Rosenfeld*, 24 Ill. 495 [1860].

¹ *People v. Hagar*, 49 Cal. 229 [1874]; *City of Stockton v. Creanor*,

to interpose substantial irregularities as defenses is especially clear where there has been no opportunity to be heard before the officials by whom the assessment is levied.² Defenses which might have been interposed against the public corporation can ordinarily be interposed against the holder of improvement bonds,³ or improvement certificates,⁴ who is attempting to enforce the assessment.

§ 1332. Contract and performance.

The fact that the contract was invalid or has not been performed may be used as a defense to an assessment. Thus, a property owner may show as a defense to an assessment that the contract for the improvement was invalid, as being let without the competitive bidding,¹ or without notice of the time and place of letting the contract,² or because the contractor made a fraudulent contract with certain property owners to charge them less for the work than the other property owners were charged,³ or because the contract was let prematurely,⁴ or because the contract did not conform to the resolution of intention.⁵ The fact that the contract contains illegal provisions is not a defense, if it does not appear that such illegal provisions increased the burden upon the property holder,⁶ though such fact is a defense if the illegal provisions increased the burden of the property holder,⁷ as where

45 Cal. 643 [1873]; *Bacon v. Mayor and Aldermen of the City of Savannah*, 86 Ga. 301, 12 S. E. 580 [1890]; *Wheeler v. City of Chicago*, 57 Ill. 415 [1870]; *Southem v. City of Chicago*, 56 Ill. 429 [1870]; *Creote v. Chicago*, 56 Ill. 422 [1870]; *City of Chicago v. Burtice*, 24 Ill. 489 [1860]; *City of Sedalia v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014 [1904].

² *Lower Kings River Reclamation District No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335 [1895].

³ *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. The Edward Jones Co.*, 20 Ind. App. 87, 50 N. E. 319 [1897].

⁴ *Berwind v. Galveston & Houston Investment Company*, 20 Tex. Civ. App. 426, 50 S. W. 413 [1899].

¹ *Zorn v. Warren-Scharf Asphalt*

Paving Company, — Ind. App. —, 84 N. E. 509 [1908]; *Zorn v. Warren-Scharf Asphalt Paving Co.*, — Ind. App. —, 81 N. E. 672 [1907].

² *Rogne v. People ex rel. Goedtner*, 224 Ill. 449, 79 N. E. 662 [1906].

³ *Brady v. Bartlett*, 56 Cal. 350 [1880].

⁴ *Burke v. Turney*, 54 Cal. 486 [1880].

⁵ *Dougherty v. Hitchcock*, 35 Cal. 512 [1868].

⁶ *Gage v. People ex rel. Hanberg*, 207 Ill. 61, 69 N. E. 635 [1904]; *Wells v. People ex rel. Raymond*, 201 Ill. 435, 66 N. E. 210 [1903]; *Givins v. People ex rel. Raymond*, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534 [1902].

⁷ *Clover v. People ex rel. Raymond*, 201 Ill. 545, 66 N. E. 820 [1903].

a specified brand of paving brick has been selected, so that no competition can be had.⁸ In many states the fact that the contract has not been performed is a defense to an action upon an assessment if the decision of the public corporation as to performance is not final.⁹ It has been held, however, that the remedy of the property owner is to compel the performance of the contract, and not to resist the payment of the assessment.¹⁰ If an assessment may be levied before the contract is completely performed, it is no defense that the improvement has not been completed.¹¹

§ 1333. Benefit to property and apportionment.

The property owner may show, as a defense, that the assessment has not been apportioned properly,¹ that his property is charged in excess of the amount of benefits conferred upon it,² that property has been omitted improperly from assessment, thus increasing the burden upon property which is assessed,³ that the property which is assessed is not subject to assessment,⁴ that it receives only general benefits, and not special benefits,⁵ that no such land exists as that which is described in the assessment,⁶ that the property owner assessed is not the owner of the land upon which the assessment is levied,⁷ or that the improvement should have been constructed by a private corporation, such as a street railway, at its own expense.⁸ If notice and an opportunity for hearing is given to the property owner, a determination by

⁸ Taylor v. Schroeder, — Mo. App. —, 110 S. W. 26 [1908].

⁹ See § 527 *et seq.*

¹⁰ Hackett v. State for use of Martindale, 113 Ind. 532, 15 N. E. 799 [1887]; Indianapolis & Cumberland Gravel Road Co. v. State ex rel. Flack, Comr., 105 Ind. 37, 4 N. E. 316 [1885].

¹¹ Britton v. City of Philadelphia, 32 Pa. St. (8 Casey) 387 [1859].

¹ Southeim v. City of Chicago, 56 Ill. 429 [1870]; Creote v. City of Chicago, 56 Ill. 422 [1870]; City of Chicago v. Burtice, 24 Ill. 489 [1860].

² Marion Bond Company v. Johnson, 29 Ind. App. 294, 64 N. E. 626 [1902].

³ Drake v. Crout, 21 Ind. App. 534, 52 N. E. 775 [1898]. Such as a street railway. Philadelphia to use of O'Rourke v. Bowman, 166 Pa. St. 393, 31 Atl. 142 [1895].

⁴ City of Erie v. Piece of Land Fronting on State Street, 175 Pa. St. 523, 34 Atl. 808 [1896].

⁵ Beechwood Avenue Sewer, (1) Pittsburgh's Appeal, 179 Pa. St. 490, 36 Atl. 209 [1897].

⁶ Commissioners of Big Lake Special Drainage District v. Commissioners of Highways of Sand Ridge, 199 Ill. 132, 64 N. E. 1094 [1902].

⁷ Board of Health v. Gloria Dei., 23 Pa. St. (11 Harr.) 259 [1854].

⁸ Philadelphia to use v. Spring Garden Farmers' Market Company, 154 Pa. St. 93, 25 Atl. 1077 [1893].

the legislature, or by the public corporation, or public officers authorized by statute upon the question of the existence and amount of benefits conferred by an improvement, is held in many jurisdictions to be conclusive.⁹ Where not conclusive it is at least entitled to great weight.¹⁰ The determination of public officials is said to be conclusive in the absence of fraud.¹¹ The courts are not bound to regard the determination of the public corporation, if the assessment is so unreasonable as to become mere confiscation.¹²

§ 1334. Notice.

The property owner may show that notice was not given to him as required by statute.¹ He cannot, however, interpose as a defense the fact that a subsequent notice was omitted, if he has been given notice of the original commencement of the proceeding from which an assessment will ordinarily follow.² He cannot

⁹ *Chadwick v. Kelly*, 187 U. S. 540, 23 S. Ct. 175 [1901]; *Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675 [1891]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181 [1899]; *Lightner v. City of Peoria*, 150 Ill. 80, 37 N. E. 69 [1894]; *Kelly v. Chadwick*, 104 La. 719, 29 So. 295 [1903]; *Heerman's Heirs v. Municipality No. 2*, 15 La. 597 [1840]; *Blanchet v. Municipality No. 2*, 13 La. 322 [1839]; *Mayor and City Council of Baltimore v. Hughes, Adm'r*, 1 Gill & Johnson (Md.) 480, 19 Am. Dec. 243 [1829]; *State ex rel. Hughes v. District Court of Ramsey County*, 95 Minn. 70, 103 N. W. 744 [1905]; *Meier v. City of St. Louis*, 180 Mo. 391, 79 S. W. 955 [1903]; *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026 [1898]; (reversing 64 Mo. App. 441, [1895]); *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *Kansas City v. Baird*, 98 Mo. 215 [1889]; *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910 [1888]; *Webster v. City of Fargo*, 9 N. D. 208, 56 L. R. A. 156, 82 N. W. 732 [1900]; (affirmed in *Web-*

ster v. City of Fargo, 181 U. S. 394, 21 S. 623, 645 [1901]); *Rolph v. City of Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242 [1898]; *Washington Avenue*, 69 Pa. St. (19 P. F. Smith) 352, 8 Am. Rep. 255 [1871]. "Where the cost of a local improvement is to be raised, in whole or in part, by special taxation, the ordinance itself must either state the sum or give the data by which the commissioners can fix the amount to be raised, and when so fixed or raised in conformity with the ordinance it is conclusive on the property owners." *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471 [1887].

¹⁰ *Philadelphia to use v. Monument Cemetery Co.*, 147 Pa. St. 170, 23 Atl. 400 [1892].

¹¹ *Latham v. Village of Wilmette*, 168 Ill. 153, 48 N. E. 311 [1897].

¹² *Mayor and Council of Baltimore v. Johns Hopkins Hospital*, 56 Md. 1 [1880].

¹ *Daly v. Gubbins*, 35 Ind. App. 86, 72 N. E. 833 [1904]; *Hoover v. People ex rel. Peabody*, 171 Ill. 182, 49 N. E. 367 [1898].

² *Prince v. City of Boston*, 111 Mass. 226 [1872].

set up want of notice if the notice would have been ineffectual,³ or if he has actually had a full hearing on the merits,⁴ nor can he object to the sufficiency of the notice on the ground that the official paper in which the notice was published was not the lowest bidder, and was therefore irregularly chosen.⁵

§ 1335. Methods of ordering improvement and levying assessment.

He may set up as a defense that the improvement ordinance is indefinite,¹ or that the improvement is undertaken under circumstances which make it a fraud upon the property owner;² although, in order to show fraud as a defense, he must show that the public officers who are authorized by statute to pass upon the validity of the assessment were guilty of fraud.³ He may show that not all the commissioners were present when the land was assessed,⁴ or that the oath prescribed by statute was not taken.⁵ He may show that the property owners did not assent to the improvement, if, by statute, such assent is necessary.⁶ The irregularity or excess of power of which the property owner complains may affect a part only of the assessment. Whether such defects invalidate the entire assessment or not, depends in the first instance upon whether the excess thus caused can readily be separated from the rest of the assessment or not. If such excess can readily be separated from the rest of the assessment, such excess is invalid but the rest of the assessment is not affected thereby.⁷ If separate assessments are levied for different por-

³ *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887].

⁴ *Kilgour v. Drainage Commissioners*, 111 Ill. 342 [1885].

⁵ *Moffitt v. Jordan*, 127 Cal. 622, 60 Pac. 173 [1900].

¹ *Joyes v. Shadburn*, — Ky. —, 13 S. W. 361, 11 Ky. L. Rep. 892 [1890].

² *Foote v. City of Milwaukee*, 18 Wis. 270 [1864].

³ *Lux & Talbot Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903].

⁴ *People v. Hagar*, 49 Cal. 229 [1874].

⁵ *Wheeler v. City of Chicago*, 57 Ill. 415 [1870].

⁶ *Henderson v. Mayor and City Council of Baltimore*, use of Eschbach, 8 Md. 352 [1855]; *City of Sedalia, Gilsonite Construction Co. v. Montgomery*, 109 Mo. App. 197, 88 S. W. 1014 [1904]; *Carron v. Martin*, 26 N. J. L. (2 Dutch.) 594, 69 Am. Dec. 584 [1857]; *Philadelphia to use v. Jewell*, 135 Pa. St. 329, 19 Atl. Rep. 947 [1890].

⁷ *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124 [1888]; *Ross v. Van Natta*, 164 Ind. 557, 74 N. E. 10 [1905]; *First National Bank of Kansas City v. Nelson*, 64 Mo. 418 [1877]; (following *First National Bank of Kansas City v. Arnoldia*, 63 Mo. 229, *Neenan v. Smith*, 60 Mo. 292).

tions of the same work, it is even more clear that the invalidity of one assessment does not invalidate the other.⁸

§ 1336. Defenses precluded by statute.

The legislature has a wide range of power in determining what defenses may be permitted by statute, and as long as the property owner is given an opportunity at some stage of the assessment proceedings for a hearing, he has not a constitutional right to a judicial hearing upon such question. Accordingly, only the issues which are provided for by statute can be tried,¹ and the property owner cannot interpose defenses which are either expressly or impliedly forbidden by statute,² as long as his constitutional rights are not infringed. Curative statutes, if within the constitutional power of the legislature, preclude the interposition of all defenses as to irregularities which are cured by such statutes.³ Thus, if curative statutes have validated the incorporation of a town, the election of the officers thereof, and their official acts, the fact that a statement of the election of the board of trustees, which was required by statute, was not filed, is no defense to the validity of the assessment.⁴

§ 1337. Defenses not made at stage required by statute.

If, by statute, certain objections to the assessment proceedings are to be made at certain specified stages of the proceedings, a property owner who does not make such objections at the time specified cannot interpose such objections as defenses in an action to enforce the assessment,¹ if the objections interposed do

⁸ *Parker v. Reay*, 76 Cal. 103, 18 Pac. 124 [1888].

¹ *Wells v. City of Chicago*, 202 Ill. 448, 66 N. E. 1056 [1903].

² *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1, 58 S. W. 371 [1900].

³ See Chapter XVIII.

⁴ *Daly v. Gubbins*, — Ind. —, 82 N. E. 659 [1907].

¹ *English v. Territory*, — Ariz. —, 89 Pac. 501 [1907]; *Haughwout v. Raymond*, 148 Cal. 311, 83 Pac. 53 [1905]; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904]; *McSherry v. Wood*, 102 Cal. 647, 36 Cal. 1010 [1894]; *Treanor v. Houghton*, 103

Cal. 53, 36 Pac. 1081 [1894]; *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *City of Denver v. Dumars*, 33 Colo. 94, 80 Pac. 114 [1904]; *City of Meriden v. Camp*, 46 Conn. 284 [1878]; *The People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872 [1890]; *Daly v. Gubbins*, — Ind. —, 82 N. E. 659 [1907]; *Chambliss v. Johnson*, 77 Ia. 611, 42 N. W. 427 [1889]; *Bacas v. Adler*, 112 La. 806, 36 So. 739 [1904]; *Auditor General v. Crane*, — Mich. —, 115 N. W. 1041 [1908]; *City of Chester v. Bullock*, 187 Pa. St. 544, 41 Atl. 452 [1898]; *Potter v. City of Whatcom*, 25 Wash. 207, 65 Pac. 197

not affect the jurisdiction of the public corporation to levy the assessment.² If the objection really goes to the want of power of a public corporation,³ or to its jurisdiction,⁴ failure to object does not waive such objection. Thus, if the property owner is required to take an appeal in order to preserve his rights, such appeal is not necessary if the proceedings are void on their face, and failure to appeal does not prevent him from setting up such defenses subsequently.⁵ If, however, the proceedings are not void on their face, failure to appeal, as required by statute, may prevent the property owner from interposing defenses which could have been made if he had taken the necessary steps to preserve his rights. Thus, the objection that the assessment includes improper items,⁶ or that the preliminary bond was for too small an amount,⁷ or that the contractor's bond was not approved properly,⁸ cannot be interposed as a defense if an appeal has not been taken. If an appeal is not taken in compliance with the terms of the statute, a property owner cannot interpose as a defense the fact that the contract was not properly performed.⁹

[1901]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Northwestern & Pacific Hypotheek Bank v. City of Spokane*, 18 Wash. 456, 51 Pac. 1070 [1898]; *Town of Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353 [1897]; *City of New Whatcom v. Bellingham Bay Improvement Co.*, 16 Wash. 131, 47 Pac. 236 [1896].

²*Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826, [1887]; *City of Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632 [1905].

³*Breed v. City of Allegheny*, 85 Pa. St. (4 Norris) 214 [1877].

⁴*Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 [1893].

⁵*De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901]; *California Improvement Co. v. Moran*, 128 Cal. 373, 60 Pac. 969 [1900]; *Ryan v. Altschul*, 103 Cal. 174, 37 Pac. 339 [1894]; *Manning v. Den*, 90 Cal. 610, 27 Pac. 435 [1891]; *Dougherty*

v. Coffin, 69 Cal. 454, 10 Pac. 672 [1886].

⁶*Blair v. Luning*, 76 Cal. 134, 18 Pac. 153 [1888]; *Boyle v. Hitchcock*, 66 Cal. 129, 4 Pac. 1143 [1884]; *Deady v. Townsend*, 57 Cal. 298 [1881]; *Himmelmann v. Hoadley*, 44 Cal. 276 [1872]; *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Whiting v. Mayor and Aldermen of the City of Boston*, 106 Mass. 89 [1870].

⁷*Greenwood v. Morrison*, 128 Cal. 350, 60 Pac. 971 [1900].

⁸*Miller v. Mayo*, 88 Cal. 568, 26 Pac. 364 [1891].

⁹*Lambert v. Bates*, 137 Cal. 676, 70 Pac. 777 [1902]; *Petaluma Paving Company v. Singley*, 136 Cal. 616, 69 Pac. 426 [1902]; *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720 [1897]; *Smith v. Hazard*, 110 Cal. 145, 42 Pac. 465 [1895]; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *Fanning v. Leviston*, 93 Cal. 186, 28 Pac. 943 [1892]; *Chambers v. Satterlee*,

Failure to appeal, however, does not prevent the property owner from interposing the defense that the contract for the improvement was absolutely void.¹⁰ The defense that property which should have been assessed was omitted, thus increasing the burden of the remaining property owners,¹¹ or that the boundaries of the assessment district are incorrect,¹² or that the land which is assessed is not benefited,¹³ or is exempt from assessment,¹⁴ or that the assessment is apportioned improperly,¹⁵ or that the diagram was incorrect,¹⁶ or that the viewers were not properly qualified,¹⁷ cannot be interposed if the objection is not made at the stage of the proceedings required by statute. If, however, the proceedings show on their face that the property in question has been assessed twice, such defense may be made without taking an appeal.¹⁸ A fraudulent contract between the contractor and some of the property owners can be attacked only by appeal, or, if the fraud is discovered too late for an appeal, by a direct attack upon the contract.¹⁹ In some jurisdictions, a property owner cannot go back of the time of making the contract in order to show irregularities which avoid the assessment.²⁰ If the ques-

40 Cal. 497 [1871]; *Shepard v. McNeil*, 38 Cal. 73 [1869]; *Emery v. Bradford*, 29 Cal. 75 [1865]; *Darnell v. Keller*, 18 Ind. App. 103, 45 N. E. 676 [1897].

¹⁰ *Perine v. Forbush*, 97 Cal. 305, 32 Pac. 226 [1893]; *Brock v. Luning*, 89 Cal. 316, 26 Pac. 972 [1891].

¹¹ *McVerry v. Boyd*, 89 Cal. 304, 26 Pac. 885 [1891].

¹² *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661 [1904].

¹³ *Trigger v. Drainage District No. 1, etc.*, 193 Ill. 230, 61 N. E. 1114 [1901]; *Gauen v. Moredock & Ivy Landing Drainage District*, 131 Ill. 446, 23 N. E. 633 [1890].

¹⁴ *McDonald v. Conniff*, 99 Cal. 386, 34 Pac. 71 [1893].

¹⁵ *Dowling v. Conniff*, 103 Cal. 75, 36 Pac. 1034 [1894].

¹⁶ *Dorland v. McGlynn*, 47 Cal. 47 [1873].

¹⁷ *Pittsburg v. Cluley*, 74 Pa. St. (24 P. F. Smith) 262 [1873].

¹⁸ *Kenny v. Kelly*, 113 Cal. 64, 45 Pac. 639 [1896].

¹⁹ *Himmelman v. Hoadley*, 44 Cal. 213 [1872].

²⁰ *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Trustees of the United Brethren in Christ Church v. Rausch*, 122 Ind. 167, 23 N. E. 717 [1889]; *Sims v. Hines*, 121 Ind. 534, 23 N. E. Rep. 515 [1889]. See also, *Jenkins v. Stetler*, 118 Ind. 275, 20 N. E. 788 [1888] and *McKinney v. State for use of Nixon*, 101 Ind. 355 [1884]. *Sims v. Hines*, 121 Ind. 534, 23 N. E. Rep. 515 [1889] overruled the earlier cases on this point in which the contrary view had been entertained; *Kretch v. Helm*, 45 Ind. 438 [1874]; *McEwen v. Gilker*, 38 Ind. 233 [1871]; *Moberry v. City of Jeffersonville*, 38 Ind. 198 [1871]; *McEwen v. Gilker*, 38 Ind. 233 [1871]. The question had been raised but not decided in *Clements v. Lee*, 114 Ind. 397, 16 N. E. 799 [1887] and *Taber v. Ferguson*, 109 Ind. 227, 9 N. E. 723 [1886]. See also, *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637, 16 N. E. 826 [1887].

tion of the existence and proper organization of the district can be raised only by proceeding in *quo warranto*, such question cannot be raised as a defense.²¹

The legislature has, accordingly, a wide discretion in restricting defenses to assessments, or in restricting the right of property owners to apply to the courts for redress against assessments. It may deny to the property owner the right to interpose defenses or to seek redress as to all matters with which the legislature could have dispensed in advance.²² As to other questions, the legislature cannot prevent the property owner from interposing defenses or seeking relief, but it may interpose reasonable restrictions upon the method and time of exercising such right. In some cases in *obiter* the power of the legislature has been stated in very broad terms, and it has been said that the property owner can interpose only such defenses as the legislature permits. The doctrine that "the property owner has only such rights of contest and defense as the legislature chooses to allow him,"²³ over emphasizes the power of the legislature. In other cases under special constitutional provisions it has been said that the legislature cannot deny to the property owner the right to invoke the judgment of the court upon the validity of assessments.²⁴ In the absence of express provisions to the contrary, a statute will be construed as permitting the property owner to interpose all defenses which go to the validity of the assessment.²⁵ The courts will not assume that the legislature intended to nullify the judgments and decrees of courts of general jurisdiction in advance.²⁶ If such intention is clear, however, it must be regarded

²¹ *Shanley v. People ex rel. Goedter*, 225 Ill. 579, 80 N. E. 277 [1907]; *People ex rel. Selby v. Dyer*, 205 Ill. 575, 69 N. E. 70 [1903]; *Tucker v. People ex rel. Wall*, 156 Ill. 108, 40 N. E. 451 [1895]; *The Wabash Eastern Railway Company of Illinois v. The Commissioners of East Lake Fork Special Drainage District*, 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781 [1891].

²² *Scranton v. Jermy*, 156 Pa. St. 107, 27 Atl. 66 [1893].

²³ *Scranton v. Jermy*, 156 Pa. St. 107, 27 Atl. 66 [1893].

²⁴ *State, Peckham, Pros. v. Mayor and Common Council of the City of*

Newark, 43 N. J. L. (14 Vr.) 576 [1881].

²⁵ "Here then is an express provision that the owner or person interested in the land may make a defense, and it cannot, we think, be reasonably contended that such defense shall not embrace everything which shows that the tax or assessment, to collect which the proceeding was instituted, ought not to be collected. Less than this would be but a mockery of justice." *Pease v. City of Chicago*, 21 Ill. 500, 508. quoted in *Foss v. City of Chicago*. 56 Ill. 354, 359.

²⁶ *Union Building Association v. City of Chicago*, 61 Ill. 439 [1871].

even if it results in making the entire statute unconstitutional.²⁷ As long as a fair opportunity for hearing is given to property owners, statutes which limit and restrict the method in which they may raise objections to the assessment, are valid.²⁸ In the absence of specific statutory provision, the right to appeal will not be regarded as exclusive.²⁹ If, by statute, however, the right of appeal is made exclusive, a failure to appeal precludes defenses of which advantage could have been taken by appeal.³⁰ By statute a member of a drainage association may be restricted to defenses which go to the amount of the assessment in an action by the association against him to recover assessments for benefits.³¹ A statute which grants to the property owner a right of appeal where none existed before, is valid.³² A statute which requires a property owner to pay an assessment before bringing an action to set it aside, is held to be unconstitutional under a constitutional provision to the effect that every person "ought to obtain justice freely and without purchase."³³ A confirmation judgment cannot properly contain a provision which enjoins all persons interested from disputing facts which might have been determined in the proceeding in question.³⁴ The legislature frequently provides that objections to an assessment must be interposed within a short period of time, and that in default thereof such objections shall be regarded as waived. As long as a reasonable period is given, such statutes are regarded as valid.³⁵ Restriction

²⁷ "It was apparently a design on the part of the draughtsmen of the section to place these original assessments beyond the reach of judicial power except when that power should be exercised in the circumscribed and in many cases impracticable manner specified." *Union Building Association v. City of Chicago*, 61 Ill. 439.

²⁸ *In the Matter of Munn*, 165 N. Y. 149, 58 N. E. 881 [1900]; (reversing *In the Matter of Munn*, 49 App. Div. 232); *Lennon v. The Mayor, Aldermen and Commonalty of City of New York*, 55 N. Y. 361 [1874]; *In the Matter of Meade*, 13 Hun, 349 [1878].

²⁹ *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926. 31 L. R. A. 213, 65 N. W. 482 [1896].

³⁰ *State of Minnesota v. Norton*,

63 Minn. 497, 58 Am. St. Rep. 549, 65 N. W. 935 [1896].

³¹ *Liberty Township Draining Association v. Watkins*, 72 Ind. 459 [1880].

³² *Garrison v. City of New York*, 88 U. S. (21 Wall.) 196, 22 L. 612 [1874].

³³ *Weller v. City of St. Paul*, 5 Minn. 95 [1861].

³⁴ *In re Madera Irrigation District*, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272 [1891].

³⁵ *Henningsen v. City of Stillwater*, 81 Minn. 215, 83 N. W. 983 [1900]; *Annie Wright Seminary v. City of Tacoma*, 23 Wash. 109, 62 Pac. 444 [1900]; *Hamar v. Leihy*, 124 Wis. 265, 102 N. W. 568 [1905]; *Pratt v. City of Milwaukee*, 93 Wis. 658, 68 N. W. 392 [1896].

tions of this sort to one year,³⁶ nine months,³⁷ thirty days,³⁸ twenty days,³⁹ or to ten days after the expiration of a notice which is to be given for ten days,⁴⁰ have all been held to be valid. On the other hand, a provision of an ordinance,⁴¹ or a city charter,⁴² to the effect that no objections can be made to a special tax bill unless they are filed with the board of public works within sixty days after such bill is issued, is held to be invalid as in violation of the constitutional provision that no one shall be deprived of property without due process of law. A statute which provides that failure to pay an improvement within thirty days shall be regarded as an election to pay in installments, and that persons electing to pay in installments are precluded from questioning the power of the city to construct the improvements, the regularity or sufficiency of the proceeding, or the validity or correctness of the assessment; and also providing that no action shall be commenced to question the validity of the assessments, or enjoin

³⁶ *Hamar v. Leihy*, 124 Wis. 265, 102 N. W. 568 [1905].

³⁷ A statute which provides that any action "to set aside any sale of lands for the non-payment of taxes, or to cancel any tax certificate, or to restrain or prevent the issuing of any tax deed or any tax certificate, or to set aside and cancel a tax deed, shall be commenced within nine months after the making of such sale, date of such certificate or recovering of such tax deed, as the case may be, and not thereafter," applies to local assessments and to certificates issued therefor. *Dalrymple v. City of Milwaukee*, 53 Wis. 178, 10 N. W. 141 [1881].

³⁸ *Board of Improvement District No. 5 of Texarkana v. Offenhauser*, 84 Ark. 257, 105 S. W. 265 [1907]; *Blackwell v. Village of Coeur D'Alene*, 13 Idaho, 357, 90 Pac. 353 [1907]; *Union Pacific Railway Co. v. Kansas City*, 73 Kan. 57, 85 Pac. 603 [1906]; *City of Kansas City v. Gray*, 62 Kan. 198, 61 Pac. 746 [1900]; *City of Kansas City v. Kimball*, 60 Kan. 224, 56 Pac. 78 [1899]; *Doran v. Barnes*, 54 Kan. 238, 38 Pac. 300 [1894]; *Marshall v. City of Leavenworth*, 44 Kan. 459, 24

Pac. 975 [1890]; *Lynch v. City of Kansas City*, 44 Kan. 452, 24 Pac. 973 [1890]; *City of Topeka v. Gage*, 44 Kan. 87, 24 Pac. 82 [1890]; *Wahlgren v. City of Kansas City*, 42 Kan. 243, 21 Pac. 1068 [1889]; *Loomis v. City of Little Falls*, 176 N. Y. 31, 68 N. E. 105 [1903]; (affirming, *Loomis v. City of Little Falls*, 72 N. Y. S. 774, 66 App. Div. 299 [1901]); *Germond v. City of Tacoma*, 6 Wash. 365, 33 Pac. 961 [1893].

³⁹ *Stiewel v. Fencing District, No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308 [1902]; *Ahern v. Board of Improvement, District No. 3 of Texarkana*, 69 Ark. 68, 61 S. W. 575 [1901]; *Owens v. City of Marion, Iowa*, 127 Ia. 469, 103 N. W. 381 [1905].

⁴⁰ *King v. Portland*, 38 Ore. 402, 52 L. R. A. 812, 63 Pac. 2 [1900].

⁴¹ *Barber Asphalt Paving Company v. Ridge*, 169 Mo. 376, 68 S. W. 1043 [1902].

⁴² *Barber Asphalt Paving Co. v. Munn*, 185 Mo. 552, 83 S. W. 1062 [1904]; *Schibel v. Merrill*, 185 Mo. 534, 83 S. W. 1069 [1904]; *Taylor v. Schroeder*, — Mo. App. —, 110 S. W. 26 [1908].

their collection unless commenced within ninety days after the passage of the assessment ordinance, does not contain inconsistent provisions, but the shorter period applies to objections other than on constitutional grounds, while the longer period applies to all grounds.⁴³ Provisions of these classes apply to all assessments, and are not limited to valid assessments.⁴⁴ Statutes which require objections to be filed within a certain short period cannot apply to void tax bills, even if the statutes are broad enough in terms to include such bills.⁴⁵ A statute which requires objections to the assessment to be made within twenty days after the publication of the ordinance levying the assessment, is held not to apply to objections to the validity of the improvement district.⁴⁶ Under a statute requiring objections to be presented within a short space of time, it has been held that filing them within the office of the clerk within such period of time, but without giving notice thereof, or without leave of court before which the assessment proceedings were pending, and without presenting such objections to the court at that term, does not comply with the statute, and the refusal of the court to hear such objections at the following term, is not erroneous.⁴⁷ Under some statutes an assessment cannot be attacked on account of the defective construction of the improvement unless during the progress of the work the affidavit stating the defects complained of is filed with the clerk.⁴⁸ In the absence of such affidavit, the court can not grant relief on the ground of defective performance.⁴⁹ Under some statutes, objections must be made in time to enable the assessors to consider the same, and if not so filed, such objections cannot be made the ground of granting subsequent relief.⁵⁰ Under a statute which fixes a short period for filing objections, and provides that, in the absence of valid objections, bonds may be issued after the expiration of such period, and that such bonds when issued shall be conclusive evidence of the regularity of all

⁴³ *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142 [1905].

⁴⁴ *Jackson v. City of Denver*, — Colo. —, 92 Pac. 690.

⁴⁵ *Winfrey v. Linger*, 89 Mo. App. 159 [1901]; *Richter v. Merrill*, 84 Mo. App. 150 [1900].

⁴⁶ *Board of Improvement District No. 60 v. Cotter*, 71 Ark. 556, 76 S. W. 552 [1903].

⁴⁷ *Gilbert v. Hall*, 115 Ind. 549, 18 N. E. 28 [1898].

⁴⁸ *Matter of Bridgeford*, 65 Hun, 227, 20 N. Y. Sup. 281 [1892].

⁴⁹ *Matter of Bridgeford*, 65 Hun, 227, 20 N. Y. Sup. 281 [1892].

⁵⁰ *People v. Common Council of City of Kingston*, 99 N. Y. S. 657, 114 App. Div. 326 [1906].

proceedings thereto, and of the lien of the assessment, the issuing of such bonds cures all the objections not going to jurisdiction which might have been attacked within the time limited.⁵¹ However, a statute which permits improvement bonds to be issued within forty days after the assessment is made, before work is begun on the improvement, and without actual notice to the property owners, and which provides that the issuing of such bonds prevents the property owner from contesting the validity of the assessment, is unconstitutional.⁵²

§ 1338. Defenses precluded by determination of public officers.

The legislature has power to provide that the determination of the public officers in charge of the improvement and assessment proceedings shall be final and conclusive upon certain questions.¹ If certain facts are to be determined finally and conclusively by public officers, the property owner cannot interpose such facts as a defense in a proceeding to enforce the assessment, in opposition to the determination of the public officers.² Thus, the property owner cannot interpose the fact that the contract has not been performed, if the public corporation has power to determine the question of performance;³ nor can he show that the work done does not benefit his property,⁴ or that an excessive value has been fixed upon land appropriated by eminent domain, to pay for which the assessment is levied,⁵ nor can he object on the ground that the city has not compelled a street railway to pave the space between its rails.⁶ If the public corporation has power to

⁵¹ *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81 [1905]; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920 [1899].

⁵² *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

¹ See §§ 290-300; 552-559; 666-674.

However a provision that the decision of a board of inspectors should be "final" has been held to mean final as to further investigation by ministerial officers but not final as to the right of the property owner to prosecute or defend his rights in court. *McGehee v. Mathis*, 21 Ark. 40 [1860].

² *Scranton v. Jermyn*, 156 Pa. St.

107, 27 Atl. 66 [1893]; *Fass v. Seahawer*, 60 Wis. 525, 19 N. W. 533 [1884]; *In re Harvard Avenue North*, — Wash. —, 92 Pac. 410 [1907].

³ *Emery v. Bradford*, 29 Cal. 75 [1865]; *Downey v. People ex rel. Raymond*, 205 Ill. 230, 68 N. E. 807 [1903]; *Haley v. City of Alton*, 152 Ill. 113, 38 N. E. 750 [1894].

⁴ *Brientnall v. City of Philadelphia*, 103 Pa. St. 156 [1883].

⁵ *City of St. Louis v. Speck*, 67 Mo. 403 [1878].

⁶ *City of Springfield to use of Central National Bank v. Weaver*, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276 [1896].

determine the existence and amount of benefits as a finality, the property owner cannot interpose as a defense that his property is not benefited,⁷ or that the land outside of the taxing district is, in fact, benefited.⁸ It has been held that the objection that the assessment is excessive is not a perfect defense, but may be used to reduce the amount of the assessment.⁹ It has also been held that the property owner cannot interpose the question of benefits as a defense to the assessment, although he may enjoin the collection of it upon that ground.¹⁰ If a petition has been, in fact, presented, and the public corporation has power to determine its sufficiency, the property owner cannot interpose as a defense the fact that such petition was insufficient.¹¹ The determination of public officials as to what is a reasonable time within which the property owner may be permitted to construct the improvement is conclusive,¹² unless it is shown that such public officials act fraudulently and in bad faith.¹³ Under some statutes, the determination of public officials is *prima facie* correct, but is not final: and, accordingly, while their decision will not be disturbed unless clearly shown to be wrong,¹⁴ such determination does not absolutely preclude inquiry as a defense, into the truth of the facts thus determined. A public official, unless specifically authorized to review certain questions, cannot review the determination by other officials, of facts which they are, by statute, authorized to determine.¹⁵

§ 1339. Defenses precluded by former adjudication.

A property owner may be prevented from setting up certain defenses by a prior decree or judgment which establishes such facts adverse to his contention and which is rendered in a proceeding which is binding upon him.¹ The property owner cannot defend on the ground that the assessment district was not prop-

⁷ Whiting v. Townsend, 57 Cal. 515 [1881].

⁸ Kansas City Grading Co. v. Holden, 107 Mo. 305, 17 S. W. 798 [1891]. See also In the Matter of Proceedings to Change of Grade of Beale Street, 39 Cal. 495 [1870].

⁹ New Eel River Draining Association v. Durbin, 30 Ind. 173 [1868].

¹⁰ Heman v. Gerardi, 96 Mo. App. 231, 69 S. W. 1069 [1902].

¹¹ Seranton v. Jermyn, 156 Pa. St. 107, 27 Atl. 66 [1893].

¹² Fass v. Seehawer, 60 Wis. 525, 19 N. W. 533 [1884].

¹³ Foote v. City of Milwaukee, 18 Wis. 270 [1864].

¹⁴ In re Harvard Avenue North, — Wash. —, 92 Pac. 410 [1907].

¹⁵ People ex rel. Brooklyn Park Commissioners v. City of Brooklyn, 3 Hun (N. Y.) 596 [1875].

¹ See §§ 986-1009.

erly organized, if such organization has been affected by proceedings in court, since such defense is a collateral attack upon such proceedings.²

§ 1340. Defenses precluded by decree of confirmation.

If, under the statutes in force, the validity of an assessment is to be determined in the first instance by proceedings in confirmation had before a court of competent jurisdiction, such judgment of confirmation prevents the property owner from making defenses subsequently, if such defenses do not either go to the want of jurisdiction of the court rendering the decree of confirmation, or do not involve matters which have arisen after such decree.¹ Thus, after a decree of confirmation has been rendered, the property owner cannot interpose as a defense the fact that the petition for the improvement was defective,² the fact that the ordinance does not describe the improvement properly as long as such ordinance is not absolutely void,³ that the commis-

²Lower Kings River Reclamation District No. 531 v. Phillips, 108 Cal. 305, 39 Pac. 630, 41 Pac. 335 [1895]; Rogne v. People ex rel. Goedtner, 224 Ill. 449, 79 N. E. 662 [1906].

¹Noonan v. People ex rel. Hanberg, 221 Ill. 567, 77 N. E. 930 [1906]; Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904]; Chew v. People ex rel. Raymond, 202 Ill. 380, 66 N. E. 1069 [1903]; Bass v. People ex rel. Raymond, 203 Ill. 206, 67 N. E. 806 [1903]; Johnson v. People ex rel. Reed, 202 Ill. 306, 66 N. E. 1081 [1903]; Vandersyde v. People ex rel. Raymond, 195 Ill. 200, 62 N. E. 806 [1902]; Fischback v. The People ex rel. Tetherington, 191 Ill. 171, 60 N. E. 887 [1901]; Blount v. People ex rel. Raymond, 188 Ill. 538, 59 N. E. 241 [1901]; Glover v. People ex rel. Raymond, 188 Ill. 576, 59 N. E. 429 [1901]; McManus v. People ex rel. Raymond, 183 Ill. 391, 55 N. E. 886 [1899]; Johnson v. People ex rel. Kochersperger, 177 Ill. 64, 52 N. E. 308 [1898]; Hammond v. People for use, etc.,

169 Ill. 545, 48 N. E. 573 [1897]; People ex rel. Kochersperger v. Markley, 166 Ill. 48, 46 N. E. Rep. 742 [1897]; People ex rel. Kochersperger v. Lingle, 165 Ill. 65, 46 N. E. 10 [1897]; People ex rel. Kochersperger v. Eggers, 164 Ill. 515, 45 N. E. 1074 [1897]; Doremus v. People ex rel. Kochersperger, 161 Ill. 26, 43 N. E. Rep. 701 [1896]; Casey v. People ex rel. Kochersperger, 159 Ill. 267, 49 N. E. 882 [1896]; LeMoynes v. West Chicago Park Commissioners, 116 Ill. 41, 4 N. E. 498, 6 N. E. 48 [1886]; Lehmer v. The People ex rel. Miller, 80 Ill. 601 [1875]; The People ex rel. Miller v. Brislin, 80 Ill. 423 [1875].

³Conlin v. The People ex rel. Lasig, 190 Ill. 400, 60 N. E. 55 [1901]; Perisho v. People ex rel. Gannaway, 185 Ill. 334, 56 N. E. 1134 [1900]; Pipher v. People ex rel. Gannaway, 183 Ill. 436, 56 N. E. 84 [1900].

²People ex rel. Russel v. Brown, 218 Ill. 375, 75 N. E. 989 [1905]; Johnson v. People ex rel. Raymond, 189 Ill. 83, 59 N. E. 515 [1901]; Blount v. People ex rel. Raymond, 188 Ill. 538, 59 N. E. 241 [1901];

sioners were appointed irregularly,⁴ or failed to take the required oath,⁵ or did not sign the report properly,⁶ or that the assessment exceeds the cost of the improvement,⁷ or that the improvement is defectively constructed, if such facts arose before confirmation,⁸ or that the land for the appropriation of which the assessment is levied was already subject to a public easement,⁹ or that the land which is assessed is not benefited to the amount of the assessment,¹⁰ or that a prior judgment of confirmation has been entered for the same improvement.¹¹ Confirmation by public officials, and not by a court, may be final, if jurisdiction to confirm exists.¹² The fact that the original assessment has been reduced by consent of the petitioner and the property owners is not ground for objection to an application for a judgment of sale, if neither fraud nor injury to the objector is shown.¹³

§ 1341. Effect of want of jurisdiction to confirm.

Defenses may be interposed subsequently which go to the jurisdiction of the court to render a decree of confirmation. Thus, defenses which show a total want of power to levy an assessment,¹ or that the ordinance is so indefinite in its description as to be absolutely void,² or that the improvement is one which cannot be assessed upon abutting property,³ or that the land is not so de-

Steenberg v. People ex rel. Kochersperger, 164 Ill. 478, 45 N. E. 970 [1897].

⁴ Harman v. People ex rel. Munsterman, 214 Ill. 454, 73 N. E. 760 [1905].

⁵ Walker v. People ex rel. Kochersperger, 169 Ill. 473, 48 N. E. 694 [1897].

⁶ Larson v. City of Chicago, 172 Ill. 298, 50 N. E. 179 [1898]; Larson v. People ex rel. Kochersperger, 170 Ill. 93, 48 N. E. 443 [1897]; People ex rel. Kochersperger v. Markley, 166 Ill. 48, 46 N. E. 742 [1897].

⁷ People of the State of Illinois v. Weber, 164 Ill. 412, 45 N. E. 723 [1897].

⁸ McManus v. People ex rel. Raymond, 183 Ill. 391, 55 N. E. 886 [1899].

⁹ Gage v. People ex rel. Kochersperger, 163 Ill. 39, 44 N. E. 819 [1896].

¹⁰ People ex rel. Kern v. Ryan, 156 Ill. 620, 41 N. E. 180 [1895].

¹¹ People ex rel. Raymond v. Fuller, 204 Ill. 290, 68 N. E. 371 [1903].

¹² Daly v. Gubbins, — Ind. —, 82 N. E. 659 [1907].

¹³ Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904].

¹ Wright v. City of Chicago, 20 Ill. 252 [1858].

² Lill v. City of Chicago, 29 Ill. 31 [1862]; Willis v. City of Chicago, 189 Ill. 103, 59 N. E. 543 [1901]; Culver v. People ex rel. Kochersperger, 161 Ill. 89, 43 N. E. Rep. 812 [1896]; O'Neil v. People ex rel. Kochersperger, 166 Ill. 561, 46 N. E. 1096 [1897].

³ Cost of paving between rails of street railway. City of Chicago v. Nodeck, 202 Ill. 257, 67 N. E. 39 [1903].

scribed in the assessment as to be capable of identification,⁴ or that the property which is assessed is, in fact, non-existent,⁵ may be made by the property owner after confirmation. The fact that the court which confirmed the judgment had not acquired jurisdiction over the property owners by notice of such confirmation, may be shown in order to prevent the judgment of confirmation from being final,⁶ as long as the record of the court rendering the judgment of confirmation is not contradicted thereby.⁷

§ 1342. Facts subsequent to judgment of confirmation.

Facts which arise after the judgment of confirmation may be used as defenses, if such facts constitute a sufficient defense in law.¹ Failure to perform the contract is not a defense as long as a different improvement is not substituted for the one for which the assessment is levied, on the theory that the remedy of the property owner is to compel substantial performance of the improvement contract.² The fact that a substantially different improvement is substituted for the one for which the assessment was levied and confirmed is a defense.³ Mere delay in the construction of the improvement is not a defense in the absence of a statutory provision avoiding the assessment therefor.⁴

⁴ *People ex rel. Kochersperger v. Eggers*, 164 Ill. 515, 45 N. E. 1074 [1897].

⁵ *Vennum v. People ex rel. Gallo-way*, 188 Ill. 158, 58 N. E. 979 [1900].

⁶ *People ex rel. Kochersperger v. Clifford*, 166 Ill. 165, 46 N. E. 770 [1897]; *Chandler v. People ex rel. Kochersperger*, 161 Ill. 41, 43 N. E. 590 [1896]; *Boynton v. People ex rel. Kern*, 155 Ill. 66, 39 N. E. 622 [1895].

⁷ *People ex rel. Merriman v. Illinois Central Railroad Company*, 213 Ill. 367, 72 N. E. 1069 [1904]; *Kirchman v. People ex rel. Kochersperger*, 159 Ill. 321, 42 N. E. 883 [1896]; *West Chicago Street Ry. Co. v. People ex rel. Kern*, 156 Ill. 18, 40 N. E. 605 [1895]; *Clark v.*

People ex rel. Kern, 146 Ill. 348, 35 N. E. 60 [1893].

¹ *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902]; *Gage v. People ex rel. Raymond*, 193 Ill. 316, 56 L. R. A. 916, 61 N. E. 1045 [1901]; *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; *Harris v. City of Chicago*, 162 Ill. 288, 44 N. E. 437 [1896].

² *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895].

³ *Young v. People ex rel. Raymond*, 196 Ill. 603, 63 N. E. 1075 [1902]; *Gage v. People ex rel. Raymond*, 193 Ill. 316, 56 L. R. A. 916, 61 N. E. 1045 [1901].

⁴ *Clingman v. People ex rel. Raymond*, 183 Ill. 339, 55 N. E. 727 [1899].

§ 1343. Judgment for installment precluding defenses.

In the absence of a statute, a judgment for one installment of an assessment is not conclusive as to subsequent installments,¹ although under some statutes either a judgment for one installment,² or the voluntary payment of one installment,³ precludes certain defenses as to the remaining installments.

§ 1344. Judgment in eminent domain as precluding defenses.

A judgment in eminent domain may fix questions of the nature of the public interest in the land appropriated, and the amount of benefits and damages, and thus prevent the property owner subsequently from making defenses to the assessment on such grounds. If a court, before which appropriation proceedings are conducted, enters any decree fixing the amount of benefits and damages, such decree cannot be attacked collaterally in a proceeding to enforce the assessment on the ground that no benefits were assessed against the city.¹ Under some statutes, a judgment rendered in a condemnation proceeding, which fixes both damages and benefits, is conclusive as to the damages, but not as to the amount of the benefits.²

§ 1345. Defenses precluded by express waiver.

A property owner may be prevented from setting up certain defenses by his express waiver of such grounds of objection. A property owner cannot interpose defenses which he has waived by entering into a special contract to pay the amount of the assessment after he knows of the existence of such defenses.¹

§ 1346. Set off.

The defendant in a suit to enforce an assessment cannot set off a claim against the assessment in the absence of a statutory provision authorizing such set-off.¹ Thus, in the absence of statutory

¹Young v. People ex rel. Kochersperger, 171 Ill. 290, 49 N. E. 503 [1898]. See also Gage v. People ex rel. Hanberg, 213 Ill. 410, 72 N. E. 1084 [1904].

²Gross v. People ex rel. Raymend. 193 Ill. 260, 86 Am. St. Rep. 322, 61 N. E. 1012 [1901].

³McDonald v. People ex rel. Hanberg, 206 Ill. 624, 69 N. E. 509 [1904].

¹City of St. Louis v. Annex Real-

ty Company, 175 Mo. 63, 74 S. W. 961 [1903].

²City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 S. W. 1091 [1907].

¹Waiver of constitutionality of statute which authorizes assessment. Shepard v. Barron, 194 U. S. 553, 24 S. 737 [1904]. Waiver of delay in performance. Bernstein v. Downs. 112 Cal. 197, 44 Pac. 557 [1896].

¹Fitzhugh v. Levee District, 54 Ark. 224, 15 S. W. 455 [1891]; Ger-

authority, he cannot plead a set-off for damages suffered by him for the improvement,² especially where the suit is brought by the contractor for his own benefit and the set-off or counter-claim is asserted against the city,³ nor can he set off a claim for material furnished.⁴ A set-off or counter-claim for damages due to the defective performance of the contract cannot be set off against the assessment,⁵ nor can damages caused by delay in constructing the improvement be set off;⁶ unless such facts amount to a valid defense to the assessment. If they do not constitute a defense, nothing is gained by making them assume the form of a set-off or counter-claim. If the city is the plaintiff in an action to enforce the assessment, a claim against the contractor cannot be set off,

man Savings & Loan Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303 [1899]; Himmelmann v. Spanagel, 39 Cal. 389 [1870]; Himmelmann v. Reay, 38 Cal. 163 [1869]; Draper v. City of Atlanta, 126 Ga. 649, 55 S. E. 929 [1906]; Flournoy v. City of Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468 [1861]; Lohrum v. Eyermann, 5 Mo. App. 481 [1878]; Watt v. Mayor, etc., of the City of New York, 3 N. Y. Sup. Ct. Rep. 23 [1847]; Smith v. City of Allegheny, 92 Pa. St. (11 Norris) 110 [1879]; City of Pittsburg v. Harrison, 91 Pa. St. (10 Norris) 206 [1879]; Keith v. Bingham, 100 Mo. 306, 13 S. W. 683 [1889]; City of New Whatcom v. Bellingham Bay Improvement Co., 16 Wash. 138, 47 Pac. 1102 [1896].

² German Savings & Loan Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; Himmelmann v. Spanagel, 39 Cal. 389 [1870]; Elgin, Joliet & Eastern R. R. Co. v. Hohenshell, 193 Ill. 159, 61 N. E. 1102 [1901]; Boynton v. People ex rel. Kern, 159 Ill. 553, 42 N. E. 842 [1896]; Whiting v. Mayor and Aldermen of Boston, 106 Mass. 89 [1870]; City of Springfield to the Use of Tuttle v. Baker, 56 Mo. App. 637 [1894]; Lohrum v. Eyermann 5 Mo. App. 481 [1878]; Watt v.

Mayor, etc., of the City of New York, 3 N. Y. Sup. Ct. Rep. 23 [1847]; Ernst v. Kunkle, 5 O. S. 521 [1856]; Ulm v. Cincinnati, 7 Ohio N. P. 278 [1900]; Smith v. City of Allegheny, 92 Pa. St. (11 Norris) 110 [1879]; City of Vancouver v. Wintler, 8 Wash. 378, 36 Pac. 278, 685 [1894]. See also The Borough of Greensburg v. Young, 53 Pa. St. (3 P. F. Smith) 280 [1866].

³ Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303 [1899]; Louisville Steam Forge Co. v. Mehler, 112 Ky. 438, 64 S. W. 396, 23 Ky. Law Rep. 1335 [1901]; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964, 23 Ky. L. R. 128 [1901]; Keith v. Bingham, 100 Mo. 300, 13 S. W. 683 [1889]; Lohrum v. Eyermann, 5 Mo. App. 481 [1878].

⁴ Sims v. Hines, 121 Ind. 534, 23 N. E. 515 [1889]; Seibert v. Tiffany, 8 Mo. App. 33 [1879]; New Whatcom v. Bellingham Bay Improvement Co., 16 Wash. 138, 47 Pac. 1102 [1896].

⁵ Lavery v. State ex rel. Hill, 109 Ind. 217, 9 N. E. 774 [1886]; Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676 [1897]. See also, City of St. Louis to use of McGrath v. Clemens, 36 Mo. 467 [1865].

⁶ Whiting v. Mayor and Aldermen of Boston, 106 Mass. 89 [1870].

although the suit is brought for his use.⁷ A pre-existing claim against the original contractor cannot be set off against his assignee by whom the contract has been performed.⁸ Credit for work already done must be claimed while the assessment proceedings are pending, and cannot be set off in an action to enforce the assessment.⁹ The fact that compensation for damages is not made to the property owner before the work is done does not render the assessment invalid.¹⁰ By the provisions of some statutes a set-off may be allowed.¹¹ Thus, a note made by the contractor and two others may be set off against an assessment levied by the city on his behalf.¹² Under statutory provisions for a set-off, a set-off cannot be had unless in compliance with the provisions of such statutes.¹³ However, where the ordinance provided that the owner who wished to set off damages against benefits should receipt on the docket for the amount of damages and obtain a certificate therefor, the fact that the property owner accepted warrants does not amount to a waiver of the right of set-off.¹⁴ A claim against a city cannot be set off against the contractor, if the contractor is authorized to enforce the assessment in his own name and for his own benefit.¹⁵ This principle has also been applied where the assessment is enforced in the name of the city, but for the benefit of the contractor; and it is held that a claim due from the contractor cannot be set off against such assessment.¹⁶ A debt owing to the property owner from the original contractor cannot be set off against the assignee of the con-

⁷ *Wilson v. City of Cincinnati*, 6 Ohio N. P. 68 [1897]; (following *Mack v. City for Use of Moore*, 1 W. L. B. 84 [1876]; *Strauss v. City*, 23 W. L. B. 359 [1890]).

⁸ *Himmelmann v. Reay*, 38 Cal. 163 [1869].

⁹ *Lux and Talbott Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903].

¹⁰ *German Savings & Loan Society v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067 [1902]; *Boynton v. People ex rel. Kern*, 159 Ill. 553, 42 N. E. 842 [1896].

¹¹ *Board of Councilmen of City of Frankfort v. Brislin*, — Ky. —, 104 S. W. 311, 31 Ky. L. R. 867 [1907]; *Bodley v. Finley*, 111 Ky.

618, 64 S. W. 439, 23 Ky. L. Rep. 851 [1901].

¹² *Bodley v. Finley*, 111 Ky. 618, 64 S. W. 439, 23 Ky. L. Rep. 851 [1901]; (question not decided in *Purdy v. Drake* (Ky.), 32 S. W. 939, 17 Ky. L. R. 819 [1896]).

¹³ *Board of Improvement District No. 5 of Texarkana v. Offenhauser*, 84 Ark. 257, 105 S. W. 265 [1907].

¹⁴ *State ex rel. Guye v. City of Seattle*, — Wash. —, 94 Pac. 656 [1908].

¹⁵ *Barfield v. Gleason*, 111 Ky. 491, 63 S. W. 964, 23 Ky. Law Rep. 128 [1901]; *Ernst v. Kunkle*, 5 O. S. 521 [1856].

¹⁶ *City of Pittsburg v. Harrison*, 91 Pa. St. 206 [1879].

tract who performed the contract without knowledge of the existence of such debt, or of an agreement between the contractor and the property owner that such debt should be applied to the amount of the assessment.¹⁷

B.—APPEAL.

§ 1347. Appeal dependent on statutory provisions.

In appeal as distinguished from error, the case is transferred from the officials by whom the assessment is levied, to other officials, or to a court which is authorized by statute, and there the question of the assessment is heard upon its merits, either as to some or as to all of the issues involved. Appeal is not an inherent or constitutional right, and the legislature is not bound to allow such appeal,¹ and such right does not exist in the absence of such statute authorizing it.² The right of appeal exists, if it is conferred by statute.³ In cases of doubtful construction, the

¹⁷ *Himmelman v. Reay*, 38 Cal. 163 [1869].

¹ *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900]; *Deane v. Indiana Macadam & Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903]; *Lake Erie & Western R. R. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436 [1890]; *McEneney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540 [1890]; *Sullivan v. Hang*, 82 Mich. 548, 10 L. R. A. 263, 46 N. W. 795; *State, Brittin, Pros. v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872]; *In the Matter of Extending Canal and Walker Streets*, 12 N. Y. 406 [1855]; *In the Matter of the Extension of Bowery*, 12 Howard (N. Y.) 97 [1856].

² *Drainage Commissioners of Union Drainage District No. 1 of Mahan and Montmorency Townships of Whiteside County v. Millivan*, 227 Ill. 303, 81 N. E. 382 [1907]; *People ex rel. Hanberg v. Cohen*, 219 Ill. 200, 76 N. E. 388 [1906]; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Kelley v. Min-*

neapolis City, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 59 N. W. 304 [1894]; *State, Brittin, Pros. v. Blake*, 35 N. J. L. (6 Vr.) 208 [1871]; *Bowersox v. Watson*, 20 O. S. 496 [1870]; *Renard v. City of Spokane*, — Wash. —, 93 Pac. 517 [1908].

³ *Dowling v. Conniff*, 103 Cal. 75, 36 Pac. 1034 [1894]; *Bucknall v. Story*, 46 Cal. 589, 13 Am. St. Rep. 220 [1873]; *City and County of San Francisco v. Certain Real Estate*, 42 Cal. 513 [1872]; *People ex rel. Ganaway v. Glasco*, 203 Ill. 353, 67 N. E. 499 [1903]; *City of Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278 [1898]; *Badger v. Inlet Drainage Dist.*, 141 Ill. 540, 31 N. E. 170 [1893]; *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219 [1897]; *Campbell v. Board of Commissioners of Monroe County*, 118 Ind. 119, 20 N. E. 772 [1888]; *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885]; *Ray v. City of Jeffersonville*, 90 Ind. 567 [1883]; *Pave v. Mavor and City Council of Baltimore*, 34 Md. 558 [1871]; *Taylor v. City of Haverhill*, 192 Mass. 287, 78

right of appeal is favored.⁴ The right of appeal may be given by statute, although none existed before,⁵ and it may be made applicable to pending proceedings.⁶ However, under a statute allowing an appeal from the decision of the county commissioners in any case, it is held that appeal will not lie in assessments, since such statute is applicable to matters of claims against the county in its quasi corporate capacity.⁷ The legislature may take away a pre-existing right of appeal,⁸ as by making a finding of the assessing officials final and conclusive.⁹ The legislature may withdraw a given ground of appeal while assessment proceedings are pending, and may make such statute applicable to such pending proceedings.¹⁰ If appeal is provided for, and an opportunity for a hearing on the merits is there secured, such provision constitutes due process of law.¹¹ Under some statutes, a petition for revision of assessments is provided for, which gives substantially the hearing given in other jurisdictions on appeal.¹² Such pro-

N. E. 475 [1906]; *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Clinton Township v. Teachout*, 150 Mich. 124, 111 N. W. 1052 [1907]; *City of St. Paul v. Nickl*, 42 Minn. 262, 44 N. E. 59 [1890]; *In the Matter of Commissioners of Central Park*, 61 Barb. 40 [1871]; *Sorchan v. City of Brooklyn*, 3 Hun (N. Y.) 562 [1875]; *Beechwood Avenue Sewer Cases*, *Pittsburg's Appeal*, 179 Pa. St. 494, 36 Atl. 210 [1897]; *In re Mount Pleasant Avenue*, 171 Pa. St. 38, 32 Atl. 1122 [1895]; *Pusey's Appeal*, 83 Pa. St. (2 Norris) 67 [1876]; *Aherns v. City of Seattle*, 39 Wash. 168, 81 Pac. 558 [1905]; *Bellingham Bay Improvement Co. v. City of New Whatcom*, 20 Wash. 53, 54 Pac. 774 [1898]; *Dickson v. City of Racine*, 61 Wis. 545, 21 N. W. 620 [1884].

⁴ *People ex rel. Gannaway v. Glasco*, 203 Ill. 353, 67 N. E. 499 [1903]; (where a change of statute was held not to destroy the right of appeal); *City of Bloomington v. Reeves*, 177 Ill. 161, 52 N. E. 278 [1898]; *Campbell v. Board of Commissioners of Monroe County*, 118 Ind. 119, 20 N. E. 772 [1888]; *Ray v. City of Jef-*

ersonville, 90 Ind. 567 [1883]; *Taylor v. City of Haverhill*, 192 Mass. 287, 78 N. E. 475 [1906]; *Clinton Township v. Teachout*, 150 Mich. 124, 111 N. W. 1052 [1907].

⁵ *In the Matter of Widening Broadway in the City of New York*, 42 Howard (N. Y.) 220 [1872].

⁶ *In the Matter of Widening Broadway in the City of New York*, 42 Howard (N. Y.) 220 [1872].

⁷ *Bowersox v. Watson*, 20 O. S. 496 [1870].

⁸ *In the Matter of Extending Canal and Walker Streets*, 12 N. Y. 406 [1855]; *In the Matter of the Extension of the Bowery*, 12 Howard (N. Y.) 97 [1856].

⁹ *In the Matter of Extending Canal and Walker Streets*, 12 N. Y. 406 [1855]; *In the Matter of the Extension of the Bowery*, 12 Howard (N. Y.) 97 [1856].

¹⁰ *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902].

¹¹ *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885]; *City of St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59 [1890].

¹² *Beals v. Brookline*, 174 Mass. 1, 54 N. E. 339.

cedure, however, necessarily concedes the validity of the assessment, subject only to a hearing on the question of the amount and apportionment of benefits.¹³ Under similar statutes, a petition for the assessing of damages caused by a public improvement may be necessary to secure such assessment.¹⁴

§ 1348. Parties to appeal.

Since the right of appeal is given by statute, the statute is also conclusive in determining who may appeal. It is ordinarily provided that a land owner, who thinks himself aggrieved, may appeal.¹ Under a statute giving the right of appeal to the owner, and to persons interested, a mortgagee may appeal.² If a property owner petitions for a revision and dies, his devisees may join in the prosecution of such petition.³ A party cannot appeal on the ground that the assessment against other property owners is improper or irregular.⁴ Under some statutes, only property owners who have made objections below can appeal.⁵ If an appeal is in legal effect separate as to each property owner, the fact that some property owners have taken an appeal from the assessment of benefits and damages does not prevent a property owner who does not appeal, from suing the city to recover the damages which have been awarded to him.⁶ A property owner who does not appeal cannot share in the benefits which result from a successful appeal by other owners.⁷ A public corporation may appeal from an order vacating an assessment, even if it is not personally liable for the cost of the improvement.⁸ If the statute provides that the township which considers itself aggrieved by an assess-

¹³ *Beals v. Brookline*, 174 Mass. 1. 54 N. E. 339.

¹⁴ *Persson v. City of Bangor*, 102 Me. 397, 66 Atl. 1019 [1907].

¹ *Clinton Township v. Teachout*, 150 Mich. 124, 111 N. W. 1052 [1907].

² *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829 [1899].

³ *Crandell v. City of Taunton*, 110 Mass. 421 [1872].

⁴ *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255 [1894]; *Zender v. Barber Asphalt Paving Co.*, — Ky. —, 74 S. W. 201, 24 Ky. Law Rep. 2279 [1903].

⁵ *Carr v. People ex rel. Goedtner*,

224 Ill. 160, 79 N. E. 648 [1906]; *Lingle v. City of Chicago*, 210 Ill. 600, 71 N. E. 590 [1904]; *Philadelphia & Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895]; *Renard v. City of Spokane*, — Wash. —, 93 Pac. 517 [1908].

⁶ *Roper v. City of New Britain*, 70 Conn. 459, 39 Atl. 850 [1898].

⁷ *In re Westlake Avenue*, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

⁸ *State ex rel. Schintengen v. Mayor and Common Council of the City of La Crosse*, 101 Wis. 208, 77 N. W. 167 [1898].

ment, may appeal within a certain time, and that the supervisor of any township which wishes to appeal may make the application for appeal, the supervisor is the proper official to determine whether the township considers itself aggrieved.⁹ A property owner who does not appeal cannot be heard at the hearing of the appeal.¹⁰ If a drain is established by the joint action of the commissioners of two counties, and a property owner appeals to the township board of the township in which his land is situated, it is not necessary that he make the drain commissioner of the other county a party to such appeal.¹¹ The appellant need only make the parties to the judgment below parties to the appeal.¹²

§ 1349. Joint and several appeals.

If a separate trial is provided for in case of separate appeals, it is error to consolidate the appeal for a joint trial, against the objection of the property owner.¹ The allowance of a joint appeal will be presumed to be proper.² Parties who have, in fact, appealed, cannot complain that other property owners were not allowed to join in their appeal.³ An appeal must be taken from a judgment as a whole, and cannot be taken from a part thereof.⁴

§ 1350. Issue on appeal.

A statute which provides for appeal, usually provides what issues may be heard on appeal, and such provision controls.¹ On

⁹ *Long v. Iona* Probate Judge, 130 Mich. 338, 89 N. W. 938.

¹⁰ *Berry v. City of Des Moines*, 115 Ia. 44, 87 N. W. 747 [1901]; *Cummings v. City of Williamsport*, 84 Pa. St. (3 Norris) 472 [1877].

¹¹ *Thomas v. Walker Township Board*, 116 Mich. 597, 74 N. W. Rep. 1048 [1898].

¹² *Stevens v. Templeton*, — Ind. —, 84 N. E. 148 [1908].

¹ *Friedenwald v. Mayor and City Council of Baltimore*, 74 Md. 116, 21 Atl. 555 [1891].

² *Philadelphia & Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895].

³ *Philadelphia & Reading Coal & Iron Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102 [1895].

⁴ *City of Portland v. Kamm*, 5 Ore. 362 [1874].

¹ *Appeal of Gray*, — Conn. —,

67 Atl. 891 [1907]; *Drainage Commissioners v. Hudson*, 109 Ill. 659 [1885]; *Ludlow v. Union Township Gravel Road Co.*, 77 Ind. 409 [1881]; *Martindale v. Palmer*, 52 Ind. 411 [1875]; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515 [1889]; (*overruling Kretsch v. Helm*, 45 Ind. 438 [1874]; *Kretsch v. Helm*, 38 Ind. 207 [1871]; *McEwen v. Gilker*, 38 Ind. 233 [1871]; *Moberry v. City of Jeffersonville*, 38 Ind. 198 [1871]; *Martindale v. Palmer*, 52 Ind. 411 [1875]; *Hellenkamp v. City of Lafayette*, 30 Ind. 192 [1868]; *Palmer v. Stumph*, 29 Ind. 329 [1868]; *Board of Commissioners of Allen County v. Silvers*, 22 Ind. 491 [1864]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902].

appeal, the appellate court has ordinarily no greater jurisdiction than the lower tribunal;² and can ordinarily consider only the questions which were presented below.³ An appeal from a final order is sufficient to bring up the entire case,⁴ including all questions as to amount.⁵ An appeal from an interlocutory order affects only the order from which the appeal is taken.⁶ Thus, an appeal from a schedule of appraisal is not in legal effect an appeal from the order finding that the petition is sufficient.⁷ If an appeal is taken from an order assessing benefits, the question as to the amount of damages awarded is not subject to review in such appeal.⁸

§ 1351. Trial de novo on appeal.

Under some statutes, a hearing *de novo* is allowed upon appeal, and all questions involving the regularity and amount of the assessment are to be considered, and any evidence which is competent and is material to such issues, may be offered.¹ Appeal in which such hearing is permitted is radically different from error,² since the issue is as to the validity of the assessment, and not as to the correctness of the action of the lower tribunal as dis-

² *Brown v. Joliet*, 22 Ill. 123 [1859].

³ *Dickey v. City of Chicago*, 164 Ill. 37, 45 N. E. Rep. 537 [1896]; *Owners of Land v. The People ex rel. Stookey*, 113 Ill. 296 [1886]; *Budd v. Reidelbach*, 128 Ind. 145, 27 N. E. Rep. 349 [1890]; *Marshalltown Light, Power & Ry. Co. v. City of Marshalltown*, 127 Iowa, 637, 103 N. W. 1005 [1905]; *Philadelphia, Wilmington & Baltimore Railroad Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890].

⁴ *Board of Commissioners of Montgomery County v. Fullen*, 118 Ind. 158, 20 N. E. 771 [1888].

⁵ *Board of Commissioners of Monroe County v. Fullen*, 118 Ind. 158, 20 N. E. 771 [1888].

⁶ *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499 [1880].

⁷ *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499 [1880].

⁸ *The Mayor and City Council of Baltimore v. The Smith & Schwartz*

Brick Company, 80 Md. 458, 31 Atl. 423 [1894].

¹ *Badger v. Inlet Drainage District*, 141 Ill. 540, 31 N. E. 170 [1893]; *Briggs v. Union Drainage District No. 1*, 140 Ill. 53, 29 N. E. 721 [1893]; *Gilkerson v. Scott*, 76 Ill. 509 [1875]; *St. John v. City of St. Louis*, 50 Ill. 92 [1869]; *Brown v. Joliet*, 22 Ill. 123 [1859]; *Manor v. Board of Commissioners of Jay Co.*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; *Hardy v. McKinney*, 107 Ind. 364, 8 N. E. 232; *Black v. Thomson*, 107 Ind. 162, 7 N. E. 184; *Early v. City of Ft. Dodge*, — Ia. —, 113 N. W. 766; *People ex rel. Parker v. Jefferson Co. Court*, 55 N. Y. 604 [1874]; *In the Matter of Opening Grant Ave.*, 175 N. Y. 509, 67 N. E. 1083 [1903]; (affirming 78 N. Y. S. 737, 76 App. Div. 87 [1902]); *City of Portland v. Kamm*, 5 Ore. 362 [1874]; *Aherns v. City of Seattle*, 39 Wash. 168, 81 Pac. 558 [1905].

² See § 1367 *et seq.*

closed by the record.³ The appellate tribunal is not limited to the evidence offered below.⁴ The appellate tribunal may consider the propriety of the purpose for which the assessment is levied,⁵ the right of the public corporation to levy the assessment,⁶ the competency of the surveyor,⁷ whether the land which was assessed was legally subject to assessment for such improvement,⁸ the existence and amount of benefits,⁹ the fact that the property which is assessed is owned in severalty by two or more persons,¹⁰ the propriety of certain items for which the assessment is levied,¹¹ and the propriety of the rule of apportionment adopted.¹²

§ 1352. Hearing limited to certain issues.

Under some statutes, the hearing on appeal is limited to certain prescribed questions.¹ The legislature may thus restrict the right of appeal, since it has the power to deny the right altogether.² Thus, the appellate tribunal may be precluded from considering the utility of the improvement,³ or whether the land which is assessed was, in fact, benefited.⁴ Under some statutes, the appellate tribunal may be prevented from considering any

³ *Manor v. Board of Commissioners of Jay County*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893].

⁴ *Ahrens v. City of Seattle*, 39 Wash. 168, 81 Pac. 558 [1905].

⁵ *Weaver v. Templin*, 113 Ind. 298, 14 N. E. 600 [1887].

⁶ *Boyden v. Village of Brattleboro*, 65 Vt. 504, 27 Atl. 164 [1893].

⁷ *Markley v. Rudy*, 115 Ind. 533, 18 N. E. 50 [1888].

⁸ *Kirkpatrick v. Taylor*, 118 Ind. 329, 21 N. E. 20 [1888].

⁹ *Mascall v. Drainage District*, 122 Ill. 620, 14 N. E. 47 [1889].

¹⁰ *Romig v. City of Lafayette*, 33 Ind. 30 [1870].

¹¹ *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897].

¹² *People ex rel. Parker v. Jefferson County Court*, 55 N. Y. 604 [1874].

¹ *Appeal of Gray*, — Conn. —, 67 Atl. 891 [1907]; *Gilbert v. City of New Haven*, 39 Conn. 467 [1872]; *New York, Chicago & St. Louis Ry. Co. v. City of Hammond*, — Ind. —, 83 N. E. 244 [1908]; *Holden*

v. City of Crawfordsville, 143 Ind. 558, 41 N. E. 370 [1895]; *Reeves v. Grottendick*, 131 Ind. 107, 30 N. E. 889 [1891]; *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515 [1889]; *McGill v. Bruner*, 65 Ind. 421 [1879]; *Martindale v. Palmer*, 52 Ind. 411 [1875]; *Hellenkamp v. City of Lafayette*, 30 Ind. 192 [1868]; *Palmer v. Stumph*, 29 Ind. 329 [1868]; *Board of Commissioners of Allen County v. Silvers*, 22 Ind. 491 [1864]; *City of Indianapolis v. Imberry*, 17 Ind. 175 [1861]; *Oliver v. Monona County*, 117 Ia. 43, 90 N. W. 510 [1902]; *Dickson v. City of Racine*, 61 Wis. 545, 21 N. W. 620 [1884]; *Teegarden v. City of Racine*, 56 Wis. 545, 14 N. W. 614 [1883].

² *New York, Chicago and St. Louis Ry. Co. v. City of Hammond*, — Ind. —, 83 N. E. 244 [1908].

³ *Holden v. City of Crawfordsville*, 143 Ind. 558, 41 N. E. 370 [1895].

⁴ *The Illinois Central R. R. Co. v. Commissioners of East Lake Fork Special Drainage District*, 129 Ill. 417, 21 N. E. 925 [1890]; *New York,*

questions which arose prior to the making of the contract.⁵ The sole issue to be tried may be the question of the amount of benefits and damages.⁶ An assessment will not be set aside on appeal for immaterial irregularities which would not affect the amount of the assessment substantially.⁷

§ 1353. Time of taking appeal.

The time at which an appeal may be taken is determined by statute.¹ If the time runs from the issuing of the warrant or precept, and a precept has issued and then been abandoned by the city, and a second precept has issued, the time for taking the appeal runs from the issuing of the second precept.² If an appeal must be taken in thirty days, an appeal is taken in time where the judgment of confirmation was rendered March fifteenth, the bond was filed April third and the record was filed June fifteenth.³ Under some statutes, an appeal must be taken before confirmation.⁴ A motion for a re-hearing, or a new trial below, is not a condition precedent to an appeal.⁵

§ 1354. To what body appeal to be taken.

An appeal must be taken to the court or tribunal specified by statute.¹ Appeal sometimes lies from the assessing officials to a

Chicago and St. Louis Ry. Co. v. City of Hammond, — Ind. —, 83 N. E. 244 [1908]; Dickson v. City of Racine, 61 Wis. 545, 21 N. W. 620 [1884]; Teegarden v. City of Racine, 56 Wis. 545, 14 N. W. 614 [1883].

⁵ Everett v. Deal, 148 Ind. 90, 47 N. E. 219 [1897]; Reeves v. Grotten-dick, 131 Ind. 107, 30 N. E. 889 [1891]; Sims v. Hines, 121 Ind. 534, 23 N. E. 515 [1889]; McGill v. Bruner, 65 Ind. 421 [1879]; Martindale v. Palmer, 52 Ind. 411 [1875]; City of Indianapolis v. Imberry, 17 Ind. 175 [1861]. The earlier cases to the contrary such as Kretsch v. Helm, 45 Ind. 438 [1874]; Gulick v. Connely, 42 Ind. 134 [1873]; McEwen v. Gilker, 38 Ind. 233 [1871]; Kretsch v. Helm, 38 Ind. 207 [1871]; Moberry v. City of Jeffersonville, 38 Ind. 198 [1871]; Hellenkamp v. City of Lafayette, 30 Ind. 192 [1868]; Palmer v. Stumph, 29 Ind. 329

[1868]; Board of Commissioners of Allen County v. Silvers, 22 Ind. 491 [1864]; (were subsequently overruled in Sims v. Hines, 121 Ind. 534, 23 N. E. 515 [1889]).

⁶ City of Valparaiso v. Parker, 148 Ind. 379, 47 N. E. 330 [1897].

⁷ Gilbert v. City of New Haven, 39 Conn. 467 [1872].

¹ Cotton v. Watson, 134 Cal. 422, 66 Pac. 490 [1901]; Stevens v. Templeton, — Ind. —, 84 N. E. 148 [1908].

² Halstead v. City of Attica, 28 Ind. 378 [1867].

³ Stevens v. Templeton, — Ind. —, 84 N. E. 148 [1908].

⁴ In the Matter of the Proceedings to Open 65th Street, 23 Howard (N. Y.) 256 [1862].

⁵ State ex rel. Greeley v. City of St. Louis, 1 Mo. App. 503 [1876].

⁶ Beach v. City of Meriden, 46 Conn. 502 [1878]; Macfarland v. Byrnes, 19 App. D. C. 531 [1902];

court.² An appeal is sometimes given from the special term of a court to the general term.³ Appeal may be given to other taxing officials,⁴ such as supervisors,⁵ or the council.⁶ The act of the council in deciding an appeal is said to be judicial in its character.⁷

§ 1355. Notice of appeal.

Notice of appeal is ordinarily provided for by statute, and where thus required, is necessary.¹ The actual knowledge of the adversary party that appeal is taken, is not a substitute for the notice required by statute.² In the absence of a statutory requirement therefor, notice need not be directed by name to the persons interested.³ A notice which advises the adversary party that an appeal has been taken, which identifies the assessment, and which states the tribunal to which the appeal is taken, and the time of the hearing thereof, is sufficient.⁴ A statement by the property owners of their interest in the assessment, and of the fact that they protest against the acceptance of the performance of the improvement contract, has been held to operate as an appeal, if it states with sufficient accuracy the facts as to each appeal.⁵ A notice of appeal stating the facts is sufficient, although it is called a respectful remonstrance.⁶ If separate appeals are taken, failure to give proper notice as to one, is not proper ground for dismissing the other.⁷ If the notice states the grounds on which each owner appeals, one notice may be given where several objectors join in a single appeal.⁸

Page v. Mayor and City Council of Baltimore, 34 Md. 558 [1871].

² *Beach v. City of Meriden*, 46 Conn. 502 [1878]; *Page v. Mayor and City Council of Baltimore*, 34 Md. 558 [1871]; *Mayor and City Council of Baltimore v. Clunet*, 23 Md. 449 [1865]; *In re Mount Pleasant Avenue, Appeal of Townson*, 171 Pa. St. 38, 32 Atl. 1122, 1124 [1895].

³ *In the Matter of Commissioners of Central Park*, 61 Barb. 40 [1871].

⁴ *Barber v. Board of Supervisors of City and County of San Francisco*, 42 Cal. 631 [1872].

⁵ *Barber v. Board of Supervisors of City and County of San Francisco*, 42 Cal. 631 [1872].

⁶ *Belser v. Hoffschneider*, 104 Cal. 455, 38 Pac. 312 [1894].

⁷ *Belser v. Hoffschneider*, 104 Cal. 455, 38 Pac. 312 [1894].

¹ *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287 [1895].

² *Williams v. Bergin*, 108 Cal. 166, 41 Pac. 287 [1895].

³ *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679 [1905]; *Harris v. City of Tacoma*, 39 Wash. 185, 81 Pac. 691 [1905].

⁴ *Williams v. Viselich*, 121 Cal. 314, 53 Pac. 807 [1898].

⁵ *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679 [1905].

⁶ *Girvin v. Simon*, 127 Cal. 491, 59 Pac. 945 [1900].

⁷ *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 380 [1899].

⁸ *Harris v. City of Tacoma*, 39 Wash. 185, 81 Pac. 691 [1905].

§ 1356. Method of taking appeal.

The legislature has full power to determine the method in which an appeal may be taken.¹ Provision is usually made for filing a transcript of the proceedings below.² Such transcript must show that the steps which are necessary to a valid assessment have been taken,³ such as the presence of a quorum of the council,⁴ and that the requisite number of the council voted for the improvement.⁵ Proceedings below after the appeal was taken cannot be regarded as a part of the transcript. A remonstrance is not a part of the transcript.⁶ While the record may be amended so as to show what was heard and determined below, it cannot be so amended as to present questions which were not, in fact, heard below.⁷ In some jurisdictions provision is made for a petition on appeal. Such petition need not be as formal as a pleading at law,⁸ but it must state specifically the facts upon which the appeal relies.⁹ It is not sufficient to allege that "the assessment was not laid according to law."¹⁰ However, a written objection which purports only to "remonstrate against the acceptance of the contract specified, upon the claim that the contract has not been done according to specifications on file in the office of the street superintendent," is sufficient as an appeal.¹¹ An answer on appeal filed by a property owner is sufficient which shows that appellant owns only a part of the tract assessed and that such tract does not abut on the street, if by statute only abutting prop-

¹ *Walston v. Nevin*, 128 U. S. 578, 32 L. 544, 9 S. 192 [1888]; (affirming *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]); *State ex rel. French v. Johnson*, 105 Ind. 463, 5 N. E. 553 [1885]; *State, Brittin, Pros. v. Blake*, 36 N. J. L. (7 Vr.) 442 [1872].

² *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872].

³ *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872].

⁴ *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872].

⁵ *Moberry v. City of Jeffersonville*, 38 Ind. 198 [1871]; (overruled in *Sims v. Hines*, 121 Ind. 534, 23 N. E. 515, on the point that on appeal the property owner cannot go back of the date of making the contract.)

⁶ *Brookbank v. City of Jeffersonville*, 41 Ind. 406 [1872].

⁷ *Philadelphia, Wilmington & Baltimore Railroad Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890].

⁸ *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679 [1905]; *Girvin v. Simon*, 127 Cal. 491, 59 Pac. 945 [1900]; *Barber v. Board of Supervisors of City and County of San Francisco*, 42 Cal. 631 [1872].

⁹ *Bowditch v. New Haven*, 40 Conn. 503 [1873].

¹⁰ *Bowditch v. New Haven*, 40 Conn. 503 [1873].

¹¹ *Girvin v. Simon*, 127 Cal. 491, 59 Pac. 945 [1900]. See also, *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679 [1905].

erty is to be assessed.¹² Whether an appeal bond is necessary, depends upon the provisions of the statute which control appeal.¹³ Under a statute which permits an appeal if an individual who wishes to connect his property with a public sewer is dissatisfied with the amount fixed by the bailiffs as the charge therefor, an appeal bond is not necessary unless such owner wishes to connect with the sewer before the determination of the appeal.¹⁴ Failure to file a bond when the transcript of the proceeding is filed, is not ground for dismissing an appeal.¹⁵ An appeal bond should be made to the party indicated by statute.¹⁶ Thus, under a statute providing therefor, it should be made payable to the contractor.¹⁷ If an appeal is allowed to the objectors it cannot be perfected by an appeal bond which binds one of the objectors only.¹⁸ In an action upon an appeal bond the assessment and costs may be recovered.¹⁹ An appeal bond may be enforced without first attempting to enforce the assessment in question;²⁰ and a recovery upon the appeal bond bars the right of action upon the assessment.²¹ An answer in a suit upon an appeal bond alleging that the assessment was subsequently set aside by the county court, is insufficient in the absence of facts showing an appeal to the county court, or some other means whereby the county court acquired jurisdiction to set aside the assessment.²²

§ 1357. Dismissal of appeal.

The appellate tribunal cannot dismiss an appeal without notice of the application to dismiss and a hearing upon such application.¹ An order dismissing an appeal, entered without notice and hearing, is a nullity.² If the appeal is taken regularly, an order dismissing it without a hearing on the merits, is said to be a

¹² Romig v. City of Lafayette, 33 Ind. 30 [1870].

¹³ Crosby v. Brattleboro, 68 Vt. 484, 35 Atl. 430 [1896].

¹⁴ Crosby v. Brattleboro, 68 Vt. 484, 35 Atl. 430 [1896].

¹⁵ Harris v. City of Tacoma, 39 Wash. 185, 81 Pac. 691 [1905].

¹⁶ First Presbyterian Church v. City of Lafayette, 42 Ind. 115 [1873].

¹⁷ First Presbyterian Church v. City of Lafayette, 42 Ind. 115 [1873].

¹⁸ Lingle v. City of Chicago, 210 Ill. 600, 71 N. E. 590 [1904].

¹⁹ Kilgour v. Drainage Commissioners, 111 Ill. 342 [1885].

²⁰ Kilgour v. Drainage Commissioners, 111 Ill. 342 [1885].

²¹ Kilgour v. Drainage Commissioners, 111 Ill. 342 [1885].

²² Kilgour v. Drainage Commissioners, 111 Ill. 342 [1885].

¹ Girvin v. Simon, 127 Cal. 491, 59 Pac. 945 [1900].

² Girvin v. Simon, 127 Cal. 491, 59 Pac. 945 [1900].

nullity.³ The fact that copies of the proceedings in appeal were not served upon public officials within the time specified is waived by not moving to dismiss the appeal at the following term of court.⁴ If an appeal cannot be taken from a judgment entered by consent, an appeal cannot be dismissed where the record shows that no opposition was made, but does not show that the appellant or his attorney was present in court and consented to the entry.⁵

§ 1358. Necessity of appeal.

If provision is made for appeal by a statute which, in effect, provides for an appeal as an exclusive remedy, failure to take such appeal operates as a waiver of any defect which might have been the ground of appeal.¹ If, by statute, a specific method is provided for raising certain questions, such questions can be raised only in the manner indicated.² Thus, if certain questions are to be determined by appeal they cannot be raised by exception to the report.³ Accordingly, an appeal is necessary under

³ *People of the City and County of San Francisco v. O'Neil*, 51 Cal. 91 [1875].

⁴ *In the Matter of Schreiber*, 3 Abb. N. C. 68 [1877].

⁵ *San Francisco, City and County v. Certain Real Estate*, 42 Cal. 513 [1872].

¹ *English v. Territory*, — Ariz. —, 89 Pac. 501 [1907]; *Hale v. Moore*, 82 Ark. 75, 100 S. W. 742 [1907]; *Williams v. Bergin*, 116 Cal. 56, 47 Pac. 877 [1897]; *Wells v. Wood*, 114 Cal. 255, 46 Pac. 96 [1896]; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 697 [1896]; *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896]; *McDonald v. Conniiff*, 99 Cal. 386, 34 Pac. 71 [1893]; *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891]; *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 25 Pac. 249, 24 Pac. 600 [1890]; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127 [1889]; *Dyer v. Parrott*, 60 Cal. 551 [1882]; *Taylor v. Palmer*, 31 Cal. 240 [1866]; *Smith v. Cofran*, 34 Cal. 310 [1867]; *Conlin v. Seamen*, 22 Cal. 546 [1863];

Beckett v. Morse, 4 Cal. App. 228, 87 Pac. 408 [1906]; *Peck v. City of Bridgeport*, 75 Conn. 417, 53 Atl. 893 [1903]; *Ferguson v. Stanford*, 60 Conn. 432, 22 Atl. 782 [1891]; *Dann v. Woodruff*, 51 Conn. 203 [1883]; *Turley v. The People ex rel. Mayfield*, 116 Ill. 433, 6 N. E. 52 [1887]; *Keigwin v. Drainage Commissioners*, 115 Ill. 347, 5 N. E. 575 [1886]; *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330 [1897]; *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219 [1897]; *Bowan v. Hester*, 143 Ind. 511, 41 N. E. 330 [1895]; *Minneapolis & St. Louis Ry. Co. v. Lindquist*, 119 Iowa, 144, 93 N. W. 103 [1903]; *Dashiell v. Mayor and City Council of Baltimore*, Use of Hax, 45 Md. 615 [1876]; *Page v. Mayor and City Council of Baltimore*, 34 Md. 558 [1871]; *Morey v. City of Duluth*, 75 Minn. 221, 77 N. W. 829 [1899]; *Sorchan v. City of Brooklyn*, 3 Hun (N. Y.) 562 [1875].

² *In re Beechwood Ave.*, 194 Pa. St. 86, 45 Atl. 127.

³ *In re Beechwood Ave.*, 194 Pa. St. 86, 45 Atl. 127.

different statutes to correct non-jurisdictional defects,* or to enable the property owner to raise the question of the benefit to his property,⁵ or as to the power of the agent of the contractor to bind his principal by the improvement contract into which he has entered,⁶ or to raise the question of the propriety of the extension of time for the performance of the improvement contract,⁷ or of defective performance,⁸ or to raise the question that a second contract was let at an increased price, while the original contract price for the same improvement was still in force,⁹ or that the work, while authorized, extends too far in space,¹⁰ or that the assessment is levied on two or more tracts of land as an entirety,¹¹ or that the land has been omitted improperly from the assessment,¹² or that an assessment has been made to one of two or more joint owners,¹³ or that the wrong rule of apportionment has been adopted,¹⁴ or that the commissioner who made the assessment was related to certain taxpayers of the city,¹⁵ or that the notice of a meeting of the commissioners was not given for the time required by statute.¹⁶ If the contractor is given the right to appeal, and he omits to exercise such right, he cannot hold the city liable in damages for defects which could have been remedied upon such appeal.¹⁷

§ 1359. Cases in which appeal not necessary to preserve rights.

Under statutes which provide for appeal upon certain questions, a property owner may attack an assessment collaterally

* *Keigwin v. Drainage Commissioners of Hamilton Township*, 115 Ill. 347, 5 N. E. 575 [1886]; *Sorchan v. City of Brooklyn*, 3 Hun (N. Y.) 562 [1875].

⁵ *Peck v. City of Bridgeport*, 75 Conn. 417, 53 Atl. 893 [1903].

⁶ *Oakland Paving Co. v. Reir*, 52 Cal. 270 [1877].

⁷ *Conlin v. Seamen*, 22 Cal. 546 [1863].

⁸ *Warren v. Riddell*, 106 Cal. 352, 39 Pac. 781 [1895]; *Jennings v. Le Breton*, 80 Cal. 8, 21 Pac. 1127 [1889].

⁹ *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 25 Pac. 249, 24 Pac. 600 [1890].

¹⁰ *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891].

¹¹ *Turley v. The People ex rel. Mayfield*, 116 Ill. 433, 6 N. E. 52 [1887].

¹² *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896].

¹³ *Taylor v. Palmer*, 31 Cal. 240 [1866].

¹⁴ *English v. Territory*, — Ariz. —, 89 Pac. 501 [1907]; *Wells v. Wood*, 114 Cal. 255, 46 Pac. 96 [1896]; *Harney v. Benson*, 113 Cal. 314, 45 Pac. 697 [1896]; *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408 [1906]; *Dann v. Woodruff*, 51 Conn. 203 [1883].

¹⁵ *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 330 [1897].

¹⁶ *Dashiell v. Mayor and City Council of Baltimore* use of Hax, 45 Md. 615 [1876].

¹⁷ *Smith v. Cofran*, 34 Cal. 310 [1867].

without appealing for defects for which appeal does not lie, or which render the proceedings absolutely void. Thus, failure to take an appeal does not waive the objection that improper items have been included which the law does not allow under any circumstances to be included, and that the assessment is, accordingly, void on its face,¹ or that the contract is invalid,² or that the assessment is illegal, and that the public corporation has no jurisdiction to levy it,³ or that the city has no power to make any assessment under the circumstances,⁴ or that a double assessment has been levied for one improvement,⁵ or that the property owner has been assessed upon the front foot plan for a frontage greater than it actually possesses,⁶ or that the owner is not made a party to the proceedings below, if this is required by statute.⁷ An appeal is not necessary if there is no statutory authority for the assessment in question, and if such assessment is void on its face.⁸ If the assessment is entirely void,⁹ as where no statutory authority therefor exists,¹⁰ an appeal is not necessary, and a failure to take an appeal does not waive any of the rights of the property owner.

¹City Street Improvement Company v. Taylor, 138 Cal. 364, 71 Pac. 446 [1903]; Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772 [1900]; Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339 [1894]; Partridge v. Lucas, 99 Cal. 519, 33 Pac. 1082 [1893]. "The assessment is to be regarded as an entirety and is equally void if it appears upon its face that a portion or the whole of it is for the expense of work which is not legally chargeable upon the property assessed; (Partridge v. Lucas, 99 Cal. 519) or if the statute required a portion of the expense incurred to be assessed upon other property. (Digins v. Brown, 76 Cal. 318)." Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339 [1894]. Appeal necessary if the items might have been included if they had not been paid before. Williams v. Bergin, 116 Cal. 56, 47 Pac. 877 [1897].

²Williams v. Bergin, 129 Cal. 461, 62 Pac. 59 [1900]; Brock v. Luning, 89 Cal. 316, 26 Pac. 972 [1891].

³Frick v. Morford, 87 Cal. 576, 25 Pac. 764 [1891].

⁴New Haven v. Fair Haven R. R. Co., 38 Conn. 422, 9 Am. Rep. 399 [1871].

⁵Etchison Ditching Association v. Hillis, 40 Ind. 408 [1872].

⁶Wilson v. Poole, 33 Ind. 443 [1870].

⁷Smith v. Cofran, 34 Cal. 310 [1867]. *Contra*, that such omission can be reached only by appeal: Huston v. Clark, 112 Ill. 344 [1885].

⁸Chase v. Treasurer of the City of Los Angeles, 122 Cal. 540, 55 Pac. 414 [1898]; Appeal of Harper, 109 Pa. St. 9, 1 Atl. 791 [1885].

⁹Chase v. Treasurer of the City of Los Angeles, 122 Cal. 540, 55 Pac. 414 [1898].

¹⁰Donnelly v. Howard, 60 Cal. 291 [1882]; Commissioners of Big Lake Special Drainage District v. Commissioners of Highways of Sand Ridge, 199 Ill. 132, 64 N. E. 1094 [1902]; Appeal of Harper, 109 Pa. St. 9, 1 Atl. 791 [1885].

§ 1360. Effect of appeal.

An appeal suspends the proceedings from which the proceeding is taken until such appeal is determined.¹ Thus, an appeal supercedes the report of the committee appointed to make an apportionment,² and prevents the foreclosure of an assessment while the appeal is pending.³ If an appeal by one property owner brings up the proceedings as to other property owners, an appeal by one owner prevents foreclosure against other property owners.⁴ Under many statutes, however, an appeal by one property owner does not affect the property owners who do not appeal.⁵ The pendency of an appeal prevents the commissioners by whom such assessment was made from making any substantial changes in the assessment.⁶

§ 1361. Power of appellate tribunal to modify assessment.

The legislature has power to determine whether the appellate tribunal may fix the amount of the assessment if it finds that the assessment is irregular, or whether it must send the case back to the taxing officials for a re-assessment.¹ Upon appeal the court or other appellate tribunal may correct irregularities,² and may fix the amount of the assessment;³ and it may reduce the amount

¹ *Turley v. The People ex rel. Mayfield*, 116 Ill. 433, 6 N. E. 52 [1887]; *Manor v. Board of Commissioners*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893].

² *Manor v. Board of Commissioners of Jay Co.*, 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893].

³ *City Bond Company v. Bruner*, 34 Ind. App. 659, 73 N. E. 711 [1904].

⁴ *Girvin v. Simon*, 127 Cal. 491, 59 Pac. 945 [1900]; *City Bond Co. v. Wells*, 34 Ind. App. 675, 73 N. E. 713 [1904].

⁵ *Cason v. Harrison*, 135 Ind. 330, 35 N. E. 268 [1893]; *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175 [1889]; *Cummings v. City of Williamsport*, 84 Pa. St. (3 Norris) 472 [1877].

⁶ *Turley v. The People ex rel. Mayfield*, 116 Ill. 433, 6 N. E. 52 [1887].

¹ *City of St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59 [1890].

² *Hall v. City of Meriden*, 48 Conn.

416 [1880]; *Brewer, Pros. v. City of Elizabeth*, 66 N. J. L. (37 Vr.) 547, 49 Atl. Rep. 480 [1901]; In the *Matter of West's Avenue*, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

³ *City of St. Louis v. Lawton*, 189 Mo. 474, 88 S. W. 80 [1905]; *Brewer, Pros. v. City of Elizabeth*, 66 N. J. L. (37 Vr.) 547, 49 Atl. 480 [1901]; *Brown v. Town of Union*, 65 N. J. L. (36 Vr.) 601, 48 Atl. 562 [1900]; *City of Elizabeth v. State, Meeker, Pros.*, 45 N. J. L. (16 Vr.) 157 [1883]; *State, Van Riper. Pros. v. Township of Plainfield*, 43 N. J. L. (14 Vroom) 349 [1881]; *County of Monroe v. City of Rochester*, 88 Hun. 164, 34 N. Y. S. 533 [1895]; *Walsh v. Sims*, 65 O. S. 211, 62 N. E. 120 [1901]. (In an action to collect an assessment such reduction may be made.) *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692 [1887]; *Blount v. City of Janesville*, 31 Wis. 648 [1872].

of the assessment if the statute provides for such action,⁴ or it may increase such amount, if it observes the proper rules of apportionment in doing so.⁵ The act of the court in reducing the amount of the assessment on appeal, is said to be judicial and not legislative in its character.⁶ If the assessment of one property owner is reduced, it is not necessary that the amount of such reduction be added to the assessments of others.⁷ Under some statutes, the court cannot reduce the amount of the assessment upon appeal, but if it finds that the assessment is irregular it must refer the assessment to the assessing officials to be corrected by them,⁸ or it must vacate the entire assessment.⁹ Upon appeal the court cannot increase the assessments levied below by a certain arbitrary proportion,¹⁰ since the assessment, as thus increased, may exceed the amount of the benefits. If an appeal is taken to the council, it may levy a new assessment.¹¹

§ 1362. Evidence.

On appeal, evidence which bears upon the issue,¹ as upon the question of benefits,² is admissible. Evidence that the assessment exceeds the benefits to the lands of owners who do not complain of the assessment is inadmissible.³ The parties are not restricted to the evidence offered below.⁴ An assessment is *prima facie* valid on appeal,⁵ and the items for which the assessment is levied,

⁴ Shannon v. Village of Hinsdale, 180 Ill. 202, 54 N. E. 181 [1899]; Early v. City of Ft. Dodge, — Iowa, —, 113 N. W. 766 [1907]; In the Matter of Westlake Avenue, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

⁵ Hall v. City of Meriden, 48 Conn. 416 [1880].

⁶ Security Trust and Safety Vault Co. v. City of Lexington, 203 U. S. 323 [1906].

⁷ Clapp v. City of Hartford, 35 Conn. 66 [1868].

⁸ The People of the State of California v. Board of Supervisors of City and County of San Francisco, 43 Cal. 91 [1872].

⁹ Sessions v. Crunkilton, 20 O. S. 349 [1870]; (not a case of appeal).

¹⁰ In re Opening of Park Avenue,

Appeal of Luce Brothers, 83 Pa. St. (2 Norris) 175 [1876]; In re Opening of Park Avenue, Hindekoper's Appeal, 83 Pa. St. (2 Norris) 167 [1876].

¹¹ Creed v. McCombs, 146 Cal. 449, 80 Pac. 679 [1905].

¹ Drainage Commissioners v. Hudson, 109 Ill. 659 [1885].

² Drainage Commissioners v. Hudson, 109 Ill. 659 [1885].

³ Earhart v. Farmer's Creamery, 148 Ind. 79, 47 N. E. 226 [1897].

⁴ Ahrens v. City of Seattle, 39 Wash. 168, 81 Pac. 558 [1905].

⁵ Briggs v. Union Drainage District No. 1, 140 Ill. 53, 29 N. E. 721 [1893]; Keiser v. Mills, 162 Ind. 366, 69 N. E. 142 [1903].

are presumed to be proper.⁶ An appeal will not be sustained for an immaterial error.⁷

§ 1363. Method of trial.

The property owners who complain of an assessment have no constitutional right to a trial by jury upon any of the issues involved,¹ and, therefore, have no right to a trial by jury in the absence of statutory provision therefor. If the statute makes provision for a jury trial, they are entitled thereto,² and they cannot be deprived of such right by ordinance of the city³ or by order of the court.⁴

§ 1364. Costs.

In the absence of specific statutory provisions, costs may be allowed on appeal in the discretion of the court.¹ Costs which are improperly made on appeal, may be charged to the party who makes them.² If, on appeal, an assessment is reduced, but is upheld as to part, an order apportioning the costs between the parties in proportion to the amount of the reduction, is not an abuse of the discretion of the court.³

§ 1365. Revision.

Under some statutes, a petition for revision of an assessment may be filed and heard.¹ On such petition the question is one of the benefits arising from the improvement as a whole, and not from the benefits arising from any particular part thereof.² On such petition the validity of the assessment cannot be attacked,

⁶ *Scott v. Stringley*, 132 Ind. 378, 31 N. E. 953 [1892].

⁷ *Appeal of Gray*, — Conn. —, 67 Atl. 891 [1907]. See also *Earhart v. Farmer's Creamery*, 148 Ind. 79, 47 N. E. 226 [1897].

¹ See § 202.

² *Mascall v. Comrs. Drainage District*, 122 Ill. 620, 14 N. E. 47 [1889]; *Friedenwald v. Mayor and City Council of Baltimore*, 74 Md. 116, 21 Atl. 555 [1891]; *In re Mount Pleasant Avenue*, *Appeal of Tourison*, 171 Pa. St. 38, 32 Atl. 1122, 1124 [1895].

³ *Friedenwald v. Mayor and City Council of Baltimore*, 74 Md. 116, 21 Atl. 555 [1891].

⁴ *Friedenwald v. Mayor and City Council of Baltimore*, 74 Md. 116, 21 Atl. 555 [1891].

¹ *The Illinois Central R. R. Co. v. Commissioners of East Lake Fork Special Drainage District*, 129 Ill. 417, 21 N. E. 925 [1890].

² *Drainage Commissioners v. Hudson*, 109 Ill. 659 [1885].

³ *Spear v. Drainage Commissioners*, 113 Ill. 632 [1886].

⁴ *Beals v. Inhabitants of Brookline*, 174 Mass. 1, 54 N. E. 339 [1899]; *Patton v. City of Springfield*, 99 Mass. 627 [1868].

⁵ *Alden v. Springfield*, 121 Mass. 27 [1876].

but the only question presented is as to the amount thereof.³ Revision cannot be given, if by statute the order of the court confirming the report of viewers is final and conclusive.⁴

§ 1366. Judgment on appeal.

If appeal is taken as to the question of the performance of the contract, the council may vacate the acceptance of the work by the street superintendent, and the assessment based upon such acceptance, and may direct a contractor to complete the work required by the contract under the direction of the city council, and may order the superintendent to accept the work when thus completed, and issue a new warrant, assessment and diagram.¹ The determination of the appellate tribunal on appeal is ordinarily final,² and objections which have thus been determined to be insufficient cannot be interposed as defenses to proceedings on the assessment.³ The question of the finality of the decision on appeal is not involved if no appeal is, in fact, taken.⁴ A judgment on appeal is not final and conclusive if the assessment is void,⁵ as where a contract is extended after the expiration of the time fixed for performance in states where jurisdiction is lost under such circumstances.⁶ It will be assumed that the appellate tribunal acted upon the objections made before it.⁷ In jurisdictions in which an appeal by one party owner does not bring up the assessment as to other property owners, a property owner who does not appeal cannot take advantage of a decision in an appeal taken by another property owner holding the assessment invalid.⁸

³ *Crandell v. Taunton*, 110 Mass. 421 [1872].

⁴ *Opening Sheridan Street, Bellevue Borough*, 138 Pa. St. 264, 22 Atl. 22 [1890].

¹ *Hadley v. Dague*, 130 Cal. 207, 62 Pac. 500 [1900].

² *Lambert v. Bates*, 148 Cal. 146, 82 Pac. 767 [1905].

³ *Lambert v. Bates*, 148 Cal. 146, 82 Pac. 767 [1905].

⁴ *Dowling v. Conniff*, 103 Cal. 75, 36 Pac. 1034 [1894].

⁵ *Dougherty v. Nevada Bank*, 81

Cal. 162, 22 Pac. 513 [1889].

⁶ *Dougherty v. Nevada Bank*, 81 Cal. 162, 22 Pac. 513 [1889].

⁷ *Belser v. Hoffschneider*, 104 Cal. 455, 38 Pac. 312 [1894].

⁸ *Carr v. People*, 224 Ill. 160, 79 N. E. 648 [1906]; *Smyth v. State ex rel. Braun*, 158 Ind. 332, 62 N. E. 449 [1901]; *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Mayor, etc., of City of Lexington v. Long*, 31 Mo. 369 [1861]; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 179 [1905].

Where an appeal by one property owner takes up the entire proceeding,⁹ a judgment rendered in an appeal by one owner is binding upon all the property owners.¹⁰ If final judgment has been entered upon an appeal, the appellate tribunal has no authority in the absence of a statute to vacate such final judgment, and to enter a different judgment at some subsequent period.¹¹

C.—ERROR.

§ 1367. Nature of error proceedings.

The right of instituting proceedings in error is frequently given to the party seeking to enforce an assessment, or the party who is resisting it, as a means of affirming or reversing the proceedings, as they may appear to be valid or invalid upon the record of the proceedings sent up to the court of error.¹ As is stated elsewhere, error differs from certiorari, in the absence of specific statutory provisions, chiefly in the fact that error lies to proceedings in the ordinary course of common law, while certiorari lies to proceedings which are not in the ordinary course of common law.² Error and appeal are terms which are used in many jurisdictions as practically synonymous, and as means of having an inferior court or tribunal reviewed by a superior court.³ In some states, the terms are distinguished and appeal is used to denote the proceedings in which questions both of law and fact are taken from a lower tribunal to a higher one, and the issues involved are heard and determined *de novo*, while error is used to denote a proceeding in which the record of the lower tribunal is sent up to the reviewing court in order that the validity of the proceedings, and of the final order entered below, may be determined

⁹ See § 1360.

¹⁰ *State, ex rel. Holden v. Gill*, 84 Mo. 248 [1884]; *Long Branch Police, Sanitary and Improvement Commission v. Dobbins*, 61 N. J. L. (32 Vr.) 659, 40 Atl. 599 [1898].

¹¹ *Creed v. McCombs*, 146 Cal. 449, 80 Pac. 679 [1905]; *Belser v. Hoffschneider*, 104 Cal. 455, 38 Pac. 312 [1894].

¹ *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903]; *Johnson v. People ex rel. Kochersperger*, 177 Ill. 64, 52 N. E. 308 [1898].

² See § 1393 *et seq.*

³ For cases in which a proceeding to review the record is termed an appeal, see § 1350 *et seq.* *Chicago Consolidated Traction Co. v. Village of Oak Park*, 225 Ill. 9, 80 N. E. 42 [1907]; *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824 [1900]; *Bickerdike v. City of Chicago*, 185 Ill. 280, 56 N. E. 1096 [1900]; *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *Patton v. City of Springfield*, 99 Mass. 627 [1868]. See also § 1347 *et seq.*

from such record.⁴ Error is frequently given in case of suits to enforce an assessment, or suits to enjoin an assessment, or to quiet title, or to vacate an assessment, or to recover payments made under constraint or mistake upon irregular or invalid assessments, or to certiorari proceedings. In some cases, by statutory provisions, error may be prosecuted from the order of the public officials fixing and apportioning an assessment.⁵ In other jurisdictions, under statutes which provide for error to final orders and judgments, it is held that such statutes apply only to judicial proceedings, and that the order of an assessing body is not a judicial order, or judgment, within the meaning of such statutes.⁶

§ 1368. Right to prosecute error dependent on statute.

Parties are not entitled to error proceedings by virtue of any constitutional provisions, such as that forbidding the taking of property without due process of law, and the like. If the adversary party has had proper notice of the proceedings in the trial court, and has had an opportunity to appear and defend, he has been allowed due process of law, whether, by statute, he is given the right to prosecute error or not. Accordingly, the right to prosecute error may be granted in some cases and denied in others, either by provisions of the statute or by constitutional provisions.¹ A property owner cannot complain on the ground that the right to prosecute error is not given in assessments of the class in question, while it is given in other classes of assessments.² However, the right of prosecuting error, given in the case of assessments generally, is not to be regarded as denied by a subsequent statute unless such intention appears affirmatively.³ Un-

⁴ *Baltimore & Ohio Railroad Co. v. City of Bellaire*, 60 O. S. 301, 54 N. E. 263 [1899].

⁵ *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292; (affirmed on rehearing, 100 N. W. 136 [1901]).

⁶ The remedy where such view obtains is certiorari; (see § 1393 *et seq.*) or injunction (see § 1411 *et seq.*) or a statutory suit to attack an assessment (see § 1411 *et seq.*; and § 1451 *et seq.*) or the defect is used as a defense to the assessment (see § 1330 *et seq.*)

¹ *Appeal of Houghton*, 42 Cal. 35 [1871]; *City of Peoria v. Smith*, 232 Ill. 561, 83 N. E. 1061 [1908]; *Graham v. City of Chicago*, 187 Ill. 411, 58 N. E. 393; *Deane v. Indiana Macadam & Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903].

² *Deane v. Indiana Macadam & Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903].

³ *Robinson v. City of St. Paul*, 40 Minn. 228, 41 N. W. 950 [1889].

der statutory provisions, the decision of the lower court may be final upon certain questions, and error cannot be prosecuted thereto;⁴ such as the fact and amount of benefits,⁵ or the apportionment of the cost between the public corporation and the owners of private property.⁶ While the apportionment made by the county court is final, error lies to an order of the county court refusing to inquire into such cases.⁷ Error may, in such cases, be allowed to the city but denied to the property owner.⁸ Under a constitutional provision to the effect that writs of error shall be allowed from the final determination of the county courts, as may be provided by law, the legislature may provide that error can be brought to a decree of confirmation rendered on default only if the applicant files an affidavit showing that he did not receive notice of the filing of such assessment after confirmation, or otherwise learn of its pendency until within ten days previous to the entry of default therein.⁹ The right to prosecute error may be given by statutes enacted after the rendition of the judgment to which error is to be prosecuted.¹⁰ Under a constitutional provision conferring exclusive jurisdiction in error on the Supreme Court, a statute authorizing the circuit court to revise and confirm assessments must be construed as merely requiring the circuit court to take part in the municipal proceedings.¹¹

⁴Hyman v. City of Chicago, 188 Ill. 462, 59 N. E. 10 [1900]; Davis v. Mayor and Common Council of Newark, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891].

⁵Dean v. City of Paterson, 68 N. J. L. (39 Vr.) 664, 54 Atl. 836 [1902]; Morris v. City of Bayonne, 62 N. J. L. 385, 41 Atl. 924 [1898]; Moran v. Mayor and Aldermen of Jersey City, 58 N. J. L. (29 Vr.) 653, 35 Atl. 950 [1896]; Davis v. Mayor and Common Council of Newark, 54 N. J. L. (25 Vr.) 144, 23 Atl. 276 [1891].

⁶Chicago Consolidated Traction Company v. Village of Oak Park, 225 Ill. 9, 80 N. E. 42 [1907]; Beckett v. City of Chicago, 218 Ill. 97, 75 N. E. 747 [1905]; Berdel v. City of Chicago, 217 Ill. 429, 75 N. E. 386 [1905]; Hyman v. City of Chicago, 188 Ill. 462, 59 N. E. 10

[1900]; Graham v. City of Chicago, 187 Ill. 411, 58 N. E. 393 [1900]; Mead v. City of Chicago, 186 Ill. 54, 57 N. E. 824 [1900]; Bickerdike v. City of Chicago, 185 Ill. 280, 56 N. E. 1096 [1900]; City of Jacksonville v. Hamill, 178 Ill. 235, 52 N. E. 949 [1899].

⁷Mercy Hospital v. City of Chicago, 187 Ill. 400, 58 N. E. 353 [1900].

⁸City of Chicago v. Singer, 202 Ill. 75, 66 N. E. 874 [1903].

⁹Lingle v. City of Chicago, 212 Ill. 512, 72 N. E. 677 [1904]; Hart Bros. v. West Chicago Park Commissioners, 186 Ill. 464, 57 N. E. 1036 [1900].

¹⁰In the Matter of Widening of Broadway in the City of New York, 61 Barb. (N. Y.) 483 [1872].

¹¹City of East Orange v. Hussey, 70 N. J. L. (41 Vr.) 244, 57 Atl. 1086 [1903].

§ 1369. Jurisdiction in error with reference to assessments.

Under some statutes, the jurisdiction of the error court is limited to cases involving a certain minimum amount.¹ Under such statutes, error cannot be prosecuted to an assessment if no one owner is assessed to such minimum amount, even though the assessment as to all the property owners who complain may exceed such amount.² Under some statutes, error will not lie unless the amount in dispute exceeds a certain fixed sum, or unless a constitutional question is involved.³ The United States Supreme Court takes jurisdiction if the validity of a United States statute is in question, even if the amount involved is less than the minimum fixed by statute.⁴ Under some statutes, provision is made for an intermediate court of error, and it is provided that error cases are to go to such intermediate court, if no constitutional question is presented; while, if a constitutional question is presented, such cases are to be taken to the court of last resort directly.⁵ Within the meaning of such statutes, the claim of a railroad company that its right of way is not benefited by the improvement, and that an assessment of such right of way would be a taking of property without due process of law, does not involve the constitutionality of the statute, but merely its construction and application, and such a case is within the jurisdiction of the intermediate court of error.⁶ If a case is transferred from the Supreme Court to the

¹ Russell v. Stansell, 105 U. S. 303, 26 L. 989 [1881].

² Russell v. Stansell, 105 U. S. 303, 26 L. 989 [1881].

³ Tebault v. City of New Orleans, 108 La. 686, 32 So. 983 [1901]; Nichols v. Voorhis, 74 N. Y. 28 [1878].

⁴ Parsons v. District of Columbia, 170 U. S. 45, 42 L. 943, 8 S. 521 [1898]; (affirming Parsons v. District of Columbia, 8 App. D. C. 391 [1896]).

⁵ If a constitutional question is involved the suit must be transferred to the Supreme Court, State ex rel. Curtice v. Smith, 177 Mo. 69, 75 S. W. 625 [1903]; (mandamus to transfer a suit in which the decision of the lower court upheld the constitutionality of a statute requiring written objections to be filed within sixty days in order to be considered; holding on the authority of Richter

v. Merrill, 84 Mo. App. 150, that such statute did not apply to void assessments. The Supreme Court held that such act was unconstitutional, following Barber Asphalt Paving Co. v. Ridge, 169 Mo. 376, 68 S. W. 1043 [1902]; that it was unconstitutional as to all cases, and that mandamus will lie; distinguishing Hilgert v. Barber Asphalt Paving Company, 173 Mo. 319, 72 S. W. 1020). If no constitutional question is involved the case must be transferred to the intermediate court of error. Security Savings Trust Co. v. Donnell, 145 Mo. 431, 46 S. W. 959 [1898]; Security Savings Trust Company v. Donnell, 81 Mo. App. 147 [1899].

⁶ Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Hays, 17 Ind. App. 261, 44 N. E. 375 [1896].

intermediate court of error, the order of transfer is an equivalent to an adjudication that the intermediate court has exclusive jurisdiction of such proceedings.⁷ Under some statutes restricting the jurisdiction of the error court to proceedings involving a certain minimum amount, but excepting cases involving the validity of a tax from such provision, an assessment is held to be a tax. Accordingly, the Supreme Court has jurisdiction to review assessment proceedings, irrespective of the amount involved.⁸ It has, however, been held that if the consent of the property owners is necessary to the assessment, it is not a tax within the meaning of such statutes.⁹ Under a statute which provides that cases relating to revenue shall be taken directly to the Supreme Court, the word "revenue" includes local assessments,¹⁰ and, accordingly, such cases should not be taken to an intermediate court of error.¹¹ Under a statute which limits the jurisdiction of the error court to cases where the judgment which it is sought to reverse equals or exceeds a certain minimum amount, or relates to a freehold, an assessment has been held to relate to a freehold so that the Supreme Court takes jurisdiction, irrespective of the amount involved.¹² An assessment involves a lien on land and, accordingly, error will lie to the Supreme Court, although the amount of the claim is less than two hundred dollars.¹³ An assessment has, however, been held not to involve the title to land within the meaning of a statute giving the Supreme Court jurisdiction of such cases.¹⁴ Under a statute which takes away the right of having an assessment reviewed as to future cases, but provides that no right or remedy of any character shall be impaired by reason

⁷ *Syenite Granite Co. v. Bobb*, 37 Mo. App. 483 [1889].

⁸ *Bitzer v. O'Bryan*, 107 Ky. 590, 54 S. W. 951 [1900]; *Pleasants v. City of Shreveport*, 110 La. 1046, 35 So. 283 [1903]; *S. D. Moody & Co. v. Chadwick*, 108 La. 66, 32 So. 181 [1901-1902]; *Kelly v. Chadwick*, 104 La. 719, 29 So. 295 [1903]; *City of Shreveport v. Prescott*, 51 La. Ann. 1895, 46 L. R. A. 193, 26 So. 664 [1899]; *Vicksburg, Shreveport and Pacific R. R. Co. v. Scott*, 47 La. Ann. 706, 17 So. 249 [1895]; *State ex rel. Hill v. Judges*, 46 La. Ann. 1292, 16 So. 219 [1894].

⁹ *Fayssoux v. Denis*, 48 La. Ann.

850, 19 So. 760 [1896]; *Rooney v. Brown*, 21 La. Ann. 51 [1869].

¹⁰ *Potwin v. Johnson*, 106 Ill. 532 [1883].

¹¹ *People ex rel. Johnson v. Springer*, 106 Ill. 542 [1883]; *Herhold v. City of Chicago*, 106 Ill. 547 [1883]; *Potwin v. Johnson*, 106 Ill. 532 [1883].

¹² *Morris v. City of Chicago*, 11 Ill. 650 [1850].

¹³ *Huesman v. Dersch*, — Ky. —, 109 S. W. 319 [1908].

¹⁴ *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107 [1904]; *Nichols v. Voorhis*, 74 N. Y. 28 [1878].

of the act, and that the act shall not affect or impair any right which has accrued, the right of a property owner to review pre-existing assessments is not affected.¹⁵ Under some statutes, a party who seeks to prosecute error to a default judgment, must file an affidavit showing that he did not have notice of such hearing.¹⁶

§ 1370. Jurisdiction of Supreme* Court of United States with reference to error.

The Supreme Court of the United States may review the judgment of an inferior federal court, if it is claimed that a state law is invalid as contrary to the Constitution of the United States.¹ The United States Supreme Court may review the judgment of the Supreme Court of a state, if the questions of the effect of a provision of the federal constitution or treaty is involved, and the judgment of the Supreme Court of the state upholds the state law as unaffected by the federal provision relied upon and as valid.² The United States Supreme Court is not, however, a harbor of refuge from the errors of the state Supreme Courts,³ and their judgments cannot be reviewed on error unless a federal

¹⁵ In the Matter of Munn, 165 N. Y. 149, 58 N. E. 881 [1900]; (reversing, *In re Munn*, 49 App. Div. 232).

¹⁶ *Stone v. City of Chicago*, 218 Ill. 348, 75 N. E. 980 [1905].

¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 41 L. 369, 17 S. 56 [1896]; (reversing, *Bradley v. Fallbrook Irrigation District*, 68 Fed. 948 [1895]); *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. 569, 4 S. 663; (affirming, *Reclamation Dist. No. 108 v. Hagar*, 4 Fed. 366 [1880]).

² *Louisville & Nashville Railroad Company v. Barber Asphalt Paving Company*, 197 U. S. 430, 25 S. 466 [1905]; (affirming, 76 S. W. 1097, 25 Ky. L. R. 1024); *City of Seattle v. Kelleher*, 195 U. S. 351, 25 S. 44 [1904]; *Chadwick v. Kelley*, 187 U. S. 540, 23 S. 175 [1903]; (affirming, *Kelley v. Chadwick*, 104 La. 719, 29 So. 295 [1901]; *Goodrich v. De-*

troit, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming, *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]); *French v. Barber Asphalt Paving Company*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901]; *Tregea v. Modesto Irrigation District*, 164 U. S. 179, 41 L. 395, 17 S. 52 [1896]; (dismissing appeal from *Modesto Irrigation District v. Tregea*, 88 Cal. 334 [1891]); *Wurts v. Hoagland*, 114 U. S. 606, 29 L. 229, 5 S. 1086 [1885]; (affirming, *Matter of Drainage of the Great Meadows on Pequest River*, 42 N. J. L. (13 Vr.) 553 [1880]; affirmed without opinion, *Hoagland v. State, Simonton, Pros.*, 43 N. J. L. (14 Vr.) 456 [1881]).

³ *Walston v. Nevin*, 128 U. S. 578, 9 S. 192 [1888]; (affirming *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]). See also *Corry v. Campbell*, 154 U. S. 629, 24 L. 926, 14 S. 1183 [1878].

question is involved therein.* The United States Supreme Court will not review a federal question which was not raised in the state courts, and upon which they have not passed.⁵ The method of raising a federal question has been considered at some length by the Supreme Court of the United States.⁶ It is not sufficient to raise the question in the pleadings, if it is not called to the attention of the trial court or the state Supreme Court.⁷ The constitutionality of a state statute as affected by the state constitution, is not a federal question;⁸ nor is the question of the validity of the assessment proceedings as affected by alleged violations of the state statute.⁹ The question of the personal liability of a resident of the state, is not a federal question;¹⁰ but the attempt to impose a personal liability upon a non-resident, presents a federal question, and the United States Supreme Court has reversed the judgment of the supreme court of a state attempting to impose such liability.¹¹ Whether the fact that the taxing officers are disqualified to act by reason of personal interest,¹² whether the property owner has estopped himself from attacking the validity of the assessment,¹³ whether the state may exact payment

* *Lent v. Tillson*, 140 U. S. 316, 334, 35 L. 419, 11 S. 825 [1891]; (affirming *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]); *Walston v. Nevin*, 128 U. S. 578, 582, 32 L. 544, 9 S. 192 [1888]; (affirming *Nevin v. Roach*, 86 Ky. 492, 5 S. W. 546 [1887]).

⁵ *Hulbert v. City of Chicago*, 202 U. S. 275, 26 S. 617 [1906]; *Schaefer v. Werling*, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming, *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149 [1900]); *Dewey v. Des Moines*, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899]; (reversing, *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897]); *Lombard v. West Chicago Park Commissioners*, 181 U. S. 33, 45 L. 731, 21 S. 507 [1901]; (affirming, *Cummings v. West Chicago Park Commissioners*, 181 Ill. 136, 54 N. E. 941 [1899]).

⁶ See *Dewey v. Des Moines*, 173 U. S. 193, 198, 200, 43 L. 665, 19 S. 379 [1899]; (reversing *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897]).

⁷ *Hulbert v. City of Chicago*, 202 U. S. 275, 26 S. 617 [1906].

⁸ *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 45 L. 879, 21 S. 625 [1901].

⁹ *Goodrich v. Detroit*, 184 U. S. 432, 46 L. 627, 22 S. 397 [1902]; (affirming, *Goodrich v. City of Detroit*, 123 Mich. 559, 82 N. W. 255 [1900]).

¹⁰ *Wood v. Brady*, 150 U. S. 18, 37 L. 981, 14 S. 6 [1893]; (affirming, *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]); *Murdock v. City of Cincinnati*, 44 Fed. Rep. 726 [1891]. See also § 1046.

¹¹ *Dewey v. City of Des Moines*, 173 U. S. 193, 43 L. 665, 19 S. 379 [1899]; (reversing, *Dewey v. City of Des Moines*, 101 Ia. 416, 70 N. W. 605 [1897]).

¹² *Hibben v. Smith*, 191 U. S. 310, 24 S. 88 [1903]; (affirming, *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1901]).

¹³ *Schaefer v. Werling*, 188 U. S. 516, 47 L. 570, 23 S. 449 [1903]; (affirming *Schaefer v. Werling*, 156 Ind. 704, 60 N. E. 149 [1900]).

in gold coin while the United States Legal Tender Act is in force,¹⁴ whether the state may assess swamp lands in the hands of a private owner when the United States has granted such swamp lands to the state, upon the understanding that the proceeds of such swamp lands are to be used by the state to reclaim them,¹⁵ whether the right of stopping an improvement by purchase may be denied to a non-resident while it is granted to a resident,¹⁶ questions as to the costs which may be allowed,¹⁷ and whether a decision of the taxing officials shall be final upon questions of fact without any opportunity of court review,¹⁸ are none of them federal questions. If the scope of the state statute conforms to the requirements of the United States Constitution and statutes, the United States Supreme Court will not review the details of the assessment.¹⁹ If error is prosecuted to the Supreme Court of a state, its judgment will not necessarily be reversed because of a change of judicial opinion after the rights of the parties have been fixed,²⁰ although if the federal courts had taken jurisdiction originally of such case they would not necessarily have followed the latest state decision.²¹

§ 1371. Order to which error will lie.

Under most statutes error can be brought only to a final order, on the theory that up to the final order the trial court may correct the error which it has made at some intermediate stage of the proceedings.¹ Accordingly, a proceeding in error which is

¹⁴ *Hagar v. Reclamation District* No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming, *Reclamation Dist. No. 108 v. Hagar*, 4 Fed. 366 [1880]).

¹⁵ *Hagar v. Reclamation District* No. 108, 111 U. S. 701, 28 L. 569, 4 S. 663 [1884]; (affirming, *Reclamation Dist. No. 108 v. Hagar*, 4 Fed. 366 [1880]).

¹⁶ *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618, 48 L. 1142, 24 S. 784 [1904]; (modifying, 117 Fed. 925 [1902]).

¹⁷ *Ballard v. Hunter*, 204 U. S. 241, 27 S. 261 [1907].

¹⁸ *Hibben v. Smith*, 191 U. S. 310, 24 S. 88 [1903]; (affirming, *Hibben v. Smith*, 158 Ind. 206, 62 N. E. 447 [1902]).

¹⁹ *Lent v. Tillson*, 140 U. S. 316, 35 L. 419, 11 S. 285 [1891]; (affirming, *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]).

²⁰ *Wood v. Brady*, 150 U. S. 18, 37 L. 981, 14 S. 6 [1893]; (affirming, *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891]).

²¹ *Board of Commissioners v. Gardiner Savings Institution*, 119 Fed. 36.

¹ *Osborn v. Maxinkuckee Lake Ice Company*, 154 Ind. 101, 56 N. E. 33 [1899]; *Neptune v. Taylor*, 108 Ind. 459, 8 N. E. 566 [1886]; *Tillie v. Mitchell*, — Ky. —, 102 S. W. 263 [1907]; *Moody & Co. v. Chadwick*, 52 La. Ann. 1888, 28 So. 361 [1900].

brought before the final order is rendered, is brought prematurely.² The time within which error may be prosecuted begins to run when the final order is entered.³ It is, accordingly, important to determine what is the final order for purposes of error. A final order is such order, judgment or decree as terminates the proceeding by adjudicating the rights of the parties in such manner as to establish them definitely, if not set aside or reversed.⁴ An order of a court dismissing a supplemental petition,⁵ a judgment in proceedings to review an assessment by certiorari,⁶ an order setting an assessment aside,⁷ an order confirming an assessment,⁸ and an order of a general term of court reversing an order of a special term vacating an assessment without a rehearing,⁹ are all final orders. An order overruling a demurrer to an answer, has been held to be a final order, where it appears that the plaintiff declined to plead further, excepted to the judgment and prayed an appeal to the Supreme Court which was granted, even though no formal order was entered dismissing the petition, where the court and all parties treat such order as a final order.¹⁰ An order non-suiting the plaintiff, which does not prevent him from obtaining relief in a subsequent proceeding,¹¹ an order authorizing an assessment,¹² an order setting aside an order of confirmation of the viewer's report,¹³ an order denying a motion made before confirmation to vacate the orders approving the viewer's

² Commissioners of Lacey Levee & Drainage District v. Langellier, 215 Ill. 271, 74 N. E. 148 [1905]; Neptune v. Taylor, 108 Ind. 459, 8 N. E. 566 [1886]; Tillie v. Mitchell, — Ky. —, 102 S. W. 263 [1907]; Moody & Co. v. Chadwick, 52 La. Ann. 1888, 28 So. 361 [1900].

³ People ex rel. Wallkill Valley Ry. Co. v. Keator, 101 N. Y. 610, 3 N. E. 903 [1885].

⁴ Neptune v. Taylor, 108 Ind. 459, 8 N. E. 566 [1886]; In the Matter of Munn, 165 N. Y. 149, 58 N. E. 881 [1900]; (reversing, *In re* Munn, 49 App. Div. 232); People ex rel. Wallkill Valley Ry. Co. v. Keator, 101 N. Y. 610, 3 N. E. 903 [1885].

⁵ Osborn v. Maxinkuckee Lake Ice Co., 154 Ind. 101, 56 N. E. 33 [1899].

⁶ People ex rel. Wallkill Valley

Ry. Co. v. Keator, 101 N. Y. 610, 3 N. E. 903 [1885].

⁷ In the Matter of Munn, 165 N. Y. 149, 58 N. E. 881 [1900]; (reversing, *In re* Munn, 49 App. Div. 232).

⁸ Neptune v. Taylor, 108 Ind. 459, 8 N. E. 566 [1886].

⁹ In the Matter of the New York Protestant Episcopal School, 82 N. Y. 606 [1880].

¹⁰ Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89, 13 L. R. A. 668, 17 S. W. 212 [1891].

¹¹ Moody & Co. v. Chadwick, 52 La. Ann. 1888, 28 So. 361 [1900].

¹² Commissioners of Lacey Levee & Drainage District v. Langellier, 215 Ill. 271, 74 N. E. 148 [1905].

¹³ Tillie v. Mitchell, — Ky. —, 102 S. W. 263 [1907].

report,¹⁴ or an order appointing freeholders to estimate and report the amount which should be paid by one county to another for the benefits of an outlet ditch,¹⁵ are not final orders, and error cannot be brought thereto. So it is not necessary to prosecute error to each allowance, but it is sufficient to prosecute error when final judgment is entered.¹⁶

§ 1372. Presumption as to error.

Error is never presumed, but in order to obtain a reversal it must appear upon the record; that is, the record must set forth facts enough to show that error was committed in the inferior tribunal which was material and prejudicial to the party who complains thereof.¹ The rule that the judgment of a court of com-

¹⁴ *Neptune v. Taylor*, 108 Ind. 459, 8 N. E. 566 [1900].

¹⁵ *Board of Commissioners of Fulton County v. Board of Commissioners of Henry County*, 64 Ohio St. 160, 59 N. E. 883 [1901].

¹⁶ *Board of County Commissioners of Montgomery County v. Fullen*, 118 Ind. 158, 20 N. E. 771 [1888].

¹ *Irwin v. Mayor, etc., of Mobile*, 57 Ala. 6 [1876]; *Stiewel v. Fencing District No. 6 of Johnson County*, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247 [1902]; *DeHaven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901]; *Pacific Paving Co. v. Mowbray*, 127 Cal. 1, 59 Pac. 205 [1899]; *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720 [1897]; *McDonald v. Dodge*, 97 Cal. 112, 31 Pac. Rep. 909 [1892]; *Crane v. Forth*, 95 Cal. 88, 30 Pac. 193 [1892]; *Alemeda Macadamizing Co. v. Williams*, 70 Cal. 534, 12 Pac. 530 [1886]; *Mahlstadt v. Blanc*, 34 Cal. 577 [1868]; *Appeal of North Beach & Mission R. R. Co., in the Matter of Widening Kearney Street*, 32 Cal. 500 [1867]; *Metropolitan Railroad Co. v. MacFarland*, 20 App. D. C. 421 [1902]; *Clark v. City of Chicago*, 229 Ill. 633, 82 N. E. 370 [1907]; *Gage v. People ex rel. Hanberg*, 213 Ill. 468, 72 N. E. 1108 [1905]; *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898]; *Casey v.*

People ex rel. Kochersperger, 165 Ill. 49, 46 N. E. 7 [1897]; *Gage v. City of Chicago*, 162 Ill. 313, 44 N. E. 729 [1896]; *Merriam v. People ex rel. Kochersperger*, 160 Ill. 555, 43 N. E. 705 [1896]; *Sargeant v. City of Evanston*, 154 Ill. 268, 40 N. E. 440 [1894]; *Schemick v. Chicago*, 151 Ill. 336, 37 N. E. Rep. 888 [1894]; *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Linck v. City of Litchfield*, 141 Ill. 469, 31 N. E. 123 [1893]; *Drainage Commissioners v. Hudson*, 109 Ill. 659 [1885]; *Prout v. The People ex rel. Miller*, 83 Ill. 154 [1876]; *Noonan v. People ex rel. Raymond*, 183 Ill. 52, 55 N. E. 679 [1899]; *Keiser v. Mills*, 162 Ind. 366, 69 N. E. 142 [1903]; *Orth v. Park & Co., — Ky.* —, 80 S. W. 1108, 26 Ky. Law Rep. 184 [1904]; (*denying rehearing of Orth v. Park & Co.*, 117 Ky. 779, 79 S. W. 206; decree modified 81 S. W. 251, 26 Ky. L. R. 342 [1904]); *Godbold v. City of Chelsea*, 111 Mass. 294 [1873]; *Loweree v. City of Newark*, 38 N. J. L. (9 Vr.) 151 [1875]; *In the Matter of Johnston*, 103 N. Y. 260, 8 N. E. 399 [1886]; *In the Matter of Peugnet*, 67 N. Y. 441 [1876]; *In re Avenue D. in City of New York*, 106 N. Y.

petent jurisdiction is conclusive as to the rights of the parties, has, of course, no application to a proceeding in error in which the validity of such judgment is attacked directly.² While every reasonable intendment is to be made in favor of the judgment of the trial court, such judgment is not conclusive evidence of its own validity in proceedings in error.

§ 1373. Materiality of error.

Judgment should be reversed if the court shows a material error prejudicial to the party who complains thereof.¹ In order to be ground for reversal the error complained of must be prejudicial to the party who complains thereof, and a judgment will not be reversed if an error is disclosed by the record, but the record shows that such error did not prejudice the party who complains thereof.² Thus, if the judgment shows that the defendants who were sued by fictitious names were dismissed from the action, failure to order the complaint to be amended by striking out the names of such parties, is not prejudicial error.³ If the determination of the public officials as to the

Supp. 889 [1907]; Northern Pacific Lumbering & Manufacturing Co. v. East Portland, 14 Ore. 3, 12 Pac. 4 [1886]; Philadelphia v. Richards, 124 Pa. St. 303, 16 Atl. 802 [1889].

²Derby v. West Chicago Park Commissioners, 154 Ill. 213, 40 N. E. 438 [1894].

¹Gage v. City of Chicago, 195 Ill. 390, 63 N. E. 184 [1902]; Michael v. City of Mattoon, 172 Ill. 394, 50 N. E. 155 [1898]; Clark v. City of Chicago, 155 Ill. 223, 40 N. E. 495 [1895]; Phillips v. Jollisaint, 7 Ind. App. 458, 34 N. E. 653 [1893]; Strassheim v. Jerman, 56 Mo. 104 [1874].

²Belzer v. Allman, 134 Cal. 399, 66 Pac. 492 [1901]; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. 672 [1886]; People of the State of California v. Hagar, 52 Cal. 171 [1877]; Clapp v. Macfarland, 20 App. D. C. 224 [1902]; Illinois Central R. R. Co. v. People ex rel. Seaton, 189 Ill. 119, 59 N. E. 609 [1901]; Chicago & Northern Pacific R. R. Co. v.

City of Chicago, 172 Ill. 66, 49 N. E. 1006 [1898]; West Chicago Street Railway Co. v. People, Kern, 156 Ill. 18, 40 N. E. Rep. 605 [1895]; Sergeant v. City of Evanston, 154 Ill. 268, 40 N. E. Rep. 440 [1894]; The Chicago, Rock Island & Pacific R. R. Co. v. City of Chicago, 139 Ill. 573, 28 N. E. 1108 [1893]; Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District, 127 Ill. 581, 21 N. E. 206 [1890]; Manor v. Board of Commissioners of Jay Co., 137 Ind. 367, 36 N. E. 1101, 34 N. E. 959 [1893]; Kelly v. Chadwick, 104 La. 719, 29 So. 295 [1903]; Bryant v. Russell, 127 Mo. 422, 30 S. W. 107 [1894]; In the Matter of Deering, 93 N. Y. 361 [1883]; Bell v. City of Yonkers, 78 Hun, 196, 28 N. Y. S. 947 [1894]; Reed v. City of Cincinnati, 8 Ohio C. C. 393 [1894].

³Belzer v. Allman, 134 Cal. 399, 66 Pac. 492 [1901].

necessity of the improvement is final, it is not error to admit evidence on the part of the public corporation tending to show that such improvement was necessary.⁴ If the report of the commissioners is *prima facie* evidence, and there is no evidence tending to rebut such report, an instruction that the report is to be regarded as evidence as if the commissioners were on the stand testifying to the facts therein stated, is, if erroneous, a harmless error.⁵ If personal judgment is entered, and execution awarded against a highway district which has no property subject to execution, the part of the decree awarding execution is a nullity, but is not prejudicial.⁶ What amount of injury as measured in money must be caused by an error to constitute ground for reversal, is a question difficult to determine.⁷ An error which is advantageous to the party who complains thereof, is not ground for reversal.⁸ Thus, a party cannot complain on the ground that interest on deferred installments begins at a period later than that fixed by the ordinance.⁹ A property owner cannot complain of a judgment of sale which orders the sale of less of his property than might have been sold for the assessment.¹⁰ A court of error will not pass upon abstract questions.¹¹ Thus, if an assessment has been vacated, pending error proceedings, the court will not pass upon the question of its validity.¹² If the trial court has rendered a correct judgment, but has given erroneous reasons therefor, such judgment will not be reversed.¹³ Reversal will not be granted for matters which

⁴ *Chicago & Northern Pacific R. R. Co. v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898].

⁵ *Green v. City of Springfield*, 130 Ill. 515, 22 N. E. 602 [1890].

⁶ *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890].

⁷ *In the Matter of Deering*, 93 N. Y. 361 [1883]. (Reversal granted for an error of \$7.01 in an assessment of \$246.95); *Coleman v. Shattuck*, 62 N. Y. 348 [1875]; (reversal denied for error amounting to five cents.)

⁸ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901];

The Bloomington Cemetery Association v. The People of the State, 139 Ill. 16, 28 N. E. 1076 [1893].

⁹ *Halsey v. Town of Lake View*, 188 Ill. 540, 59 N. E. 234 [1901].

¹⁰ *Illinois Central Railroad Company v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609 [1901]; *The Bloomington Cemetery Association v. The People of the State of Illinois*, 139 Ill. 16, 28 N. E. 1076 [1893].

¹¹ *Berry v. City of Des Moines*, 115 Ia. 44, 87 N. W. 747 [1901].

¹² *Berry v. City of Des Moines*, 115 Ia. 44, 87 N. W. 747 [1901].

¹³ *Dunning v. Calkins*, 51 Mich. 556, 17 N. W. 54 [1883].

are within the discretion of the trial court.¹⁴ Error which is prejudicial to the party complaining thereof, may be waived by him, and if so waived is not a ground for reversal.¹⁵ Thus, if a complaint in an action to enforce a street assessment is demurrable because it does not aver performance of the contract for the improvement, and such demurrer is improperly overruled, a judgment will not be reversed where the defendant by answer averred defective performance, and such issue was tried.¹⁶ An amendment to the pleadings to conform to the evidence, will be presumed, if the court below could have permitted such amendment, and if the judgment is otherwise correct.¹⁷ Thus, if an action was brought in the name of a city, when it should have been brought in the name of the contractor, and no objection is made thereto, and the court orders the assessment when collected to be paid over to the contractor, the Supreme Court will regard the complaint as having been amended by making the contractor the plaintiff.¹⁸ The omission of the corporate seal upon the certificate to the copy of an ordinance for a street improvement can be supplied by amendment and will not therefore be reversible error.¹⁹ An error rendered at the instance of the party who complains thereof is not ground for reversal.²⁰ An error prejudicial to other property owners is not ground for reversing a judgment against a property owner who is not prejudiced thereby.²¹ Accordingly, a property owner against whose property confirmation of an assessment has been refused, cannot prosecute error, nor can he join with property owners whose property was included in such judgment.²² Error cannot be prosecuted by one whose property does not appear to have been assessed on the ground that the property benefited was not properly assessed for the costs and expenses of widen-

¹⁴ In the Matter of Loew, 90 N. Y. 666 [1882]; In the Matter of the Extension of the Bowery, 12 Howard (N. Y.) 97 [1856].

¹⁵ Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897].

¹⁶ Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042 [1897].

¹⁷ First Presbyterian Church v. City of Lafayette, 42 Ind. 115 [1873].

¹⁸ First Presbyterian Church v. City of Lafayette, 42 Ind. 115 [1873].

¹⁹ White v. City of Chicago, 188 Ill. 392, 58 N. E. 917 [1900].

²⁰ Fuess v. Kansas City and the Brooklyn Avenue Railway Co., 191 Mo. 692, 90 S. W. 1029 [1905].

²¹ Woodwine v. Leak, 127 Ind. 569, 27 N. E. 161 [1890].

²² Jacobs v. City of Chicago, 178 Ill. 560, 53 N. E. 363 [1899].

ing a street.²⁷ If a verdict and judgment has been entered in favor of a public corporation for its claim in full, and also a finding has been made that the property owner is entitled to a set-off against the contractor, the city cannot complain of the error in permitting such set-off.²⁴

§ 1374. Of what record consists.

The question presented to the error court is whether any error appears upon the record which is material and prejudicial to the party who complains thereof. It is, accordingly, important in many cases to know of what the record consists. This is usually determined by statutory provisions. A record ordinarily consists of the pleadings, process, the verdict, or in some cases the finding of fact, and the final judgment.¹ Under some statutes some of the foregoing matters, such as the findings of fact, are not a part of the record unless made a part thereof by a bill of exceptions, while under other statutes other matters are made a part of the record, even if not preserved by a bill of exceptions.² Under the practice in some jurisdictions the opinion of the trial court is part of the record.³ It has been held that the record must contain the convening order of the court in order that it may appear that the record presents the proceedings of a court.⁴ Since error is tried upon the record of the inferior tribunal, a mistake or deficiency in the record of a lower court can be corrected only by application to the lower court to send up a complete and correct record.⁵ A notice of such application should, however, be given to the adversary party.⁶

§ 1375. Necessity of objections and exceptions.

In most statutes a court of error cannot entertain original jurisdiction of cases which come up before it on error, and, ac-

²² *City and County of San Francisco v. Kiernan*, 98 Cal. 614, 33 Pac. 720 [1893].

²⁴ *City of Pittsburg v. McKnight*, 91 Pa. St. (10 Norris) 202 [1879].

¹ Copy of ordinance attached to assessment petition is part of record: *Maxwell v. City of Chicago*, 185 Ill. 18, 56 N. E. 1101 [1900].

² *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053 [1894]. (Supplemental proceeding for assessment must be part of record.)

³ *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 482, 45 L. 280, 21 S. 174 [1901] (reversing, *Loeb v. Trustees of Columbia Township*, 91 Fed. 37 [1899]).

⁴ *Rich v. City of Chicago*, 59 Ill. 286 [1871].

⁵ *The Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 625 [1892]; *Goodrich v. City of Minonk*, 62 Ill. 121 [1871].

⁶ *Goodrich v. City of Minonk*, 62 Ill. 121 [1871].

cordingly, in order to obtain a reversal, the question upon which reversal is sought, must have been presented to the trial court, and must there have been ruled upon adversely to the party who complains thereof in the error court.¹ Where a motion for a new trial is necessary, it has been held that the party who was defeated below waives all questions raised upon the evidence, unless they are carried into the motion for a new trial as a ground therefor.² An objection which goes to the jurisdic-

¹ *Hulbert v. City of Chicago*, 202 U. S. 275, 26 S. 617 [1906]; *Warner & Malley v. Russel*, 129 Cal. 381, 62 Pac. 75 [1900]; *Swamp Land District No. 207 v. Glide*, 112 Cal. 85, 44 Pac. 451 [1896]; *Ede v. Knight*, 93 Cal. 159, 28 Pac. Rep. 860 [1892]; *Schmidt v. Market Street & Willow Glenn R. R. Co.*, 90 Cal. 37, 27 Pac. 61 [1891]; *Mason v. Austin*, 46 Cal. 285 [1873]; *Williams v. McDonald*, 58 Cal. 527 [1881]; *Nutwood Drainage and Levee District v. Reddish*, 234 Ill. 130, 84 N. E. 750 [1908]; *Lamb v. City of Chicago*, 219 Ill. 229, 76 N. E. 343 [1905]; *Close v. City of Chicago*, 217 Ill. 216, 75 N. E. 479 [1905]; *Frank v. City of Chicago*, 216 Ill. 587, 15 N. E. 213 [1905]; *Ziegler v. City of Chicago*, 213 Ill. 61, 72 N. E. 719 [1904]; *Fiske v. People ex rel. Raymond*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985 [1900]; *Steidl v. People ex rel. Alexander*, 173 Ill. 29, 50 N. E. 129 [1898]; *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731 [1897]; *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897]; *Delamater v. City of Chicago*, 158 Ill. 575, 42 N. E. Rep. 444 [1895]; *Young v. People ex rel. Kern*, 155 Ill. 247, 40 N. E. 604 [1895]; *Thomas v. City of Chicago*, 152 Ill. 292, 38 N. E. 923 [1894]; *County of Jefferson v. City of Mt. Vernon*, 145 Ill. 80, 33 N. E. 1091 [1893]; *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892]; *Hunerberg v. Village of Hyde Park*, 130 Ill. 156, 22 N. E. 486 [1890]; *Deane v. Indiana Macadam & Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903];

Roberts v. Gierss, 101 Ind. 408 [1884]; *Houk v. Barthold*, 73 Ind. 21 [1880]; *Daly v. Gubbins*, 35 Ind. App. 86, 73 N. E. 833 [1904]; *Fralich v. Barlow*, 25 Ind. App. 383, 58 N. E. 271 [1900]; *Lewis v. Albertson*, 23 Ind. App. 147, 53 N. E. 1071 [1899]; *Chicago, Rock Island & Pacific R. R. Co. v. City of Ottumwa*, 112 Ia. 300, 51 L. R. A. 763, 83 N. W. 1074 [1900]; *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899]; *Sleeper v. Bullen*, 6 Kan. 300 [1870]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *Riley v. Stewart*, 50 Mo. App. 594 [1892]; *McCann v. City of Albany*, 158 N. Y. 634, 53 N. E. 673 [1899]; (affirming *McCann v. Albany*, 11 App. Div. 378); *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841 [1892]; *Brehm v. Mayor, Aldermen and Commonalty of New York*, 104 N. Y. 186, 10 N. E. 158 [1887]; *In the Matter of the Department of Public Parks to Acquire Lands*, 85 N. Y. 459 [1881]; *Laimbeer v. Mayor Aldermen and Commonalty of the City of New York*, 6 N. Y. Sup. Ct. Rep. 109 [1850]; *Shiloh Street, Wilson's Appeal*, 152 Pa. St. 136, 25 Atl. 530 [1893].

² *Himmelman v. Hoadley*, 44 Cal. 213 [1872]; *Burhans v. Village of Norwood Park*, 138 Ill. 147, 27 N. E. 1088 [1892]; *Deane v. Indiana Macadam & Construction Co.*, 161 Ind. 371, 68 N. E. 686 [1903]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *City of St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677, 10 S. W. 477 [1888].

tion of the trial court over the subject matter, is never waived; and, accordingly, can be raised for the first time on error.³ Any other question which has not been presented to the inferior tribunal at the trial, and which is first presented to it by a motion for a new trial, is not ground for reversal.⁴ All questions which were raised in the inferior tribunal, and which have been preserved properly, should be considered by the error court if they come within its jurisdiction, and have not in some way been waived by the party complaining thereof.⁵ In order to call the attention of the inferior tribunal to the fact that the party who is prejudiced by its rulings intends to rely thereon in error proceedings, it is ordinarily provided that such party must except to such rulings, and that such exceptions should appear upon the record.⁶ Failure to take an exception, and to have it noted properly on the record operates as a waiver thereof.⁷ An insufficient petition may, however, be regarded as amended if the evidence which has been admitted without objection shows that the plaintiff is entitled to relief, and if the petition could have been amended to conform to such evidence.⁸ It is not, however, necessary that exceptions be made to a final judgment;⁹ or that exceptions be made if the judgment could not be rendered upon the pleadings of the prevailing party.¹⁰ If, however, the only objection to the form of the judgment is that it is a personal judgment as well as a judgment foreclosing the lien of an assessment, such objection is waived if not made to the trial court.¹¹ No particular form of taking exceptions is required.¹² If a decision has been entered overruling a motion to set aside certain findings and conclusions of law, an exception thereto on

³ *Fisher v. City of Chicago*, 213 Ill. 268, 72 N. E. 680 [1904].

⁴ *Goowine v. Leak*, 127 Ind. 569, 27 N. E. 161 [1890].

⁵ *Mack v. Polecat Drainage District*, 216 Ill. 56, 74 N. E. 691 [1908]; *Clark v. City of Chicago*, 155 Ill. 223, 40 N. E. 495 [1895].

⁶ *San Francisco Paving Co. v. Egan*, 146 Cal. 635, 80 Pac. 1076 [1905]; *Santa Cruz Rock Pavement Co. v. Bowie*, 104 Cal. 286, 37 Pac. 934 [1894]; *Hulbert v. City of Chicago*, 217 Ill. 286, 75 N. E. 486 [1905]; *City of Atchison v. Byrnes*, 22 Kan. 65 [1879].

⁷ *City of Atchison v. Byrnes*, 22 Kan. 65 [1879].

⁸ *Harriman v. City of Yonkers*, 181 N. Y. 24, 73 N. E. 493 [1905]; (affirming 81 N. Y. S. 823, 82 App. Div. 408 [1903]).

⁹ *The Board of Commissioners of Wyandotte County v. Arnold*, 49 Kan. 279, 30 Pac. 486 [1892].

¹⁰ *Preston v. Roberts*, 75 Ky. (12 Bush.) 570 [1877].

¹¹ *Leeds v. Defrees*, 157 Ind. 392, 61 N. E. 930 [1901].

¹² *City of Leavenworth v. Mills*, 6 Kan. 288 [1870].

the ground that it is "against the law of the land" is sufficient to save such questions of law for review by the error court.¹³

§ 1376. Form of bill of exceptions.

Since the error court looks solely to the record, and since many questions material to the rights of the parties, such as the evidence and questions as to its admissibility and the charge of the court, do not ordinarily appear of record, it is necessary, in order to have such questions considered by the error court, to have such facts made a part of the record. This is the function of a bill of exceptions.¹ The form of the bill of exceptions depends upon the statutory provisions applicable thereto. If the bill is to be signed by the presiding judge, and it is signed by a person other than the one who appears in the record to be the sole presiding judge, such bill of exceptions is subject to a motion to strike from the files,² but if such motion is not made, and such bill is considered by an intermediate error court, the judgment of such court cannot be reversed by the Supreme Court on the ground of the insufficiency of the bill of exceptions.³ A document not physically incorporated in a bill of exceptions cannot be made a part thereof by a mere reference thereto.⁴ A mere reference in a bill of exceptions to another case in which error was prosecuted from the same judgment is insufficient, even if an abstract of such case was filed.⁵ The time at which a bill of exceptions is to be taken, depends upon the provisions of the statute. Under a statute which provides that a bill of exceptions must be taken at the term at which the objections are made and the exceptions are taken, unless such time is extended, it has been held that where objections were made and overruled at one term, and a final judgment rendered at a subsequent term, a bill of exceptions taken at such later term and embodying the objections made at the preceding term cannot be considered as to the objections made at the preceding term, if no order extending the time for taking such bill of

¹³ *City of Leavenworth v. Mills*, 6 Kan. 288 [1870].

¹ *Santa Cruz Rock Pavement Co. v. Bowie*, 104 Cal. 286, 37 Pac. 934 [1894]. See § 1374.

² *McChesney v. City of Chicago*, 159 Ill. 223, 42 N. E. 894 [1896].

³ *McChesney v. City of Chicago*, 159 Ill. 223, 42 N. E. 894 [1896].

⁴ *Frank v. City of Chicago*, 216 Ill. 587, 15 N. E. 213 [1905].

⁵ *Frank v. City of Chicago*, 216 Ill. 587, 15 N. E. 213 [1905].

exceptions appears.⁶ If a case is taken under advisement at one term and judgment is subsequently entered at a later term, and it is ordered by the court that such judgment be entered as of such preceding term, the time for taking a bill of exceptions runs from the time that the judgment was actually entered.⁷ If separate hearings are had upon the different classes of objections to a special assessment, and no objection is made to such separate hearing, a property owner is entitled to a bill of exceptions showing only the evidence offered by himself and by the other objectors who took part in the hearing, on the same class of objections.⁸

§ 1377. Necessity of bill of exceptions.

If the question complained of appears upon the record in the normal form of the record, a bill of exceptions is not necessary.¹ Thus, where in a confirmation proceeding the ordinance is a part of the record and objections are based upon its insufficiency, such objections present pure questions of law, and no bill of exceptions is necessary.² If, on the other hand, the objections relied upon do not appear upon the record as it is normally constituted, such objections cannot be considered unless the facts upon which such objections are based are preserved by a bill of exceptions.³ Thus, questions as to the admissibility and sufficiency of evidence cannot be considered by the reviewing court unless such evidence is preserved in a bill of exceptions.⁴

⁶ *Village of Franklin Park v. Franklin*, 228 Ill. 591, 81 N. E. 1132 [1907]. See also as to necessity of taking bill of exceptions at term unless time is extended. *City of Chicago v. Hulbert*, — Ill. —, 85 N. E. 222 [1908].

⁷ *Hosmer v. The Hunt Drainage District*, 134 Ill. 360, 26 N. E. 584 [1891].

⁸ *People ex rel. Fisher v. Carter*, 210 Ill. 122, 71 N. E. 369 [1904].

¹ *McChesney v. Chicago*, 151 Ill. 307, 37 N. E. Rep. 872 [1894].

² *McChesney v. Chicago*, 151 Ill. 307, 37 N. E. Rep. 872 [1894].

³ *City of Chicago v. Hulbert*, — Ill. —, 85 N. E. 222 [1908]; *Schafer v. Gerbers*, 234 Ill. 468, 84 N. E. 1064 [1908].

⁴ *Crane v. Forth*, 95 Cal. 88, 30

Pac. 193 [1892]; *Frank v. City of Chicago*, 216 Ill. 587, 15 N. E. 213 [1905]; *Gage v. City of Chicago*, 203 Ill. 26, 67 N. E. 477 [1903]; *Gross v. Village of Grossdale*, 176 Ill. 572, 52 N. E. 370 [1898]; *Cramer v. City of Charleston*, 176 Ill. 507, 52 N. E. 73 [1898]; *Parker v. Village of La Grange*, 171 Ill. 344, 49 N. E. 550 [1898]; *Gage v. City of Chicago*, 162 Ill. 313, 44 N. E. 729 [1896]; *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894]; *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741 [1893]; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892]; *Huston v. Clark*, 112 Ill. 344 [1885]; *Drainage Commissioners v. Hudson*, 109 Ill. 659 [1885]; *Deane v. Indiana & Macadam Construction Co.*, 161 Ind. 371, 18 N. E. 686 [1903];

If a bill of exceptions does not purport to contain all the evidence, it will be presumed, if consistent with the record, that sufficient evidence was offered to support the finding of the court;⁵ and a certificate that the bill of exceptions contains all the evidence cannot be regarded if it is added to such bill after it is filed, and without notice to the adversary party.⁶ A motion to dismiss an improvement petition is regarded as a collateral motion, which is not ordinarily a part of the record, and such motion can therefore become a part of the record only by a special order of the court, or by a bill of exceptions.⁷ Questions raised on a motion to dismiss an appeal from a precept which is issued to collect an assessment for a street improvement, cannot be considered unless preserved in a bill of exceptions.⁸ Evidence which is not preserved in a bill of exceptions cannot be considered, even if it is actually set forth upon the record, since it should not be regarded as a part thereof in legal effect.⁹ Accordingly, if affidavits are introduced, and are not embodied in a bill of exceptions, they cannot be regarded on error, even if they are actually printed in the transcript.¹⁰ On the other hand, if objections are made before the lower court, it will not be presumed that any of them were waived unless a bill of exceptions is taken, showing what particular defenses were urged at the hearing.¹¹

§ 1378. Necessity and form of findings of fact.

The findings of fact must correspond to the issues,¹ and if they do not correspond, the judgment must be reversed.² How-

Rosetta Gravel Paving & Improvement Co. v. Kennedy, 51 La. Ann. 1535, 26 So. 468; Cuming v. City of Grand Rapids, 46 Mich. 150, 9 N. W. 141 [1881]; Hill-O'Meara Construction Co. v. Sessinghaus, 106 Mo. App. 163, 80 S. W. 747 [1904]; Crane v. Mallinckrodt, 9 Mo. App. 316 [1880]; Northern Pacific Lumbering & Manufacturing Company v. East Portland, 14 Or. 3, 12 Pac. 4 [1886]; Wilvert v. Sunbury Borough, 81½ Pa. St. (31 P. F. Smith) 57 [1876].

⁵ Gage v. City of Chicago, 162 Ill. 313, 44 N. E. 729 [1896]; Goodwillie v. City of Lake View, 137 Ill. 51,

27 N. E. 15 [1892]; Goodrich v. City of Minonk, 62 Ill. 121 [1871].

⁶ Goodrich v. City of Minonk, 62 Ill. 121 [1871].

⁷ Sample v. Carroll, 132 Ind. 496, 32 N. E. 220 [1892].

⁸ Lammers v. Balfe, 41 Ind. 218 [1872].

⁹ Warren & Malley v. Russell, 129 Cal. 381, 62 Pac. 75 [1900].

¹⁰ Warren & Malley v. Russell, 129 Cal. 381, 62 Pac. 75 [1900].

¹¹ Gage v. City of Chicago, 201 Ill. 93, 66 N. E. 374 [1903].

¹ Spaulding v. Wesson, 84 Cal. 141, 24 Pac. 377 [1890].

² Spaulding v. Wesson, 84 Cal. 141, 24 Pac. 377 [1890].

ever, a finding as to controlling facts is sufficient, even if certain minor questions embodied in the issue were not passed upon, if such minor questions could not have affected the result under the controlling facts as found.³ An omission to make a specific finding as to the validity of assessment liens, is not ground for reversal if the judgment of the trial court is against the validity of the liens, and if the record shows affirmatively that there was no evidence tending to establish the existence of certain facts which were essential to the validity of such liens.⁴ If the judgment of the lower court is based upon special findings of fact, and in such findings one of the essential ultimate facts is omitted, judgment based upon such findings must be reversed.⁵ While it is ordinarily said that findings of fact made by the trial court must be findings of the ultimate and controlling facts in the case,⁶ it has been said to be sufficient if facts are found from which the ultimate fact must necessarily follow, even if the ultimate fact is not found in express terms.⁷ A finding of fact is not necessary if judgment is rendered upon the pleadings.⁸

§ 1379. Effect of findings of fact.

A general finding of fact for one of the parties, will be presumed to be based upon sufficient evidence, in the absence of a bill of exceptions in which the evidence is embodied,¹ or even if there is a bill of exceptions if it does not show that it contains all the evidence.² If, however, an ordinance is *prima facie* insufficient, and can only be rendered sufficient by explanatory evidence, it has been held that it will not be presumed that such explanatory evidence was offered, unless a bill of exceptions

³ Blochman v. Spreckels, 135 Cal. 662, 57 L. R. A. 213, 67 Pac. 1061 [1902]; Dougherty v. Nevada Bank, 81 Cal. 162, 22 Pac. 513 [1889]; Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589 [1886].

⁴ Brady v. Burke, 90 Cal. 1, 27 Pac. 52 [1891].

⁵ Union Cemetery Association v. McConnel, 124 N. Y. 88, 26 N. E. 330 [1891]; Springer v. Avondale, 35 O. S. 620 [1880].

⁶ People of the State of California v. Hagar, 52 Cal. 171 [1877].

⁷ People of the State of California v. Hagar, 52 Cal. 171 [1877].

⁸ Taylor v. Palmer, 31 Cal. 240 [1866].

¹ De Haven v. Berendes, 135 Cal. 178, 67 Pac. 786 [1901]; Larson v. City of Chicago, 172 Ill. 298, 50 N. E. 179 [1898]; Wadlow v. City of Chicago, 159 Ill. 176, 42 N. E. 866 [1896].

² Goodwillie v. City of Lake View, 137 Ill. 51, 27 N. E. 15 [1892].

preserving such evidence is taken.³ If a bill of exceptions is taken which shows upon its face that it contains all the evidence offered at the hearing a judgment may be reversed if evidence essential to the case of the prevailing party is omitted.⁴ An error which appears from the entire record to be based upon the clerical or technical mistake, will not be regarded by the court.⁵ Findings of ultimate and controlling facts made by the trial court, will be followed by the error court unless a bill of exceptions is taken, preserving all the evidence and showing that no evidence was offered tending to establish one or more of such essential facts.⁶ Accordingly, a finding of fact made by the trial court will be followed if no bill of exceptions is taken.⁷ A finding of fact is insufficient if the record contains all the evidence, and there is a total lack of evidence in support of such finding.⁸ Thus, if there is a total lack of evidence tending to establish a necessary notice, a judgment of confirmation should be reversed.⁹ In case of a conflict between the special findings and the general findings, the special findings control.¹⁰ A finding of fact, or the verdict of a jury, will not be reviewed by the error court if there is any substantial evidence tending to support each ultimate fact,¹¹ or if there is no bill of exceptions setting forth all the evidence.¹² By statute in some jurisdictions

³ *Kelly v. City of Chicago*, 193 Ill. 324, 61 N. E. 1009 [1901]; *Kuester v. City of Chicago*, 187 Ill. 21, 58 N. E. 307 [1900].

⁴ *People ex rel. Price v. Lyon*, 218 Ill. 577, 75 N. E. 1017 [1905]; *City of St. Louis to use of Botchford v. DeNoue*, 44 Mo. 136 [1869].

⁵ *Himmelmänn v. Reay*, 38 Cal. 163 [1869].

⁶ *Russell v. Adkins*, 24 Mo. App. 605 [1887].

⁷ *Blanchard v. Ladd*, 135 Cal. 214, 67 Pac. 131 [1901]; *Gage v. People ex rel. Kochersperger*, 163 Ill. 39, 44 N. E. 819 [1896]; *Falch v. The People ex rel. Johnson*, 99 Ill. 137 [1881].

⁸ *Himmelmänn v. Spanagel*, 39 Cal. 389 [1870].

⁹ *White & Gleason v. City of Chicago*, 188 Ill. 392, 58 N. E. 917 [1900]; *Toberg v. City of Chicago*, 164 Ill. 572, 45 N. E. 1010 [1897];

Kearney v. City of Chicago, 163 Ill. 293, 45 N. E. 224 [1896].

¹⁰ *Capron v. Hitchcock*, 98 Cal. 427, 33 Pac. 431 [1893].

¹¹ *King v. City of Portland*, 184 U. S. 61, 46 L. 431, 22 S. 290 [1902]; (affirming *King v. City of Portland*, 38 Or. 402, 55 L. R. A. 812, 63 Pac. 2 [1900]); *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896]; *Williams v. Savings & Loan Society*, 97 Cal. 122, 31 Pac. 908 [1893]; *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33 [1898]; *Fahnestock v. City of Peoria*, 171 Ill. 454, 49 N. E. 496 [1898]; *Smith v. City of Buffalo*, 159 N. Y. 427, 54 N. E. 62 [1899].

¹² *Pacific Paving Co. v. Mowbray*, 127 Cal. 1, 59 Pac. 205 [1899]; *Michael v. City of Mattoon*, 172 Ill. 394, 50 N. E. 155 [1898]; *Larson v. People ex rel. Kochersperger*, 170 Ill. 93, 48 N. E. 443 [1897]; *Casey v. People ex rel. Kochersperger*, 165

the error court cannot review the findings of fact upon certain specified questions made by inferior courts.¹³

§ 1380. Conclusions of law.

Provision is frequently made for findings of law as separate and distinct from findings of fact or from a general finding on the issues in favor of one party or the other. A finding of ultimate facts controls erroneous conclusions of law, and upon such findings the error court may reverse the judgment of a trial court and enter the judgment which the trial court should have entered.¹ If possible, conclusions of fact will be construed so as to be consistent with the conclusions of law actually found by the court.² A finding that a lien is valid, is a conclusion of law, even if erroneously incorporated in the conclusions of fact.³ Under some statutes the conclusions of law reached by the trial court may be preserved upon the record separate from the conclusions of fact.⁴ Substantial compliance with the statutes applicable thereto must be had in order to enable the defeated party to obtain a reversal upon such questions. Under a statute requiring the submission of written propositions of law to the court, in order to enable him to adopt or reject them, a party who has not submitted such written propositions cannot have a reversal based upon the remarks of the trial court in deciding the case as showing the conclusions of law adopted.⁵

§ 1381. Reversal not granted if evidence conflicting.

It is the duty of the trial court to pass upon the weight of the evidence,¹ and under many statutes the error court will not

Ill. 49, 46 N. E. 7 [1897]; *Cuming v. Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881].

¹³ *Dean v. Mayor and Aldermen of the City of Paterson*, 68 N. J. L. (39 Vr.) 664, 54 Atl. 836 [1902]; *Morris v. Mayor and Council of the City of Bayonne*, 62 N. J. L. (33 Vr.) 385, 41 Atl. 924 [1898]; *State, Moran, Pros. v. Mayor and Aldermen of Jersey City*, 58 N. J. L. (29 Vr.) 653, 35 Atl. 950 [1896].

¹ *Nevada National Bank of San Francisco v. Poso Irrigation District*, 140 Cal. 344, 73 Cal. 1056 [1903]; *Oakland Paving Co. v. Bagge*, 79 Cal. 439, 21 Pac. 855 [1889]; *The Board of Commissioners of Wy-*

lotte County v. Arnold, 49 Kan. 279, 30 Pac. 486 [1892].

² *De Haven v. Berendes*, 135 Cal. 178, 67 Pac. 786 [1901].

³ *Petaluma Paving Co. v. Singley*, 136 Cal. 616, 69 Pac. 426 [1902].

⁴ *West Chicago Park Commissioners v. Metropolitan West Side Elevated Railway Co.*, 182 Ill. 246, 55 N. E. 344 [1899]; *Louisville, New Albany & Chicago Ry. Co. v. State for use*, 122 Ind. 433, 24 N. E. 350 [1889].

⁵ *West Chicago Park Commissioners v. Metropolitan West Side Elevated Railway Co.*, 182 Ill. 246, 55 N. E. 344 [1899].

¹ *Mason v. Austin*, 46 Cal. 385 [1873].

pass upon the weight of the evidence if there is substantial evidence tending to establish each fact material to the case of the prevailing party.² Accordingly, if the evidence is conflicting, and there is some evidence tending to establish each fact material to the case of the prevailing party, the error court will not attempt to weigh the evidence, or make its own findings of fact, and in such cases it will accordingly not reverse the judgment of the trial court.³

§ 1382. Reversible error.

If substantial error is shown which is prejudicial to the party who complains thereof, a judgment rendered against such party must be reversed, if he has not in some way waived such error. Judgment may accordingly be reversed for errors on questions of evidence which are properly presented by a bill of exceptions.¹ If the trial court reserves his ruling when objection is made, and subsequently omits to make such ruling, this constitutes reversible error.² The exclusion of evidence which is in legal effect a repetition of evidence already introduced, is

² *Ritter v. Drainage District No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *Kiley v. Forsee*, 57 Mo. 390 [1874].

³ *Ritter v. Drainage District No. 1, Poinsett County*, 78 Ark. 580, 94 S. W. 711 [1906]; *Lower Kings River Reclamation District No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887 [1899]; *Bernstein v. Downs*, 112 Cal. 197, 44 Pac. 557 [1896]; *Diggins v. Hartshorne*, 108 Cal. 154, 41 Pac. 283 [1895]; *Fanning v. Deviston*, 93 Cal. 186, 28 Pac. 943 [1892]; *Himmelmann v. Booth*, 53 Cal. 50 [1878]; *Piper's Appeal in the Matter of Widening Kearney Street*, 32 Cal. 530 [1867]; *Clapp v. Macfarland*, 20 App. D. C. 224 [1902]; *Topliff v. City of Chicago*, 196 Ill. 215, 63 N. E. 692 [1902]; *Houston v. City of Chicago*, 191 Ill. 559, 61 N. E. 396 [1901]; *West Chicago Park Commissioners v. Chicago Terminal Transfer Ry. Co.*, 183 Ill. 68, 56 N. E. 1134 [1899]; *Illinois Central R. R. Co. v. City of Kankakee*, 164 Ill. 608, 45 N. E. 971 [1897]; *Culver v.*

People ex rel. Kochersperger, 161 Ill. 89, 43 N. E. 812 [1896]; *Falloon v. City of Hiawatha*, 66 Kan. 769, 71 Pac. 1127 [1903]; *Heming v. Stengel*, 112 Ky. 906, 66 S. W. 41, 67 S. W. 64, 23 Ky. Law Rep. 1793 [1902]; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045 [1900]; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 860 [1898]; *Kiley v. Forsee*, 57 Mo. 391 [1874]; *Kuhns v. City of Omaha*, 55 Neb. 183, 75 N. W. 562 [1898]; *Dean v. Mayor and Aldermen of the City of Paterson*, 68 N. J. L. (39 Vr.) 664, 54 Atl. 836 [1902].

¹ *Dyer v. Brogan*, 57 Cal. 234 [1881]; *Jones v. City of Chicago*, 206 Ill. 374, 69 N. E. 64 [1903]; *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101 [1902]; *Chicago & Northern Pacific R. R. Co. v. City of Chicago*, 172 Ill. 66, 49 N. E. 1006 [1898]; *St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677, 10 S. W. 477 [1888].

² *City of Stockton v. Dunham*, 59 Cal. 608 [1881].

not erroneous.³ A judgment confirming an assessment which is based upon an ordinance which is fatally defective as not specifying the dimensions or material of the improvement, should be reversed.⁴ If the trial court leaves to the jury questions which should be determined by the court, and the jury decides such questions erroneously,⁵ or if the court decides questions of fact which should be left to the jury,⁶ reversible error exists. If the court denies trial by jury, reversible error exists if the party demanding a jury is entitled thereto by law;⁷ while otherwise no error exists.⁸ An error in the charge of the court to the jury which is substantially prejudicial to the party complaining thereof,⁹ such as an erroneous charge concerning the burden of proof,¹⁰ is reversible error. The refusal of erroneous instructions is not of course error. A charge is not erroneous if taken as a whole if it gives to the jury the correct rule of law to apply.¹¹ It has been held that it is not error for the trial court to refer to the number of witnesses upon each side, and charge the jury that they must decide according to the weight of the evidence,¹² at least as long as the court does not tell the jury that as a matter of law, the weight of the evidence is with the party offering the greater number of witnesses. An error in omitting to charge upon certain questions is ordinarily not error unless a correct charge upon such questions has been offered and refused.¹³

§ 1383. Error in form of judgment.

Even if the plaintiff is entitled to judgment, an error in the form thereof may constitute reversible error,¹ as where it is ad-

³ Thomas v. City of Chicago, 152 Ill. 292, 38 N. E. 923 [1894].

⁴ Mansfield v. People ex rel. Wells, 164 Ill. 611, 45 N. E. 976 [1897].

⁵ Bowery National Bank v. Mayor, etc., of the City of New York, 8 Hun (N. Y.) 224 [1876].

⁶ Gibson v. Zimmerman, 27 Mo. App. 90 [1887]; O'Meara v. Green, 16 Mo. App. 118 [1884].

⁷ Todd v. Macfarland, 20 App. D. C. 176 [1902].

⁸ Commissioners of Fountain Head District v. Wright, 228 Ill. 208, 81 N. E. 849 [1907].

⁹ Bacon v. Mayor and Aldermen of Savannah, 91 Ga. 500, 17 S. E. 749

[1893]; Walters v. Town of Lake, 129 Ill. 23, 21 N. E. 556 [1890]; Kansas City v. Hill, 80 Mo. 523 [1883].

¹⁰ Bacon v. Mayor and Aldermen of Savannah, 91 Ga. 500, 17 S. E. 749 [1893].

¹¹ Thomas v. City of Chicago, 152 Ill. 292, 38 N. E. 923 [1894].

¹² Philadelphia to use v. Monument Cemetery Co., 147 Pa. St. 170, 23 Atl. 400 [1892].

¹³ Wilson v. Talley, 144 Ind. 74, 42 N. E. 362, 42 N. E. 1009 [1895].

¹ Clark v. Porter, 53 Cal. 409 [1879].

mitted in the pleading that the property assessed belongs to several owners, but judgment is rendered against only one,² or where judgment is rendered declaring an assessment a lien upon two or more distinct tracts of land for the aggregate amount due upon each of them.³ A personal judgment is erroneous under a statute which does not authorize such judgment,⁴ but if a judgment is ambiguous upon this question, and is capable of being construed as a personal judgment, it may, if otherwise correct, be modified so as not to be a personal judgment, and may be affirmed as modified,⁵ or the personal judgment may be reversed while the judgment declaring the assessment to be a lien may be affirmed.⁶

§ 1384. Parties to error proceedings.

Error can be prosecuted only by a party who was prejudiced by the judgment of the lower court.¹ Other property owners who do not prosecute error are not adversary parties,² as they are not regarded as being prejudicially affected by a reversal of a judgment upholding an assessment against their property. So a street car company cannot be heard in an error proceeding prosecuted by a property owner to which such street car company is not a party, although the question of the duty of such company to pave the space between its tracks is involved.³ A lessee cannot prosecute error to a judgment of confirmation by which his entire leasehold interest has been expressly excepted, even if he has covenanted in his lease to pay all taxes and assessments.⁴ Under some statutes, property owners

² Clark v. Porter, 53 Cal. 409 [1879].

³ Brockschmidt v. Cavender, 3 Mo. App. 568 [1877].

⁴ Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014 [1895]; Strasshein v. Jerman, 56 Mo. 104 [1874].

⁵ Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014 [1895].

⁶ Strasshein v. Jerman, 56 Mo. 104 [1874].

¹ City and County of San Francisco v. Kiernan, 98 Cal. 614, 33 Pac. 720 [1893]; Jacobs v. City of Chicago, 178 Ill. 560, 53 N. E. 363 [1899]; Gibler v. City of Mattoon, 167 Ill. 18, 47 N. E. 319 [1897];

Schemick v. City of Chicago, 151 Ill. 336, 37 N. E. Rep. 888 [1894]; Woodwine v. Leak, 127 Ind. 569, 27 N. E. 161 [1890]; Hawley v. Mayor and City Council of Baltimore, 33 Md. 270 [1870]; City of Pittsburg v. McKnight, 91 Pa. St. (10 Norris) 202.

² Warren v. Ferguson, 108 Cal. 353, 41 Pac. 417 [1895]; Foley v. Bullard, 97 Cal. 516, 32 Pac. 574 [1893]; Morgan Civil Township v. Hunt, 104 Ind. 590, 4 N. E. 299 [1885].

³ Berry v. City of Des Moines, 115 Ia. 44, 87 N. W. 747 [1901].

⁴ Weise v. City of Chicago, 200 Ill. 339, 65 N. E. 648 [1902].

in interest, who were not parties below, may, on filing an affidavit showing interest, be heard on appeal or error.⁵ By statute the right of appeal and error may be expressly limited to those who appear and file remonstrances below.⁶ All the remonstrants must be made parties to the proceedings in error and if one is omitted the proceedings in error should be dismissed.⁷ One who has purchased special assessment vouchers, but who is not party to the assessment proceedings, cannot be made a party to an appeal.⁸ Executors of a deceased defendant have been allowed to become parties to an error proceeding.⁹ It is better practice to make all the parties to the suit below, parties to the proceedings in error. At the same time, if unnecessary parties have been brought in in the original action, it has been held not to be ground for dismissal in error to omit such parties from the error proceedings.¹⁰ A slight defect in naming partners as defendants in error, which can be cured by the doctrine of *idem sonans*, is immaterial.¹¹

§ 1385. Pleadings in error.

A petition in error ordinarily raises questions of pure law, and is not therefore governed by the rules applicable to pleading facts. It is, however, necessary that the petition assign the errors upon which the plaintiff in error relies, and the reviewing court need not regard any error which is not assigned,¹ even if it is argued.² Objections must be so definite that the court can see from the record what effect or irregularity was questioned thereby.³ Thus, a general objection that certain affidavits

⁵ *Swindler v. Monrovia & Belleville Gravel Road Co.*, 33 Ind. 160 [1870].

⁶ *Wilkinson v. Lemasters*, 122 Ind. 82, 23 N. E. Rep. 688 [1889].

⁷ *Lanster v. Meyers*, — Ind. —, 84 N. E. 1087 [1908].

⁸ *Markley v. City of Chicago*, 167 Ill. 626, 48 N. E. 1056 [1897].

⁹ *The Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 625 [1892].

¹⁰ *City of Kansas City v. Hanson*, 8 Kan. App. 290, 55 Pac. 513 [1898].

¹¹ *American Steel Dredge Works v. Board of Commissioners of Putnam County*, — Ind. —, 85 N. E. 1 [1908].

¹ *Buckman v. Landers*, 111 Cal. 347, 43 Pac. 1125 [1896]; *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541 [1903]; *Drainage Commissioners v. Hudson*, 109 Ill. 659 [1885]; *Lux & Talbot Stone Co. v. Donaldson*, 162 Ind. 481, 68 N. E. 1014 [1903]; *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897].

² *Drainage Commissioners v. Hudson*, 109 Ill. 659 [1885].

³ *McLennan v. City of Chicago*, 218 Ill. 62, 75 N. E. 762 [1905]; *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541 [1903].

were defective, without pointing out wherein they were defective,⁴ or that the improvement ordinance is defective in its description of the improvement, without indicating in what part of the specifications such deficiency exists,⁵ is in each case insufficient. If, however, the case has been tried below upon the objection that the ordinance does not specify the nature, character, locality and description of the proposed improvement, and such objection is not attacked below as being indefinite, such question will be considered on error.⁶ Under some statutes the defendant in error cannot seek reversal of the judgment by filing a cross-petition in error.⁷ In other jurisdictions he is permitted to file a cross-petition in error,⁸ but unless he assigns the errors upon which he wishes to rely, he cannot be heard to object to the judgment rendered below.⁹

§ 1386. Necessity of brief.

Under some statutes it is necessary that a party seeking reversal for alleged error file a brief in support of his position, and if such brief is not filed within the time specified, such petition or cross petition in error must be dismissed without consideration of the merits.¹ It is often provided that a brief or abstract must be filed, referring to the parts of the record in which the alleged error appears, so as to aid the court in finding such questions in the record, and in the absence of such brief or abstract the court will not search the record in order to determine whether error exists.²

§ 1387. Notice of proceedings in error.

Notice of proceedings in error must usually be given by the party who brings such proceeding to the parties who would be

⁴ McLennan v. City of Chicago, 218 Ill. 62, 75 N. E. 762 [1905].

⁵ Gorton v. City of Chicago, 201 Ill. 534, 66 N. E. 541 [1903].

⁶ Close v. City of Chicago, 217 Ill. 216, 75 N. E. 479 [1905]; Mead v. City of Chicago, 186 Ill. 54, 57 N. E. 824 [1900].

⁷ Dougherty v. Henarie, 47 Cal. 9 [1873].

⁸ The People ex rel. Miller v. Brislin, 80 Ill. 423 [1875].

⁹ The People ex rel. Miller v. Brislin, 80 Ill. 423 [1875].

¹ Lux & Talbot Stone Co. v. Donaldson, 162 Ind. 481, 68 N. E. 1014 [1903].

² Ottis v. Sullivan, 219 Ill. 365, 76 N. E. 487 [1906]; Baltimore & Ohio Railroad Co. v. Daegling, 30 Ind. App. 180, 65 N. E. 761 [1902]; Farmers Loan & Trust Co. v. Hastings, 2 Neb. (Unoff.) 337, 96 N. W. 104 [1902].

affected prejudicially by the reversal.¹ Notice need not, however, be given to those who would not be prejudicially affected by the reversal. Thus, if the lower court has held the assessment to be valid, and a property owner brings proceedings in error in the attempt to have the assessment set aside, he need not serve notice on the other property owners.²

§ 1388. Time of bringing error proceedings.

A time is usually fixed by statute within which proceedings in error must be brought.¹ This time ordinarily runs from the entry of the final judgment or order.² If the trial court has taken the case under advisement, and at a subsequent term has rendered a judgment, and has ordered it to be entered as of the preceding term at which he took it under advisement, it has been held that the time for prosecuting error begins to run from the time at which such judgment is in fact rendered.³ The propriety of this holding is undoubted, and if the record shows the date at which the judgment was rendered in fact, no difficulty in applying the rule can arise; but if the record merely shows as of what date judgment was rendered, but does not disclose the fact that it was not actually rendered until a later term, the conclusive effect of the record below presents many practical difficulties to a party who seeks relief by error. A statute permitting error to be prosecuted in thirty days does not take away the right, given by an earlier statute, to prosecute error in six months.⁴ A statute extending the period of limitations, and by its terms applicable to "any assessment heretofore made," is held not to apply to assessments as to which the bar of the prior statute was complete.⁵

§ 1389. Nature of judgment of reversal.

The form and nature of a judgment of reversal depends upon the nature of the error for which the judgment of the court

¹ Warren v. Ferguson, 108 Cal. 535, 41 Pac. 417 [1895].

² Warren v. Ferguson, 108 Cal. 535, 41 Pac. 417 [1895].

³ Hosmer v. The Hunt Drainage District, 134 Ill. 360, 26 N. E. 584 [1891]; People ex rel. Wallkill Valley Railroad Company v. Keator, 101 N. Y. 610, 3 N. E. 903 [1885].

⁴ Hosmer v. The Hunt Drainage

District, 134 Ill. 360, 26 N. E. 584 [1891].

⁵ Hosmer v. The Hunt Drainage District, 134 Ill. 360, 26 N. E. 584 [1891].

⁶ In re Scranton Sewer, 213 Pa. 4, 62 Atl. 173 [1905].

⁷ The Russel and Allison Drainage District v. Benson, 125 Ill. 490, 17 N. E. 814 [1889].

below has been reversed. If the error of the lower court is only in the entry of the judgment, and not in the proceedings antecedent thereto,¹ as where the error consists in failing to show the amount for which the judgment was rendered, and in ordering the sale for the costs only,² reversal will be had, with instructions to enter the judgment in the proper manner.³ An error court may, however, reserve the judgment of the trial court, and enter judgment upon the findings of fact made by such trial court.⁴ If a finding of fact is defective, the case may be remanded for a complete finding of fact.⁵ If the trial court erroneously declines to pass on the validity of certain defenses, the error court may reverse and remand with instructions to pass on the validity of such defenses.⁶ If the findings on certain issues are free from error and those on other distinct and separate issues are erroneous, the latter only may be reversed.⁷ If the controlling facts are established or conceded, the court of error may render the judgment which the court below should have rendered, and, accordingly, it may correct a description of the realty, if there is no dispute as to the controlling facts, and if the court below should have made such correction.⁸ In case of a total failure of evidence on some material point, there is a difference of procedure in different jurisdictions as to the power of the court in reversing the judgment in favor of the party whose case is thus defective. It has been said to be discretionary with the error court, whether to reverse the judgment and remand for a new hearing, or to dismiss the petition if the petitioner's case is defective.⁹ In other jurisdictions it has been said that in such case the error court has power only to reverse and remand, and that it cannot enter judgment for the adversary party.¹⁰ If improper items have been included in a judgment

¹ *People v. Smythe*, 232 Ill. 242, 83 N. E. 821 [1908]; (same style, 232 Ill. 348, 83 N. E. 858 and 232 Ill. 529, 83 N. E. 828 [1908]; *Gage v. People ex rel. Hanberg*, 213 Ill. 457, 72 N. E. 1099 [1905]; *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904].

² *Gage v. People ex rel. Hanberg*, 213 Ill. 457, 72 N. E. 1099 [1905].

³ *Gage v. People ex rel. Hanberg*, 207 Ill. 377, 69 N. E. 840 [1904].

⁴ The Board of Commissioners of

Wyandotte County v. Arnold, 49 Kan. 279, 30 Pac. 486 [1892].

⁵ *City of Bridgeport v. Giddings*, 43 Conn. 304 [1876].

⁶ *Quint v. McMullen*, 103 Cal. 381, 37 Pac. 381 [1894].

⁷ *Patton v. City of Springfield*, 99 Mass. 627 [1868].

⁸ *Haegle v. Mallinckrodt*, 3 Mo. App. 329 [1877].

⁹ In the Matter of Meade, 74 N. Y. 216 [1878].

¹⁰ *Ede v. Knight*, 93 Cal. 159, 28 Pac. 860 [1892].

of confirmation, the reviewing court has power only to reverse, and it cannot expunge such items, and render a judgment of confirmation for the proper items.¹¹ If evidence is excluded, the error court has no power to order the entry of a judgment in accordance with the effect which such evidence would have had if admitted.¹² If the defendant in error consents to a modification of the judgment of the lower court by striking out the improper part of an assessment, the court may modify and affirm as modified instead of reversing and remanding for a new trial.¹³

§ 1390. Effect of reversal and affirmance.

If the error court reverses the judgment of the lower court, the case stands for most purposes as if the judgment of the lower court had never been rendered.¹ Such judgment of reversal is an adjudication between the parties upon the grounds for which such reversal was entered.² Thus, if a judgment refusing confirmation is reversed, such reversal is conclusive as to the regularity and sufficiency of the proceedings.³ If a judgment has been rendered in favor of defendant on a general demurrer to plaintiff's complaint, a reversal of such judgment is an adjudication that the suit was brought in the name of the proper plaintiff.⁴ If a judgment of confirmation of a second assessment has been reversed upon the ground that the first assessment is still in force, the trial court may, upon notice, vacate its order, setting aside the judgment upon the first assessment, and may on proper application enter a judgment of sale for non-payment of such first assessment.⁵ The reversal of an order dismissing an assessment petition leaves a prior judgment in full force and effect without a *nunc pro tunc* order

¹¹ *Thompson v. City of Chicago*, 197 Ill. 599, 64 N. E. 392 [1902].

¹² *Dyer v. Brogan*, 57 Cal. 234 [1881]. "This would be to convert this court into a court of original jurisdiction. We would then be trying the case on the evidence, which would be a usurpation of power." *Dyer v. Brogan*, 57 Cal. 234, 235, 236 [1881].

¹³ *Perine v. Lewis*, 128 Cal. 236, 60 Pac. 422 [1900].

¹ *McChesney v. People ex rel. Raymond*, 200 Ill. 146, 65 N. E. 626 [1902].

² *McChesney v. People ex rel. Raymond*, 200 Ill. 146, 65 N. E. 626 [1902]; *Sweet v. West Chicago Park Commissioners*, 177 Ill. 492, 53 N. E. 74 [1899].

³ *Sweet v. West Chicago Park Commissioners*, 177 Ill. 492, 53 N. E. 74 [1899].

⁴ *Reclamation District No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676 [1884].

⁵ *McChesney v. People ex rel. Raymond*, 200 Ill. 146, 65 N. E. 626 [1902].

confirming such assessment.⁶ A judgment reversing a confirmation judgment on the ground that it is invalid in matter of substance, imposes upon the public corporation the duty of levying a re-assessment under a statute making provision therefor, even if there is no formal order remanding the cost and directing a re-assessment.⁷ A reversal of a judgment of confirmation which does not go to the ultimate validity of the original assessment is not a final disposition of the assessment, and does not confer or impose the power to levy a re-assessment. Thus, if the ordinance contains the term "flat stones," and a judgment of confirmation entered without proof that such term had a well known and commercial meaning among persons engaged in constructing such improvement, has been reversed and remanded to allow evidence to be taken upon such question, the power of levying a re-assessment does not exist.⁸ The judgment of the trial court is not an adjudication upon the merits of the case between the parties thereto after it has been reversed.⁹ After a judgment of confirmation has been reversed, a sale for such assessment cannot be ordered.¹⁰ If a judgment of confirmation has been reversed, and the ordinance was valid except as to certain specified items, the trial court may recast the assessment without a new ordinance.¹¹ If, however, the judgment of confirmation is reversed on the ground that the ordinance was void,¹² as where it included the cost of paving the space between the rails of a street railway which, by contract, was to be paved at the expense of the railway,¹³ the trial court cannot eliminate such cost, and recast the assessment, but a new ordinance is necessary. If a judgment of confirmation has been reversed upon a specific

Hull v. West Chicago Park Commissioners, 185 Ill. 150, 57 N. E. 1 [1900].

⁷ Gorton v. City of Chicago, 201 Ill. 534, 66 N. E. 541 [1903]; Gage v. City of Chicago, 193 Ill. 108, 61 N. E. 850 [1901]. So if the Supreme Court expressly orders the levy of such new assessment. Thomas v. Walker Township Board, 116 Mich. 597, 74 N. W. Rep. 1048 [1898].

⁸ Holden v. City of Chicago, 212 Ill. 289, 72 N. E. 435 [1904].

⁹ Wiemers v. People ex rel. Price, 225 Ill. 82, 80 N. E. 68 [1907].

¹⁰ Glos v. Collins, 110 Ill. App. 121 [1903].

¹¹ Gage v. People ex rel. Hanberg, 207 Ill. 377, 69 N. E. 840 [1904]; Thompson v. People ex rel. Hanberg, 207 Ill. 334, 69 N. E. 842 [1904]; McChesney v. City of Chicago, 205 Ill. 528, 69 N. E. 38 [1903].

¹² American Hide & Leather Co. v. City of Chicago, 203 Ill. 451, 67 N. E. 979 [1903].

¹³ American Hide & Leather Co. v. City of Chicago, 203 Ill. 451, 67 N. E. 979 [1903].

ground,¹⁴ such as the insufficiency of the description of the improvement,¹⁵ other objections which existed when the original proceedings in confirmation were heard, cannot be urged at the second hearing.¹⁶ Failure to file the mandate of an error court which reverses a judgment upholding the validity of a prior assessment, does not constitute an abandonment of the proceedings.¹⁷ While a proceeding in error involving the validity of an assessment is pending, an application for a judgment of sale for such assessment may be refused.¹⁸ Judgment of sale cannot be granted until a copy of the order of affirmance has been filed in the county court.¹⁹ If a judgment has been affirmed upon a premature appeal, an execution sale under a judgment rendered thereafter is valid and passes title.²⁰

§ 1391. Several nature of error proceedings.

Error proceedings in some jurisdictions are several as to the different property owners, and as to the different tracts assessed.¹ Under this theory, the prosecution of error as to one tract, does not invalidate or delay the enforcement of a judgment as to other tracts,² even if they all belong to the same property owner.³ The reversal of the judgment as to one tract, does not affect the judgment against other tracts,⁴ even if such other tracts belong to the owner of the tract as to which such judgment was reversed.⁵ Under some statutes, however, bene-

¹⁴ *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878 [1904].

¹⁵ *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878 [1904].

¹⁶ *Beckett v. City of Chicago*, 218 Ill. 97, 75 N. E. 747 [1905]; *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786 [1903].

¹⁷ *Pearson v. City of Chicago*, 162 Ill. 383, 44 N. E. 739 [1896].

¹⁸ *People ex rel. Hughes v. Stone*, 141 Ill. 281, 31 N. E. 502 [1893].

¹⁹ *Pople ex rel. Kochersperger v. Wadlow*, 166 Ill. 119, 46 N. E. 775 [1897].

²⁰ *Brady v. Burke*, 90 Cal. 1, 27 Pac. 52 [1891].

¹ *Gibler v. City of Mattoon*, 167 Ill. 18, 47 N. E. 319 [1897]; *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688 [1894]; *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W.

389 [1899]; *City of Pittsburg v. Maxwell*, 179 Pa. St. 553, 36 Atl. 158 [1897]; *In re Westlake Avenue*, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

² *Gibler v. City of Mattoon*, 167 Ill. 18, 47 N. E. 319 [1897].

³ *City of Pittsburg v. Maxwell*, 179 Pa. St. 553, 36 Atl. 158 [1897].

⁴ *Goldstein v. Village of Milford*, 214 Ill. 528, 73 N. E. 758 [1905]; *Harman v. People ex rel. Munsterman*, 214 Ill. 454, 73 N. E. 760 [1905]; *Sumner v. Village of Milford*, 214 Ill. 388, 73 N. E. 742 [1905]; *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752 [1894]; *In re Westlake Avenue*, Seattle, 40 Wash. 144, 82 Pac. 279 [1905].

⁵ *Gage v. City of Chicago*, 216 Ill. 107, 74 N. E. 726 [1905].

fits and damages cannot be assessed against one tract until they can be assessed against all the property affected.^o

§ 1392. Waiver of right to prosecute error.

The right to prosecute error may be waived by the party who would be entitled to take advantage thereof but for such waiver. A party who interposes objections below, but subsequently withdraws some or all of them, waives the objections thus withdrawn.¹ Entry of appearance generally waives all objection to notice or service of process.² Receiving the benefit of the judgment below is a waiver of any error therein.³ Payment by compulsion while proceedings in error are pending does not waive the right to prosecute error.⁴ The payment of one installment of an assessment does not waive the right to prosecute error to a judgment of confirmation in order to reverse it as to the remaining installments.⁵ The orders of the trial court made after a final order and after error is prosecuted, cannot relate back so as to defeat such error proceedings.⁶

D.—CERTIORARI.

§ 1393. Nature of certiorari.

Certiorari is a common law writ which, as ordinarily defined, issues from a superior court to an inferior court, commanding it to certify and return to the superior court the record of the proceedings which it is sought to review.¹ The fact that a proceeding is called by some name other than certiorari, such as appeal, is not conclusive, since the proceeding known as an appeal may be certiorari or error.² It is often said that if the

^o *City of St. Louis v. Nelson*, 169 Mo. 461, 69 S. W. 466 [1902].

¹ *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358 [1905]; *Esroger v. City of Chicago*, 185 Ill. 420, 56 N. E. 1086 [1900].

² *Bradford v. City of Pontiac*, 165 Ill. 612, 46 N. E. 794 [1897].

³ *Maypoth v. Gast*, — Ky. —, 110 S. W. 308 [1908]; (receipt of balance of price of realty sold on judgment upon mortgage set up in cross-petition; a *supersedeas* bond having been filed in error proceed-

ings to the judgment rendered against the realty upon the assessment set up in the petition).

⁴ *Whittaker v. City of Deadwood*, 12 S. Dak. 608, 82 N. W. 202 [1900].

⁵ *Markley v. City of Chicago*, 167 Ill. 626, 48 N. E. 1056 [1897].

⁶ *Lammers v. Balfe*, 41 Ind. 218 [1872].

¹ *People ex rel. Reynolds v. City of Brooklyn*, 49 Barb. (N. Y.) 136 [1867].

² *In re Diamond Street*, 196 Pa. St. 254, 46 Atl. 428 [1900].

proceedings sought to be reviewed are in the ordinary course of common law, error lies, while if the proceedings are not according to the course of the common law, certiorari is the proper method of review.³ If an assessment is confirmed by a court, certiorari may be brought thereto.⁴

§ 1394. Certiorari as a remedy in assessment.

Since certiorari, as defined, is ordinarily a writ issued to a court of inferior jurisdiction, it has been questioned whether certiorari can be used as a method of reviewing an assessment levied by a public corporation, since such proceedings are the proceedings of a municipal body, and not of a court. In many jurisdictions it is held that certiorari lies to review assessments.¹ The theory of this holding is, in some jurisdictions, that proceedings which impose a tax or assessment, and determine its amount, are so far judicial in their nature that certiorari will lie.² In other jurisdictions the theory is advanced that certiorari is not to be regarded as limited to a review of judicial decisions, and that the acts of a public corporation may be reviewed by certiorari,

³*In re Diamond Street*, 196 Pa. St. 254, 46 Atl. 428 [1900].

⁴*State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885].

¹*Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897]; *State ex rel. Ryan v. District Court of Ramsey County*, 87 Minn. 146, 91 N. W. 300 [1902]; *Sherwood v. City of Duluth*, 40 Minn. 22, 41 N. W. 234 [1889]; *State of Minnesota ex rel. Merrick v. District Court of Hennepin County*, 33 Minn. 235, 22 N. W. 625 [1885]; *State, Stewart, Pros. v. Mayor and Common Council of the City of Hoboken*, 57 N. J. L. (28 Vr.) 330, 31 Atl. 278 [1894]; *State, Culver, Pros. v. Mayor and Aldermen of Jersey City*, 45 N. J. L. (16 Vr.) 256 [1883]; *State, Doyle, Pros. v. Mayor and Common Council of the City of Newark*, 30 N. J. L. (1 Vr.) 303 [1863]; *Treasurer of City of Camden v. Mulford*, 26 N. J. L. (2

Dutcher) 49 [1856]; *State, Tims, Pros. v. Mayor and Common Council of Newark*, 25 N. J. L. (1 Dutcher) 399 [1856]; *LeRoy v. Mayor, Aldermen and Commonalty of the City of New York*, 20 John. Sup. Ct. 430, 11 Am. Dec. 289 [1823]; *People of the State of New York ex rel. Spencer v. Village of New Rochelle*, 83 Hun (N. Y.) 185, 31 N. Y. S. 592 [1894]; *People ex rel. Ackerly v. City of Brooklyn*, 8 Hun (N. Y.) 56 [1876]; *People ex rel. Griffing v. Mayor and Common Council of the City of Brooklyn*, 9 Barb (N. Y.) 535 [1850]; *The People ex rel. Moore v. The Mayor, etc., of City of New York*, 5 Barb (N. Y.) 43 [1848]; *Wilson v. City of Seattle*, 2 Wash. 543, 27 Pac. 474 [1891].

²*People ex rel. Griffing v. Mayor and Common Council of the City of Brooklyn* 9 Barb. (N. Y.) 535 [1850]; *The People ex rel. Moore v. The Mayor, etc., of City of New York*, 5 Barb. (N. Y.) 43 [1848].

whether they are judicial or legislative.³ In some states the scope of the writ of certiorari has been extended by statute, so that it is a means of reviewing assessments, whether they are to be regarded as exercise of judicial power or not.⁴ Even under a statute which provides that certain assessments when confirmed by the circuit court shall be final and conclusive, certiorari will lie to a superior court where the prosecutor challenges the right to impose any assessment at all upon his lands.⁵ Under such statutes, it has been held to lie where the right to levy some assessment was not denied.⁶ Even where certiorari lies to an assessment, it has been said that it will not lie to an enactment of an improvement ordinance.⁷ In some jurisdictions it has been said that certiorari is not a proper method of reviewing an assessment, since the making of an assessment is not judicial in its nature, and certiorari is, in the absence of statute, to be regarded as restricted to judicial proceedings.⁸ If confirmation by a court is an essential step in levying an assessment, certiorari will lie to the decree of confirmation.⁹

§ 1395. Scope of certiorari with reference to assessments.

Upon the question of the scope of the writ of certiorari, with reference to special assessments, there is a considerable divergence among the adjudicated cases, caused, in part, by different theories of the function of certiorari at common law, and in part by statutes by which the scope of the writ is either extended or restricted. It has been said that if a public corporation exceeds its jurisdiction, certiorari is concurrent with *quo warranto* and *scire facias* as a means of reviewing such action.¹ It has been held that the fact that the aggrieved property owner brings a suit for

³ *Treasurer of City of Camden v. Mulford*, 26 N. J. L. (2 Dutcher) 49 [1856].

⁴ *Horn v. Board of Supervisors of Livingston County*, 135 Mich. 553, 98 N. W. 256 [1904]; *Township of Swan Creek v. Brown*, 130 Mich. 382, 90 N. W. 38; *Moore v. McIntyre*, 110 Mich. 237, 68 N. W. 130.

⁵ *Erisman v. Board of Chosen Freeholders of the County of Burlington*, 64 N. J. L. (35 Vr.) 516, 45 Atl. 998 [1900].

⁶ *LeRoy v. Mayor, Aldermen and Commonalty of City of New York*,

20 John Sup. Ct. 430, 11 Am. Dec. 289 [1823].

⁷ *The People ex rel. Moore v. The Mayor, etc., of the City of New York*, 5 Barb. 43 [1848].

⁸ *Bixler v. Board of Supervisors of Sacramento County*, 59 Cal. 698 [1881].

⁹ *Sherwood v. City of Duluth*, 40 Minn. 22, 41 N. W. 234 [1889].

¹ *Commissioners of Mason and Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891].

injunction as well as proceedings in certiorari, does not prevent him from proceeding in certiorari;² since, if either proceeding is a bar to the other, the equity proceeding is the one which should be barred.³ The right given by statute to bring a suit to have the assessment reviewed before a jury, does not prevent the property owner from bringing certiorari to review the proceedings.⁴ Under statutes which permit a property owner to show cause why a decree of sale should not be entered in a proceeding to enforce the assessment, he may question the validity or the constitutionality of the assessment in a proceeding to enforce it without bringing certiorari.⁵ Certiorari is said to lie where no provision for appeal is made.⁶ A statute which specifically gives to the property owner the right of appeal to the court at which he may be heard upon the merits,⁷ or a statute which provides an exclusive method of attacking and vacating an assessment,⁸ is held to prevent the aggrieved property owner from bringing certiorari. Certiorari is, accordingly, used regularly in some states as the proper form of making a direct attack upon an assessment. In other states, certiorari may be made a means of testing the validity of an assessment, but it is rarely used for that purpose, as the same result may be reached more conveniently by other remedies, as by making a defense in a proceeding to enforce an assessment, or by seeking an injunction, and the like. In other states, certiorari is not resorted to in practice as a means of testing the validity of an assessment, and in many of these states it is either obsolete, or is regarded as abolished by the code of civil procedure.

§ 1396. Certiorari lies where jurisdiction is wanting.

Where certiorari can be used as a means of attacking an assessment, it lies if the public corporation has exceeded its jurisdic-

² *Robertson v. Baxter*, 57 Mich. 127, 23 N. W. 711 [1885].

³ *Robertson v. Baxter*, 57 Mich. 127, 23 N. W. 711 [1885].

⁴ *State, Walls, Pros. v. Mayor and Aldermen of Jersey City*, 55 N. J. L. (26 Vroom) 511, 26 Atl. Rep. 828 [1893].

⁵ *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899].

⁶ *Wilson v. City of Seattle*, 2 Wash. 543, 27 Pac. 474 [1891].

⁷ *State of Washington on the Relation of Nelson v. Superior Court of King County*, 31 Wash. 32, 71 Pac. 601 [1903]; (even if such appeal can not be heard for several months).

⁸ *People ex rel. Martin v. Myers*, 135 N. Y. 465, 32 N. E. 241 [1892]; *People ex rel. Church of the Holy Communion v. The Assessors of Taxes of Town of Greenburg*, 106 N. Y. 671, 12 N. E. 794 [1887].

tion;¹ as where the notice required as a jurisdictional step has not been given,² or the necessary petition for the improvement does not locate it accurately,³ or the statute under which the public corporation is acting is unconstitutional,⁴ or the assessment proceedings are void on their face. While certiorari does not lie to the formation of a drainage district,⁵ it lies to proceedings to enlarge a drainage district, the original formation of which is not called into question.⁶

§ 1397. Discretionary nature of writ.

It is sometimes said that the court before which such writ is sought has discretion to grant it or refuse it.¹ This does not mean that the court possesses an arbitrary discretion, but means that the court may deny the writ if a great public inconvenience will be caused by issuing it, and if the rights of the property owner can be protected in some manner which will not interfere with the public at large.²

§ 1398. Who may have writ.

Only the party injured by the defect can be permitted to apply for a writ of certiorari.¹ A property owner cannot object in certiorari because the assessment is invalid or excessive as to

¹ *Allman v. District of Columbia*, 3 App. D. C. 8 [1894]; *Bixby v. Goss*, 54 Mich. 551, 20 N. W. 587 [1884]; *Township of Whiteford v. Phinney*, 53 Mich. 130, 18 N. W. 593 [1884]; *Null v. Zierle*, 52 Mich. 540, 18 N. W. 348 [1884]; *Daniels v. Smith*, 38 Mich. 660 [1878]; *Weed v. Mayor and Aldermen of Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898]; *Erisman v. Freeholders of Burlington*, 64 N. J. L. 516, 45 Atl. 998 [1900]; *State, Wilkinson, Pros. v. Inhabitants of the City of Trenton*, 36 N. J. L. (7 Vroom) 499 [1873].

² *Bixby v. Goss*, 54 Mich. 551, 20 N. W. 587 [1884]; *Daniels v. Smith*, 38 Mich. 660 [1878].

³ *Null v. Zierle*, 52 Mich. 540, 18 N. W. 348 [1884].

⁴ *Weed v. Mayor and Aldermen of*

Boston, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898].

⁵ See § 1477.

⁶ *Commissioners of Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891].

¹ *People ex rel. Vanderbilt v. Stillwell*, 19 N. Y. 531 [1859]; *Matter of 80th Street*, 17 Abb. Prac. 324 [1804].

² *People ex rel. Vanderbilt v. Stillwell*, 19 N. Y. 531 [1859]; *The People ex rel. Moore v. The Mayor, etc., of the City of New York*, 5 Barb. 43 [1848]; *Matter of 80th Street*, 17 Abb. Prac. 324 [1804].

³ *Zeliff v. Bog & Fly Meadow Co.*, 68 N. J. L. (39 Vr.) 200, 56 Atl. 302 [1902]; *State, Hunt, Pros. v. Mayor and Common Council of Rahway*, 39 N. J. L. (10 Vr.) 646 [1877].

other property owners,² or because the improvement of the street for which the assessment is levied infringes the rights of a turn-pike company.³ Two or more property owners cannot join,⁴ although objections thus made have been passed upon.⁵ If the excess above special benefits is to be paid out of the general tax, a general tax payer cannot bring certiorari to set aside an assessment.⁶

§ 1399. Against whom writ may issue.

The writ of certiorari must issue against the officers in charge of the record which is attacked.¹ It will not lie against other officers.² It will not lie against persons who are neither officers *de jure* nor *de facto*.³ A writ issued against such persons should be dismissed, as such an assessment, being absolutely void could not thus be reviewed.⁴ It has been held that the city is the proper party in interest,⁵ irrespective, it is said, of its ultimate liability, since it is primarily responsible for the collection of the assessment.⁶ Appearance of the defendant without making objection to a service of process is a waiver of such defects in certiorari.⁷

² *Zeliff v. Bog & Fly Meadow Co.*, 68 N. J. L. (39 Vr.) 200, 56 Atl. 302 [1902]; *State, Hunt, Pros. v. Mayor and Common Council of Rahway*, 39 N. J. L. (10 Vr.) 646 [1877].

³ *State, Parker Pros. v. Mayor of City of New Brunswick*, 30 N. J. L. (1 Vr.) 395 [1863].

⁴ *Zahn v. Borough of Rutherford*, 72 N. J. L. (43 Vr.) 446, 60 Atl. 1123 [1905].

⁵ *Zahn v. Borough of Rutherford*, 72 N. J. L. (43 Vr.) 446, 60 Atl. 1123 [1905].

⁶ *State, Coward, Pros. v. Mayor, etc., of North Plainfield*, 63 N. J. L. (34 Vr.) 61, 42 Atl. 805 [1899].

¹ *People of the State of New York ex rel. Robbins v. Mayor, Aldermen and Commonalty of the City of New York*, 20 Hun (N. Y.) 73 [1880]; *People of the State of New York ex rel. Law v. Commissioners of Taxes and Assignments of County of New York*, 9 Hun (N. Y.) 609 [1877]; *People ex rel. Reynolds v. City of*

Brooklyn, 49 Barb. (N. Y.) 136 [1867].

² *People of the State of New York ex rel. Law v. Commissioners of Taxes and Assignments of the County of New York*, 9 Hun (N. Y.) 609 [1877].

³ *People ex rel. President, Manager and Company of Delaware & Hudson Canal Company v. Parker*, 117 N. Y. 86, 22 N. E. 752 [1889]. (Such as persons acting as assessors who are neither officers *de jure* nor *de facto*.)

⁴ *People ex rel. President, Managers and Company of the Delaware & Hudson Canal Company v. Parker*, 117 N. Y. 86, 22 N. E. 752 [1889].

⁵ *Frederick v. City of Seattle*, 13 Wash. 428, 43 Pac. 364 [1896].

⁶ *Frederick v. City of Seattle*, 13 Wash. 428, 43 Pac. 364 [1896].

⁷ *Commissioners of Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891].

§ 1400. Pleading.

Applications for certiorari are subject to the ordinary rules of pleading except in so far as the conclusive effect of the return modifies the ordinary rules of pleading. Material facts averred in the petition or answer and not denied are to be regarded as admitted as far as consistent with the record and return.¹ An answer may deny the facts alleged in the petition or may set up new facts which avoid the legal effect of the facts pleaded in the petition, if such allegations of the answer are consistent with the record.² The allegations of the answer are to be taken as true except as far as controverted by the admissible evidence.³ An answer containing averments of fact and signed by counsel is irregular.*

§ 1401. Assignment of error.

Errors or defects shown by the record as sent up, whereby it is claimed the proceedings are rendered invalid, must be especially assigned.¹ The court will not regard a general assignment,² nor will it regard an error which is not assigned.³ In a proceeding in certiorari a construction which is reasonably consistent with the record, and which will sustain the proceedings should be preferred to one which will defeat them.*

§ 1402. Contents of record and return.

The record as sent up must show facts which confer the power to levy the assessment in question, and a substantial compliance with the provisions of the law with reference to such assessment.¹ Thus, the record must show that the work for which the assess-

¹ *Weed v. Mayor and Aldermen of Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898].

² *Fairbanks v. Mayor and Aldermen of Fitchburg*, 132 Mass. 42 [1882].

³ *Dickinson v. City Council of Worcester*, 138 Mass. 555 [1885].

⁴ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

¹ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1879]; *State, Simmons, Pros. v. City of Passaic*, 55 N. J. L. (26 Vr.) 485, 27 Atl. 909 [1893].

² *State, Simmons, Pros. v. City of*

Passaic, 55 N. J. L. (26 Vr.) 485, 27 Atl. 909 [1893].

³ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

⁴ *State, Wilkinson, Pros. v. Inhabitants of City of Trenton*, 36 N. J. L. (7 Vr.) 499 [1893].

¹ *Keyser v. District of Columbia*, 3 App. D. C. 31 [1894]; *Wright v. Township Drain Commissioners*, 44 Mich. 557, 7 N. W. 235 [1880]; *Taylor v. Burnap*, 39 Mich. 739 [1878]; *Lane v. Burnap*, 39 Mich. 736 [1878]; *People ex rel. Livermore v. Burnap*, 38 Mich. 350 [1878]; *Rosell, Pros. v. Mayor and Council of Nep-*

ment is levied, was ordered,² and it must show the facts with reference to notice,³ and not merely the conclusion of the officer making the return,⁴ as that he "gave the notice required by statute,"⁵ or that he served the notice, a copy of which is given, without showing the method of service.⁶ The record must show an application of the property owners for the improvement, if this is necessary by statute,⁷ that the commissioners or assessors possessed the qualifications required by statute,⁸ and that the assessment was limited to the benefits conferred.⁹ Averments in the petition, which are not denied in the return and which are not contradicted by the record, must be regarded as admitted.¹⁰

§ 1403. Certiorari granted only in cases of substantial injustice.

Relief will not be given by certiorari if substantial justice has, in fact, been done, and only technical irregularities are claimed as a basis for relief,¹ especially if consequences disastrous to the public would arise from quashing the proceedings.² This is

tune City, 68 N. J. L. 509, 55 Atl. 199 [1902]; State ex rel. Pope v. Town of Union in County of Hudson, 32 N. J. L. (3 Vr.) 343 [1867].

² Keyser v. District of Columbia, 3 App. D. C. 31 [1894].

³ Wright v. Township Drain Commissioners, 44 Mich. 557, 7 N. W. 235 [1880]; Taylor v. Burnap, 39 Mich. 739 [1878]; Lane v. Burnap, 39 Mich. 736 [1878]; People ex rel. Livermore v. Burnap, 38 Mich. 350 [1878].

⁴ Lane v. Burnap, 39 Mich. 736 [1878].

⁵ Wright v. Township Drain Commissioners, 44 Mich. 557, 7 N. W. 235 [1880]; People ex rel. Livermore v. Burnap, 38 Mich. 350 [1878].

⁶ Taylor v. Burnap, 39 Mich. 739 [1878].

⁷ State, Pope, Pros. v. Town of Union in the County of Hudson, 32 N. J. L. (3 Vr.) 343 [1867].

⁸ State, Speer, Pros. v. City of Passaic, 38 N. J. L. (9 Vr.) 168 [1875]; State, Pope, Pros. v. Town of Union, in the County of Hudson, 32 N. J. L. (3 Vr.) 343 [1867].

⁹ Rosell, Pros. v. Mayor and Council of Neptune City, 68 N. J. L. 509,

53 Atl. 199 [1902]; State, Simmons, Pros. v. City of Passaic, 58 N. J. L. (9 Vr.) 60 [1875]. See also § 894.

¹⁰ People ex rel. Keim v. Desmond, 186 N. Y. 232, 78 N. E. 857 [1906]; (reversing, 97 N. Y. S. 795 [1906]).

¹ Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874]; Harwood v. Donovan, 188 Mass. 487, 74 N. E. 914 [1905]; Cheney v. City of Beverly, 188 Mass. 81, 74 N. E. 306 [1905]; People ex rel. Roediger v. Drain Commissioner of Wayne County, 40 Mich. 745 [1879]; Tusting v. City of Asbury Park, — N. J. L. —, 62 Atl. 183 [1905]; Brewer, Pros. v. City of Elizabeth, 66 N. J. L. (37 Vr.) 547, 49 Atl. 480 [1901]; State, Simmons Pros. v. City of Passaic, 55 N. J. L. (26 Vr.) 485, 27 Atl. 909 [1893]; In the Matter of East 18th Street, 75 Hun, 603, 27 N. Y. Supp. 591 [1894]; The People ex rel. Moore v. The Mayor, etc., of the City of New York, 5 Barb. 43 [1848]; State ex rel. Schintgen v. Mayor and Common Council of City of La Crosse, 101 Wis. 208, 77 N. W. 167 [1898].

² Hagar v. Board of Supervisors of Yolo County, 47 Cal. 222 [1874].

sometimes expressed by saying that certiorari is a discretionary writ.³ Relief has been denied where improper items have been included which amount to less than four per cent. of the total assessment.⁴

§ 1404. Defects for which proceedings will be quashed.

The proceedings will be quashed for substantial violations of statutory provisions which are prejudicial to the party complaining thereof, and which can be reviewed on certiorari. Thus, proceedings will be quashed if no attempt has been made to secure a release for the right of way for the improvement as required by statute,¹ or if the road for which the assessment is levied has never been legally located,² or if the assessment includes the cost of an improvement already constructed, but not constructed on the assessment plan,³ or if an erroneous principle of apportionment has been adopted,⁴ or if the assessment is clearly in excess of the benefits conferred,⁵ or if the notice required by statute has not been given,⁶ or if objectors have been denied the right to offer evidence upon the question of benefits and damages.⁷ The court cannot quash proceedings for facts arising subsequent to the assessment,⁸ such as a misappropriation of a part of the tax.⁹

³ *People ex rel Roediger v. Drain Commissioner of Wayne County*, 40 Mich. 745 [1879].

⁴ *People of the State of New York ex rel. Jessup v. Kelley*, 33 Hun, 389 [1884].

¹ *Whisler v. Drain Commissioners of Lenawee County*, 40 Mich. 591 [1879].

² *Pierce v. County Commissioners of Franklin County*, 63 Me. 252 [1872].

³ *Brown v. Mayor and Aldermen of Fitchburg*, 128 Mass. 282 [1880].

⁴ *State, Speer, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 168 [1875].

⁵ *Frevert, Pros. v. Mayor and Council of the City of Bayonne*, 63 N. J. L. (34 Vr.) 202, 42 Atl. 773 [1899]. Though not if evidence outside of the record is necessary to establish such fact. *Jones v. Board*

of Aldermen of City of Boston, 104 Mass. 461 [1870].

⁶ *Commissioners of Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891]; *Bush v. City of Dubuque*, 69 Ia. 233, 28 N. W. 542 [1886]; *Pierce v. County Commissioners of Franklin County*, 63 Me. 252 [1872]; *Bixby v. Goss*, 54 Mich. 551, 20 N. W. 587 [1884]; *Daniels v. Smith*, 38 Mich. 660 [1878]; *State, Beam, Pros. v. Mayor and Aldermen of the City of Paterson*, 47 N. J. L. (18 Vr.) 15 [1885].

⁷ *Heinz v. Buckham*, —Mich.—, 116 N. W. 736 [1908].

⁸ *State, Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr.) 227 [1870].

⁹ *State, Sigler, Pros. v. Fuller*, 34 N. J. L. (5 Vr.) 227 [1870].

§ 1405. Defects for which proceedings cannot be quashed.

Proceedings will not be quashed if they are regular, if the violations of statute are merely technical and not prejudicial, if the defects cannot be reviewed by this writ, or in cases of estoppel. An assessment cannot be quashed on the ground that the work was done under two contracts instead of one, or that the assessment in question was preceded by two assessments for the expense of separate parts of the work done under each contract, which assessments were annulled before the assessment in question was levied.¹ The court cannot quash proceedings for a failure to establish a grade line, if this is not made a condition precedent by statute.² The court cannot review the judgment of the assessing officials if the correct principle has been adopted,³ at least unless error on their part is clearly shown.⁴ Under a statute making the judgment of an inferior court final upon the question of benefits, certiorari will not lie to the finding of such court.⁵ Proceedings will not be quashed for failure to pay damages to the property owner, since his remedy is by mandamus to compel such payment.⁶ A property owner may be estopped from using certain defenses which, but for such facts of estoppel, he might have used.⁷ Thus, a property owner who has conceded in the assessment proceedings that his lands are swamp lands, and overflow, is estopped from denying such facts on certiorari.⁸ A property owner who, in a petition for certiorari, recognizes as valid the statute under which a drainage district was organized, cannot attack such statute as invalid.⁹ A valid curative statute

¹ *People ex rel. Thompson v. Mayor, etc., of the City of Syracuse*, 6 Hun 652 [1876].

² *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

³ *State of Minnesota ex rel. Cunningham v. Board of Public Works of the City of St. Paul*, 27 Minn. 442, 8 N. W. 161 [1881]. Especially if confirmed by a court of competent jurisdiction. *Stockton v. Mayor and Common Council of the City of Newark*, 58 N. J. L. 116, 32 Atl. Rep. 67 [1893].

⁴ *Kirkland v. Parker*, — N. J. L. —, 68 Atl. 913 [1908]; *State Rettinger, Pros. v. City of Passaic*, 45 N. J. L. (16 Vr.) 146 [1883]; *State,*

Skinkle, Pros. v. Inhabitants of Township of Clinton, in the County of Essex, 39 N. J. L. (10 Vroom) 656 [1877].

⁵ *Stockton v. Mayor and Common Council of Newark*, 58 N. J. L. (29 Vr.) 116, 32 Atl. Rep. 67 [1895].

⁶ *State, Ward, Pros. v. Commissioners of Streets and Sewers of New Brunswick*, 49 N. J. L. (20 Vr.) 552, 10 Atl. 109 [1887].

⁷ *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874].

⁸ *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874].

⁹ *Barnes v. Drainage Commissioners of Drainage District No. 7, etc.*, 221 Ill. 627, 77 N. E. 1124 [1906].

has been held to apply to prior proceedings, even if a writ of certiorari has been issued to review such proceedings before such curative statute has been passed.¹⁰

§ 1406. Effect of record and return.

In the absence of statute the tribunal to which the record of the assessment proceedings is returned, determines the validity of the assessment solely by the record.¹ Under this theory disputed questions of fact cannot be tried by certiorari,² nor can questions as to the performance of the contract.³ The existence and amount of benefits as questions of fact cannot be tried by this writ.⁴ The question of the title of the property owner to the land upon which the public improvement is being constructed cannot be tried by this writ.⁵ Disputed questions of fact can not be tried.⁶ Where this theory prevails, the return of the officers is conclusive, and cannot be contradicted,⁷ the remedy of the

¹⁰ *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362 [1877].

¹ *Kammann v. City of Chicago*, 222 Ill. 63, 78 N. E. 16 [1906]; *Barnes v. Drainage Commissioners of Drainage District No. 7, etc.*, 221 Ill. 627, 77 N. E. 1124 [1906]; *Commissioners of Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 25 N. E. 995 [1891]; *Rue v. City of Chicago*, 66 Ill. 256 [1872]; *Tilestone v. Street Commissioners of City of Boston*, 182 Mass. 325, 65 N. E. 380 [1902]; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *Wood v. Mayor and Aldermen of Boston*, 172 Mass. 28, 42 L. R. A. 642, 51 N. E. 204 [1898]; *Holt v. City Council of Somerville*, 127 Mass. 408 [1879]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Kenyon v. Board of Supervisors of Ionia County*, 138 Mich. 544, 101 N. W. 851 [1904]; *State, Stewart, Pros. v. Mayor and Common Council of the City of Hoboken*, 57 N. J. L. (28 Vr.) 330, 31 Atl. 278 [1894]; *State, Wilson, Pros. v. Mayor and Common Council of the City of Hudson*, 32 N. J. L. (3 Vr.) 365 [1865]; *People ex rel. Davidson et al v. Gilon*, 126

N. Y. 147, 27 N. E. 282 [1891]; (reversing *People ex rel. Davidson v. Gilon*, 58 Hun (N. Y.) 76 [1890]); *Butts v. Common Council of Rochester*, 5 Lansing, 142 [1871].

² *Barnes v. Drainage Commissioners of Drainage District No. 7, etc.*, 221 Ill. 627, 77 N. E. 1124 [1906]; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870]; *Holmes v. Jersey City*, 12 N. J. Eq. (1 Beasley) 299.

³ *State, Wilson, Pros. v. Mayor and Common Council of the City of Hudson*, 32 N. J. L. (3 Vr.) 365 [1867].

⁴ *Barnes v. Drainage Commissioners of Drainage District No. 7, etc.*, 221 Ill. 627, 77 N. E. 1124 [1906].

⁵ *Mayor and Common Council of Jersey City v. State ex rel. Howeth, Pros.*, 30 N. J. L. (1 Vr.) 521 [1863].

⁶ *Mayor and Common Council of Jersey City v. State ex rel. Howeth, Pros.*, 30 N. J. L. (1 Vr.) 521 [1863].

⁷ *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897]; *People of the State of New York ex rel. Gage v. Lohnas*, 54 Hun 604, 8 N. Y. Supp. 104 [1889]; *People ex rel. Thompson*

property owner in case of a false return being an action against the officer by whom such return is made.⁸ Thus, a return denying allegations to show that special commissioners were not "disinterested freeholders" is conclusive.⁹ Extrinsic evidence, accordingly, cannot be considered,¹⁰ and if extrinsic evidence is necessary to determine the rights of the parties, the property owner should not sue in certiorari but in a petition for an abatement of the assessment.¹¹ Under some statutes, the general scope of the writ has been enlarged, and extrinsic evidence may be considered in determining the validity of the assessment.¹² Under such statutes the question of the amount and apportionment of benefits may be considered, even if depending upon facts which do not appear of record.¹³ If a stipulation provides that facts alleged in the petition and answer are to be taken as true, an averment in the petition to the effect that the improvement was not completed when the assessment was levied is overcome by a copy of the assessment order annexed to the petition and made a part thereof, in which it is recited that the improvement has been completed.¹⁴

v. Mayor, etc., of City of Syracuse, 6 Hun (N. Y.) 652 [1876]; *People ex rel. Crowell v. Lawrence*, 36 Barb. (N. Y.) 178 [1862].

⁸ *People ex rel. Thompson v. Mayor, etc., of Syracuse*, 6 Hun (N. Y.) 652 [1876].

⁹ *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091 [1897].

¹⁰ *Rue v. City of Chicago*, 66 Ill. 256 [1872]; *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *People ex rel. Davidson v. Gilon*, 126 N. Y. 147, 27 N. E. 282 [1891]; (*reversing*, *People ex rel. Davidson v. Gilon*, 58 Hun (N. Y.) 76, 11 N. Y. Supp. 439 [1890]); *Diamond Street*, Pittsburgh, 196 Pa. St. 254, 46 Atl. 428 [1900].

¹¹ *Beals v. James*, 173 Mass. 591, 54 N. E. 245 [1899]; *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870].

¹² *Harton v. Town of Avondale*, 147

Ala. 458, 41 So. 934 [1906]; *State ex rel. Sanford, Pros. v. Township of Kearny*, 48 N. J. L. (19 Vr.) 125, 4 Atl. 442 [1886]; *State, Simmons, Pros. v. City of Passaic*, 42 N. J. L. (13 Vr.) 524 [1880]; *Kennedy v. City of Troy*, 77 N. Y. 493 [1879]; *People ex rel. Connelly v. Reis*, 96 N. Y. S. 597, 109 App. Div. 748 [1905]; *In re Phelps*, 96 N. Y. S. 862, 110 App. Div. 69 [1905].

¹³ *State, Sanford, Pros. v. Township of Kearny*, 48 N. J. L. (19 Vr.) 125, 4 Atl. 442 [1886]; *State, Simmons, Pros. v. City of Passaic*, 42 N. J. L. (13 Vr.) 524 [1880]; *In re Phelps*, 96 N. Y. S. 862, 110 App. Div. 69 [1905]; *People v. Reis*, 96 N. Y. S. 597, 109 App. Div. 748 [1905].

¹⁴ *Masonic Building Assoc. v. Brownell*, 164 Mass. 306, 41 N. E. 306 [1895].

§ 1407. Incomplete record.

If the record as returned to the superior court is defective, the party who will be prejudiced by such defect may have an order requiring a perfect record to be transmitted.¹ Thus, if the assessing body does not set forth the system adopted by them in fixing the assessments, the remedy is not to have the proceedings quashed but to have such body ordered to certify the material facts.² If authority to amend a return exists, and the evidence which is admitted shows a valid assessment, the proceedings will not be quashed because the return is not actually amended.³ Particular defects may be supplied from the record as a whole, and if the record taken as a whole shows that the proceedings were in conformity to law, such proceedings will not be quashed, though certain essential facts may not be specifically stated.⁴ An agreed statement of facts may be looked to as correcting the record below and supplying its deficiencies.⁵ A return, to the effect that all the proceedings have been sent up, imposes the duty of supplying an omission upon the party claiming that such omission exists.⁶

§ 1408. Effect of laches.

If a property owner has delayed his application for a writ of certiorari until circumstances have altered so that the granting of such writ would inflict great injury upon the public,¹ as where

¹ *Burnett v. Town of Boonton*, 73 N. J. Law (44 Vr.) 102, 63 Atl. 995 [1906]; (under statutory provision.)

² *Tilestone v. Street Commissioners of City of Boston*, 182 Mass. 325, 65 N. E. 380 [1902].

³ *State, Van Solinger, Pros. v. Town of Harrison*, 39 N. J. L. (10 Vroom) 51 [1876].

⁴ *Jones v. Board of Aldermen of the City of Boston*, 104 Mass. 461 [1870].

⁵ *Chase v. Board of Aldermen of Springfield*, 119 Mass. 556 [1876].

⁶ *State ex rel. Wilkinson, Pros. v. Trenton*, 36 N. J. L. (7 Vr.) 499 [1873].

¹ *Guy v. District of Columbia*, 25 App. D. C. 117 [1905]; (delay of sixteen years); *Deslauries v. Soucie*,

222 Ill. 522, 113 Am. St. Rep. 432, 78 N. E. 799 [1906]; *Zeliff v. Bog & Fly Meadow Co.*, 68 N. J. L. (39 Vr.) 200, 56 Atl. 302 [1902]; (delay of seven years); *Stetler v. Mayor and Council of the Borough of East Rutherford*, 65 N. J. L. (36 Vr.) 528, 47 Atl. 489 [1900]; (delay of three years after improvement and two years after assessment); *State, Stewart, Pros. v. Mayor and Common Council of Hoboken*, 57 N. J. L. 28 Vr.) 330, 31 Atl. 278 [1894]; (delay of nearly two years); *State, Aldridge, Pros. v. Essex Public Road Board*, 46 N. J. L. (17 Vr.) 126 [1884]; *State ex rel. Kirkpatrick, Pros. v. Commissioners of Streets and Sewers of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880]; *State, Wetmore v. City of Elizabeth*, 41 N.

he has delayed until the improvement has been completed,² or until debts have been incurred by the public corporation in reliance upon the assessment,³ he will be denied relief in certiorari by reason of such laches, even if the assessment proceedings would have been quashed had application been made promptly; and certiorari will not lie especially where, in cases of delay, the prosecutor relies upon objections which are technical rather than substantial.⁴ If certiorari is applied for promptly upon the levy of the assessment but after an unwarranted delay after the improvement is ordered, the assessment may be reviewed while such relief is denied as to the improvement proceedings.⁵ The right to deny the writ on the ground of laches is sometimes referred to the doctrine that the writ is discretionary.⁶ Laches is not a bar to a writ of certiorari where there is no authority whatever for imposing the lien or selling the property,⁷ or if the statute under which the proceedings are instituted is unconstitutional.⁸ Laches is not a bar where no serious injury can result from the delay,⁹ as where the public corporation has authority to

J. L. (12 Vr.) 152 [1879]; (delay of five years); *State, Ryerson, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 171 [1875]; *State, Ropes, Pros. v. Essex Public Road Board*, 37 N. J. L. (8 Vr.) 335 [1875]; *State, Wilkinson, Pros. v. Inhabitants of the City of Trenton*, 36 N. J. L. (7 Vr.) 499 [1873]; *State, Wakeman, Pros. v. Mayor and Aldermen of Jersey City*, 35 N. J. L. (6 Vr.) 455 [1872]; *State, Malone, Pros. v. Water Commissioners of Jersey City*, 30 N. J. L. (1 Vr.) 247 [1863]; (delay of three years); *People ex rel. Ackerly v. City of Brooklyn*, 8 Hun (N. Y.) 56 [1876].

² *State, Post, Pros. v. City of Passaic*, 56 N. J. L. (27 Vr.) 421, 28 Atl. 553 [1894]; *State, Ryerson, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 171 [1875]; *State, Ropes, Pros. v. Essex Public Road Board*, 37 N. J. L. (8 Vr.) 335 [1875]; *State, Wilkinson, Pros. v. City of Trenton*, 36 N. J. L. (7 Vr.) 499 [1873]; *State, Malone, Pros. v. Water Commissioners of Jersey City*, 30 N. J. L. (1 Vr.) 247 [1863].

³ *Deslauries v. Soucie*, 222 Ill. 522,

113 Am. St. Rep. 432, 78 N. E. 799 [1906].

⁴ *Hagar v. Board of Supervisors of Yolo County*, 47 Cal. 222 [1874]; *People ex rel. Roediger v. Drain Commissioner of Wayne County*, 40 Mich. 745 [1879]; *Brewer, Pros. v. City of Elizabeth*, 66 N. J. L. (37 Vr.) 547, 49 Atl. 480 [1901].

⁵ *Tusting v. City of Asbury Park*, — N. J. —, 62 Atl. 183 [1905]; *State, Post, Pros. v. City of Passaic*, 56 N. J. L. (27 Vr.) 421, 28 Atl. 553 [1894]; *State, Ryerson, Pros. v. City of Passaic*, 38 N. J. L. (9 Vr.) 171 [1875].

⁶ *People ex rel. Ackerly v. City of Brooklyn*, 8 Hun (N. Y.) 56 [1876].

⁷ *State, Waln, Pros. v. Common Council of Beverly*, 53 N. J. L. (24 Vr.) 560, 22 Atl. 340 [1891].

⁸ *State, Culver, Pros. v. Mayor and Aldermen of Jersey City*, 45 N. J. L. (16 Vr.) 256 [1883]; *State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers of New Brunswick*, 42 N. J. L. (13 Vr.) 510 [1880].

⁹ *State, Frevert, Pros. v. Mayor*

levy a re-assessment.¹⁰ If the original owner remains in possession after the sale, it has been held that delay in applying for certiorari to set the proceedings aside does not prevent him from attacking such sale.¹¹ Delay in applying for the writ pending a mandamus suit to determine the duty of the city to make compensation for damages due to change of grade,¹² or delay in obtaining writs which were applied for promptly but were delayed owing to the disqualification of the judge to hear the case¹³ is not laches.¹⁴

§ 1409. Statute of limitations.

Under some statutes, a period is fixed within which certiorari must be sought. The property owner cannot have certiorari after the period thus fixed by statute.¹ The property owner may, however, have a writ of certiorari as against the assessment if he proceeds within the time limited after such assessment is levied, even if the time for reviewing the improvement ordinance is passed,² and under such circumstances the court will consider the improvement ordinance in passing upon the validity of the assessment.³ A statute of limitations for certiorari contained in an act to incorporate a city, does not apply to proceedings commenced under an act incorporating such municipality into a vil-

and Council of the City of Bayonne, 63 N. J. L. (34 Vr.) 202, 42 Atl. 773 [1899]; State, Graham, Pros. v. Mayor, etc., of the City of Paterson, 37 N. J. L. (8 Vr.) 380 [1875].

¹⁰ State, Frevert, Pros. v. Mayor and Common Council of City of Bayonne, 63 N. J. L. (34 Vr.) 202, 42 Atl. 773 [1899]; State, Graham, Pros. v. Mayor, etc., of the City of Paterson, 37 N. J. L. (8 Vr.) 380 [1875].

¹¹ State ex rel. Evans, Pros. v. Mayor and Aldermen of Jersey City, 35 N. J. L. (6 Vr.) 381 [1872].

¹² Rogge v. City of Elizabeth, 64 N. J. L. 491, 46 Atl. 164 [1900].

¹³ Bush v. City of Dubuque, 69 Ia. 233, 28 N. W. 542 [1886].

¹⁴ See also Taylor v. Burnap, 39 Mich. 739 [1878].

¹ United New Jersey R. & Canal Co. v. Gummere, 69 N. J. L. (40 Vr.) 111, 54 Atl. 520 [1903]; Stock-

ton v. Mayor and Common Council of the City of Newark, 58 N. J. L. 116, 32 Atl. 67 [1895]; State, Schulting, Pros. v. City of Passaic, 47 N. J. L. (18 Vroom) 273 [1885]; State, Rettinger, Pros. v. City of Passaic, 45 N. J. L. (16 Vr.) 146 [1883]; State, Kirkpatrick, Pros. v. Commissioners of Streets and Sewers of New Brunswick, 42 N. J. L. (13 Vr.) 510 [1880]; State, Wetmore, Pros. v. City of Elizabeth, 41 N. J. L. (12 Vr.) 152 [1879].

² Tusting v. City of Asbury Park, — N. J. —, 62 Atl. 183 [1905]; State, Kerrigan, Pros. v. Township of West Hoboken, 37 N. J. L. (8 Vr.) 77 [1874]; State, Doyle & Co., Pros. v. Mayor and Common Council of the City of Newark, 30 N. J. L. (1 Vr.) 303 [1863].

³ State ex rel. Kerrigan, Pros. v. Township of West Hoboken, 37 N. J. L. (8 Vr.) 77 [1874].

lage.* The statute of limitations applicable to proceedings in certiorari does not apply where the assessment is one which the legislature could not authorize constitutionally.⁵ So delay is held not to bar the writ where an absolute exemption from assessment is claimed.⁶ If the period of limitations has elapsed, and certiorari proceedings have not been brought, the public officials can not refuse to proceed to put the assessment upon the tax rolls on account of the irregularities or defects in the proceedings.⁷ If, on the other hand, certiorari can be brought only within ten days after the final order of determination of the commissioner in establishing a drain, and the act which is claimed to make the proceedings fatally defective does not occur till such time limit has expired, the board of supervisors may refuse to spread such assessment without resort to certiorari.⁸ Under some statutes, a writ of certiorari cannot be had after the contract is let, to review antecedent proceedings.⁹

§ 1410. Judgment.

In the absence of statute the judgment in certiorari must be that the proceedings be sustained or quashed. If the record shows that the proceedings are invalid the proper judgment is that the assessment proceedings and record be quashed.¹ Under some statutes, an assessment may be sent back to the common council "to amend or correct according to law."² Under some statutes, the court may reduce the amount of the assessment if an assessment could lawfully be made at the time of the adjudication.³ An assessment may be set aside as to some lots but not

*State, Bogart, Pros. v. City of Passaic, 38 N. J. L. (9 Vr.) 57 [1875].

⁵See also State ex rel. Van Cleef, Pros. v. Commissioners of Streets and Sewers of New Brunswick, 38 N. J. L. (9 Vr.) 320 [1876].

⁶State, Benedictine Sisters v. City of Elizabeth, 50 N. J. L. (21 Vr.) 347, 13 Atl. 5 [1888].

⁷Horn v. Board of Supervisors of Livingston County, 135 Mich. 553, 98 N. W. 256 [1904].

⁸Kenyon v. Board of Supervisors of Ionia County, 138 Mich. 544, 101 N. W. 851 [1904].

⁹Rosell, Pros. v. Mayor and Coun-

cil of Neptune City, 68 N. J. L. (39 Vr.) 509, 53 Atl. 199 [1902]; Van Wagoner v. Mayor and Aldermen of the City of Paterson, 67 N. J. L. (38 Vr.) 455, 51 Atl. 922 [1902].

¹Commissioners of Mason & Tazewell Special Drainage District v. Griffin, 134 Ill. 330, 25 N. E. 995 [1891].

²People of the State of New York ex rel. Lehigh Valley R. R. Co. v. City of Buffalo, 147 N. Y. 675, 42 N. E. 344 [1895].

³Zahn v. Borough of Rutherford, 72 N. J. L. (43 Vr.) 446, 60 Atl. 1123 [1905].

as to others, if the error does not result in increasing the burden upon the lots as to which the assessment is not erroneous.⁴ The court has power, however, to set aside the entire assessment, and not merely the assessments against those who complain; and it will exercise this power if public inconvenience will not result therefrom.⁵ An order of court setting aside an assessment on certiorari and directing that a new assessment be made is not an adjudication that the amount of the assessment on the property of any particular individual should be set aside or reduced.⁶ If a writ of certiorari has been allowed, the court will not ordinarily dismiss such writ subsequently on an *ex parte* application made on grounds which were before the court originally, but it will retain the writ until final hearing.⁷ In the absence of statute costs are not allowable on certiorari.⁸

E.—EQUITABLE RELIEF.

§ 1411. Equitable relief given only if no adequate remedy at law.

The jurisdiction of courts of equity is frequently invoked by property owners as a means of testing the validity of special assessments, and of protecting their rights as against irregular or invalid assessments. We find in the adjudicated cases in which the question of the power of courts of equity to grant relief against special assessments has been considered, a comparative degree of harmony in a statement of the general principles which control, but a wide divergence as to the application of such principles to specific defects in the assessment. This lack of harmony arises in part out of the fact that the different states are not agreed as to the function and scope of equity in American law, nor as to the circumstances under which the property owner needs equitable relief in order to protect his rights properly. If the proceedings which result in the assessment are in substantial

⁴ State, Coward, Pros. v. North Plainfield, 63 N. J. L. 61, 42 Atl. 805 [1899]; State, Wakeman, Pros. v. Mayor and Aldermen of Jersey City, 35 N. J. L. (6 Vr.) 455 [1872].

⁵ Town of Bergen in County of Hudson v. State, Van Horne, Pros., 32 N. J. L. (3 Vr.) 490 [1865].

⁶ Milton v. Stell, — N. J. L. —,

65 Atl. 1118 [1907]; (affirming, 73 N. J. Law (44 Vr.) 261, 62 Atl. 1133 [1906].

⁷ State, Van Cleef, Pros. v. Commissioners of Streets and Sewers of New Brunswick, 38 N. J. L. (9 Vr.) 320 [1876].

⁸ People ex rel. Vanderbilt v. Stillwell, 19 N. Y. 531 [1859].

compliance with the law, an injunction will, of course, be denied.¹ The general principle that equitable relief is not given, if there is a clear, adequate and complete remedy at law, is applied to local assessments and it is held that injunction will not be given against an invalid assessment if the property owner has a sufficient legal remedy.²

§ 1412. Opportunity to defend as preventing equitable relief.

If the assessment is to be enforced by an action or suit, and the property owner is given an opportunity of setting up any defense which he may have, and of being heard in such action, or suit, he has an adequate remedy in the opportunity of making such defense, and, accordingly, he cannot have an injunction,¹ even where he might have had an injunction if the assessment were enforceable by summary sale without an opportunity for a

¹ *Schumacker v. Toberman*, 56 Cal. 508 [1880]; *Buddecke v. Ziegenhein*, 122 Mo. 239, 26 S. W. 696 [1894]; *Erickson v. Cass County*, 11 N. D. 494, 92 N. W. 841 [1902]; *Leake v. Philadelphia*, 150 Pa. St. 643, 24 Atl. 351 [1892].

² *Harkness v. Board of Public Works*, 1 McArthur (D. C.) 121 [1873]; *Rice v. Mayor and Council of Macon*, 117 Ga. 401, 43 S. E. 773 [1903]; *Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428 [1896]; *Lyman v. City of Chicago*, 211 Ill. 209, 71 N. E. 832 [1904]; *City of Bloomington v. Blodgett*, 24 Ill. App. 650 [1886]; *McKee v. Town of Pendleton*, 162 Ind. 667, 69 N. E. 997 [1904]; *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. Rep. 542 [1896]; *Norton v. City of Boston*, 119 Mass. 194 [1875]; *Whiting v. Mayor and Aldermen of City of Boston*, 106 Mass. 89 [1870]; *Brewer v. City of Springfield*, 97 Mass. 152 [1867]; *Jones v. Gable*, 150 Mich. 30, 113 N. W. 577 [1907]; *Bryam v. City of Detroit*, 50 Mich. 56, 14 N. W. 698, 12 N. W. 912 [1883]; *Williams v. Mayor etc., of Detroit*, 2 Mich. 560 [1853]; *Fadger v. Village of Aitkin*, 87 Minn. 445, 92 N. W. 332, 934 [1902]; *Kel-*

ley v. Minneapolis City, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 59 N. W. 304 [1894]; *Albrecht v. City of St. Paul*, 47 Minn. 531, 50 N. W. 608 [1891]; *Philadelphia Mortgage & Trust Co. v. City of Omaha*, 63 Neb. 280, 93 Am. St. Rep. 442, 57 L. R. A. 150, 88 N. W. 523 [1901]; *Watson v. City of Elizabeth*, 35 N. J. Eq. (8 Stew.) 345 [1882]; *President, Managers and Company of the Delaware & Hudson Canal Co. v. Atkins, Collector*, 121 N. Y. 246, 24 N. E. 319 [1890]; *Heiser v. The Mayor, Aldermen and Commonalty of the City of New York*, 104 N. Y. 68, 9 N. E. 866 [1887]; *Thurston v. City of Elmira*, 10 Abb. Pr. N. S. 119 [1868]; *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908].

¹ *McKee v. Town of Pendleton*, 162 Ind. 667, 69 N. E. 997 [1904]; *Fadger v. Village of Aitkin*, 87 Minn. 445, 92 N. W. 332, 934 [1902]; *Kelley v. City of Minneapolis*, 57 Minn. 294, 47 Am. St. Rep. 605, 26 L. R. A. 92, 59 N. W. 304 [1894]; *Albrecht v. St. Paul*, 47 Minn. 531, 50 N. W. 608 [1891]; (overruling *Mayall v. City of St. Paul*, 30 Minn. 294, 15 N. W. 170 [1883].

defense.² So, if the property owner has an opportunity of interposing his defense upon filing an affidavit in which he sets forth the irregularity of the assessment, he cannot have an injunction.³ On this point, however, there is some conflict of authority, and it has been held that an injunction will lie against the issuing of a special tax bill upon the ground that the ordinance which provides for the improvement is unreasonable and oppressive, even if such facts could be interposed as a defense to the bill, the bill being at least *prima facie* evidence of its validity.⁴

§ 1413. Right to sue at law as preventing equitable relief.

It has been held that a right of action against an official who has proceeded to collect an invalid tax, is an adequate remedy at law and precludes the property owner from obtaining relief by injunction.¹ The right to have a hearing upon petition to revise an assessment is held to preclude equitable relief.²

§ 1414. Right of appeal as precluding equitable relief.

If the public corporation has obtained jurisdiction to levy the assessment, and an opportunity for appeal is given by statute to the property owner as a means of protecting his rights, it has been held that such opportunity for appeal, whether taken advantage of by the property owner or not, will ordinarily prevent him from obtaining an injunction as to any defect which might have been remedied by appeal¹ since if he does not take such ap-

² Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468 [1874].

³ Rice v. Mayor and Council of Macon, 117 Ga. 401, 43 S. E. 773 [1903]; Regenstein v. City of Atlanta, 98 Ga. 167, 25 S. E. 428 [1896].

⁴ Skinker v. Heman, 148 Mo. 349, 49 S. W. 1026 [1898].

¹ President, Managers and Company of the Delaware & Hudson Canal Company v. Atkins, 121 N. Y. 246, 24 N. E. 319 [1890].

² Whiting v. Mayor and Aldermen of City of Boston, 106 Mass. 89 [1870].

¹ Field v. Barber Asphalt Paving Company, 117 Fed. Rep. 925 [1902]; Brown v. Drain, 112 Fed. 582 [1901]; Duncan v. Ramish, 142 Cal. 686, 76

Pac. 661 [1904]; Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759 [1903]; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71 [1887]; Lyman v. City of Chicago, 211 Ill. 209, 71 N. E. 832 [1904]; Morrell v. Union Drainage District No. 1, 118 Ill. 139, 8 N. E. 675 [1887]; Ottawa v. Chicago and Rock Island Railroad Company, 25 Ill. 29 [1860]; Alley v. City of Lebanon, 146 Ind. 125, 44 N. E. 1003 [1896]; Millikan v. Wall, 133 Ind. 51, 32 N. E. 828 [1892]; Goff v. McGee, 128 Ind. 394, 27 N. E. 754 [1891]; Terre Haute & Logansport R. Co. v. Soice, 128 Ind. 105, 27 N. E. 429 [1890]; Trimble v. McGee, 112 Ind. 307, 14 N. E. 83 [1887]; Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92 [1886]; Sunier

peal, he has failed to protect his rights by his own negligence,² and if he has taken such appeal he is precluded by the decision of the tribunal to which he has appealed.³ It has been held in some jurisdictions that the right of appeal is merely cumulative, and does not prevent the property owner from obtaining an injunction if he could have had such injunction but for such right of appeal.⁴ If the public corporation has not obtained jurisdiction to levy an assessment, or has⁵ lost jurisdiction, and the assessment is, accordingly, void, the property owner may in some jurisdictions have an injunction, even if he might also have an appeal.⁶ This result has been reached, even under a statute which provides that no court shall entertain a complaint that the property owner was authorized to make and did make,⁶ or

v. Miller, 105 Ind. 393, 4 N. E. 867 [1885]; Foster v. Paxton, 90 Ind. 122 [1883]; Nixon v. City of Burlington, — Ia. —, 115 N. W. 239 [1908]; Minneapolis & St. Louis Ry. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103 [1903]; Friedenwald v. Shipley, 74 Md. 220, 21 Atl. 790, 24 Atl. 156 [1891]; Jones v. Gable, 150 Mich. 30, 113 N. W. 577 [1907]; Murray v. Graham, 6 Paiges Chan. Rep. 622 [1837].

²Brown v. Drain, 112 Fed. 582 [1901]; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661 [1904]; Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759 [1903]; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71 [1887]; Spalding v. City and County of Denver, 33 Colo. 172, 80 Pac. 126 [1905]; Morrell v. Union Drainage District, 118 Ill. 139, 8 N. E. 675 [1887]; City of Ottawa v. Chicago and Rock Island Railroad Company, 25 Ill. 29 [1860]; Alley v. City of Lebanon, 146 Ind. 125, 44 N. E. 1003 [1896]; Goff v. McGee, 128 Ind. 394, 27 N. E. 754 [1891]; Minneapolis & St. Louis Ry. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103 [1903]; Jones v. Gable, 150 Mich. 30, 113 N. W. 577 [1907]; Wilson v. City of Salem, 24 Ore. 504, 34 Pac. 9,691 [1893].

³Friedenwald v. Shipley, 74 Md. 220, 21 Atl. 790, 24 Atl. 156 [1891].

⁴The President and Fellows of

Yale College v. City of New Haven, 57 Conn. 1, 17 Atl. 139 [1889]; Ft. Dodge Electric Light & Power Company v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902]; Chicago, Milwaukee & St. Paul R. R. Co. v. Phillips, 111 Ia. 377, 82 N. W. 787 [1900]; Spence v. City of Milwaukee, — Wis. —, 113 N. W. 38 [1907]; Kersten v. City of Milwaukee, 106 Wis. 200, 48 L. R. A. 851, 81 N. W. 1103, 948 [1900]; Hayes v. Douglas County, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896]; Watkins v. City of Milwaukee, 52 Wis. 98, 8 N. W. 823 [1881]; Harrison v. City of Milwaukee, 49 Wis. 247, 5 N. W. 326 [1880].

⁵Alley v. City of Lebanon, 146 Ind. 125, 44 N. E. 1003 [1896]; Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92 [1886]; Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902]; Chicago, Milwaukee and St. Paul R. R. Co. v. Phillips, 111 Ia. 377, 82 N. W. 787 [1900]; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218 [1897]; Wilson v. City of Salem, 24 Or. 504, 34 Pac. 9,691 [1893]; Howell v. City of Tacoma, 3 Wash. 711, 28 Am. St. 83, 29 Pa. 447 [1892]; Spence v. City of Milwaukee, — Wis. —, 113 N. W. 38 [1907].

⁶Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218 [1897].

under a statute which provides that an appeal shall be an exclusive remedy and that "no action at law" shall lie;⁷ especially if the relief given by appeal is inadequate.⁸ It has been said that if appeal is allowed, equity will not interfere unless the method which is adopted for ascertaining the benefits and for assessing the cost of the improvement amounts to a fraud upon the property owner.⁹ The right of appeal does not preclude the right to sue for an injunction on account of defects for which no remedy could have been had by appeal.¹⁰

§ 1415. Right to bring certiorari as affecting equitable relief.

The fact that the property owner might have had the assessment reviewed, and the proceedings quashed on certiorari, does not establish his right to an injunction by reason of such defect;¹ but, on the other hand, the fact that he has a remedy in certiorari ordinarily prevents him from obtaining relief by injunction.² In-

⁷ *Spence v. City of Milwaukee*, — Wis. —, 113 N. W. 38 [1907]; *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

⁸ *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

⁹ *St. Benedict's Abbey v. Marion County*, — Or. —, 93 Pac. 231 [1908].

¹⁰ *Thayer Lumber Co. v. City of Muskegon*, — Mich. —, 115 N. W. 957 [1908]; *Cavanaugh v. Sander-son*, — Mich. —, 115 N. W. 955 [1908].

¹ *Clayton, Sheriff v. Lafargue*, 23 Ark. 137 [1861]; *Greenhood v. MacDonald*, 183 Mass. 342, 67 N. E. 336 [1903]; *County of Monroe v. City of Rochester*, 154 N. Y. 570, 49 N. E. 139 [1898]; *Hoffeld v. City of Buffalo*, 130 N. Y. 387, 29 N. E. 747 [1892]; *President, Managers and Company of Delaware & Hudson Canal Company v. Atkins*, 121 N. Y. 246, 24 N. E. 319 [1890]; *Guest v. City of Brooklyn*, 69 N. Y. 506 [1877]; *Betts v. City of Williamsburg*, 15 Barb. 255 [1853].

² *Sheriff v. Lafargue*, 23 Ark. 137 [1861]; *Greenhood v. MacDonald*, 183 Mass. 342, 67 N. E. 336 [1903]; *Jones v. Gable*, 150 Mich. 30, 113 N. W. 577 [1907]; *County of Monroe v. City of Rochester*, 154 N. Y. 570, 49 N. E. 139 [1898]; *Hoffeld v. City of Buffalo*, 130 N. Y. 387, 29 N. E. 747 [1892]; *Kennedy v. City of Troy*, 77 N. Y. 493 [1879]; (reversing, *Kennedy v. City of Troy*, 14 Hun, 308 [1878]); *Guest v. City of Brooklyn*, 69 N. Y. 506 [1877]; *Betts v. City of Williamsburg*, 15 Barb. 255 [1853]. To obtain an injunction it is said that "it must appear that, in the methods pursued in making the assessment, the inequality was, or may have been, due to some erroneous rule or principle. The facts should show that the municipal officers had transgressed their jurisdiction and that, in making the assessment, they had failed to comply with and had, in fact, disregarded the ordinance or resolution from which they derived their authority to act." *County of Monroe v. City of Rochester*, 154 N. Y. 570, 49 N. E. 139 [1898].

junction lies for defects which do not appear of record ³ and certiorari for those which appear of record.⁴ Where, by the constitution, common law jurisdiction is vested in certain courts, it has been held that a statute which authorizes a court of equity to grant an injunction against the collection of an assessment for defects which could be reached by certiorari, is unconstitutional as ousting the common law tribunal of its jurisdiction.⁵ In some jurisdictions defects in assessment proceedings may be reached either by certiorari or by injunction.⁶ Certiorari has been held not to be an adequate legal remedy as it does not issue as a matter of right.⁷

§ 1416. Right to bring error as affecting equitable relief.

If error lies to the assessment proceedings, and the property owner can have relief by prosecuting error, he cannot have an injunction,¹ since he has clear, adequate and complete relief at law.²

§ 1417. Right to bring *quo warranto* as affecting equitable relief.

In some jurisdictions the appropriate legal remedy for testing the validity of the formation of a drainage district is said to be a writ of *quo warranto*.¹ Where *quo warranto* is held to be the appropriate remedy, as in cases of this sort, it is often said that injunction will not lie.² One reason assigned for this view is that

³ Kennedy v. City of Troy, 77 N. Y. 493 [1879]; Clark v. Village of Dunkirk, 75 N. Y. 612; (no opinion; affirming, Clark v. Village of Dunkirk, 12 Hun (N. Y.) 181 [1877]).

⁴ See § 1393 *et seq.*

⁵ Lembeck v. Mayor and Aldermen of Jersey City, 30 N. J. Eq. (3 Stew.) 554 [1879].

⁶ Ogden City v. Armstrong, 168 U. S. 224, 42 L. 444, 18 S. 98 [1897]; (modifying, Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119 [1895]; Armstrong v. Ogden City, 9 Utah, 255, 34 Pac. 53 [1893]. See also Zeigler v. Hopkins, 117 U. S. 683, 6 S. 919 [1886].

⁷ Beaser v. City of Ashland, 89 Wis. 28, 61 N. W. 77 [1894].

¹ Lyman v. City of Chicago, 211 Ill. 209, 71 N. E. 832 [1904]; Lewis

v. Laylin, 46 O. S. 663, 23 N. E. 288 [1889].

² "The omissions and irregularities, held by the circuit court to be errors invalidating the proceeding had before the county commissioners were all apparent on their face and for their correction there was provided a legal remedy by petition in error and they were not proper predicates for equitable relief." Lewis v. Laylin, 46 O. S. 663, 677, 23 N. E. 288 [1889].

³ See § 1477.

⁴ The People ex rel. Wood v. Jones, 137 Ill. 35, 27 N. E. 294 [1892]; Bodman v. Lake Fork Special Drainage, 132 Ill. 439, 24 N. E. 630 [1891]; Evans v. Lewis, 121 Ill. 478, 13 N. E. 246 [1889]; Keigwin v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886].

the party aggrieved has a full, adequate and complete remedy at law in the form of the proceeding in *quo warranto*, and that he should therefore be denied relief in equity.³ Another reason suggested is that if a direct proceeding in *quo warranto* will lie, a collateral attack in equity should not be permitted.⁴

§ 1418. Effect of payment and right to recover payment.

If a property owner has paid the assessment voluntarily, he cannot thereafter bring a proceeding in equity to have such assessment set aside.¹ If the payment is voluntary and the property owner cannot recover it,² such payment is a waiver of his right to enjoin the assessment. If the property owner has paid the assessment under circumstances which give him a right to recover the same, his remedy is said to be at law, and not in equity.³ Under a statute which provides that a property owner may test the validity of an assessment by paying it, and then suing for its recovery, it has been held that an injunction can not be had, even before payment, since a complete remedy is given by statute.⁴ Such a statute, however, has been held not to oust equity of jurisdiction if the public corporation had no jurisdiction to levy the assessment.⁵

§ 1419. Discretionary nature of injunction.

The granting of an injunction rests in the sound discretion of the court,¹ and if a greater injury will result to the defendant from granting the injunction, than to the plaintiff from refusing it, and the rights of the plaintiff can be protected if they are shown to exist by granting an injunction upon the hearing upon the merits, a preliminary injunction will be refused.²

³Bodman v. Lake Fork Special Drainage, 132 Ill. 439, 24 N. E. 630 [1891].

⁴Keigwin v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886].

¹Diefenthaler v. Mayor, Aldermen and Commonalty of New York, 111 N. Y. 331, 19 N. E. 48 [1888].

²See § 1478 *et seq.* State on Application of Alter v. Bader, 56 O. S. 718, 47 N. E. 564 [1897].

³Watson v. City of Elizabeth, 35 N. J. Eq. (8 Stew.) 345 [1882].

⁴Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738 [1896].

⁵Ogden City v. Armstrong, 168 U. S. 224, 42 L. 444, 18 S. 98 [1897]; (modifying Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119 [1895]); (where the petition of the requisite number of property owners was not presented.)

¹Santa Cruz Fair Building Association v. Grant, 104 Cal. 306, 37 Pac. 1034 [1894].

²Santa Cruz Fair Building Association v. Grant, 104 Cal. 306, 37 Pac. 1034 [1894].

§ 1420. Equitable relief generally available against invalid assessments.

In some jurisdictions injunction has been extended by judicial decision, or by statute, so as to be the general remedy for testing the validity of an assessment.¹ These jurisdictions are for the most part those in which certiorari is obsolete or rare, and in which assessments are enforced by a summary sale without an opportunity to defend.

§ 1421. Injunction as regular method of testing validity of tax.

Under some statutes an injunction is made the regular method of testing the validity of the assessment,¹ and the court of equity is given power in a proper case to reduce the amount of the assessment. However, a clause in an assessment statute which provides that equity courts shall have jurisdiction to restrain violations of any provisions of the act has been held not to apply to defects which can be reached by certiorari.²

§ 1422. Effect of statutory provisions.

Under a statute which provides a proceeding for vacating an assessment upon certain grounds, and which is evidently intended as the exclusive method of testing the validity of the assessment, an injunction cannot be had,¹ at least until it is sought to take

¹ *Wilson v. Lambert*, 168 U. S. 611, 42 L. 599, 18 S. 217 [1897]; (reversing, *Craighill v. Van Riswick*, 8 App. D. C. 185 [1896]); *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898]; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885]; *Mayor and City Council of Baltimore v. Johnson*, 62 Md. 225 [1884]; *Mayor and City Council of Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686 [1861]; *Lockwood v. City of St. Louis*, 24 Mo. 20 [1856]; *Harmon v. City of Omaha*, 53 Neb. 164, 73 N. W. 671 [1897]; *Morris v. Merrell*, 44 Neb. 423, 62 N. W. 865 [1895]; *Teegarden v. Davis*, 36 O. S. 601 [1881]; *Burnet v. Corporation of Cincinnati*, 3 Ohio, 73, 17 Am. of Cincinnati, 3 Ohio, 17 Am. Elkins, 57 W. Va. 9, 49 S. E. 898 [1905]; *Johnson v. City of Milwau-*

kee, 40 Wis. 315 [1876]; *Myrick v. City of La Crosse*, 17 Wis. 442 [1863].

¹ *Fields v. The Commissioners of Highland County*, 36 O. S. 476 [1881]; *Steesse v. Oviatt*, 24 O. S. 248 [1873]; *Buckley v. Commissioners of Lorain County*, 1 Ohio C. C. 251 [1885].

² *Greenhood v. MacDonald*, 183 Mass. 342, 67 N. E. 336 [1903].

¹ *The Sixth Avenue Railroad Company v. The Mayor, Aldermen and Commonalty of the City of New York*, 63 Hun, 271, 17 N. Y. Supp. 903 [1892]; *Astor v. Mayor, etc. of New York*, 39 N. Y. Sup. Ct. Rep. 120 [1875]; *Rae v. Mayor etc., the City of New York*, 39 N. Y. Sup. Ct. Rep. 192 [1875]; *Heckman v. Mayor, etc., of New York*, 22 Hun (N. Y.) 590 [1880].

the property of the plaintiff to satisfy the lien of such assessment.² In New York a statute adopting into the charter of Brooklyn provisions of the New York charter with reference to vacating an assessment for fraud, has been held to adopt such statute as it stood at that time, and not to adopt subsequent statutory provisions, forbidding a property owner to bring an action in equity to vacate an assessment, and restricting him to the statutory remedy.³ A statute which provides for a stay of proceedings in an action to avoid an assessment until a re-assessment can be made does not prevent the owner from restraining the sale of his land for an illegal assessment.⁴

§ 1423. Equitable relief refused except on special grounds.

In other jurisdictions, courts of equity are very unwilling to review the acts of a public corporation.¹ In such jurisdictions, injunction is generally denied where it is invoked against an assessment on the ground that the property owner has an adequate remedy at law, if the only question at issue is the validity of the assessment.² It is not granted because the assessment is unjust and oppressive.³ In jurisdictions where this view obtains, a court of equity will review the acts of a public corporation in levying a special assessment, only where some special ground exists for invoking the jurisdiction for a court of equity, such as a multiplicity of suits, the casting of a cloud upon the title to realty, or an irreparable injury to the property owner.⁴

² See § 1451 *et seq.*

³ *Knapp v. City of Brooklyn*, 97 N. Y. 520 [1884]; (reversing *Knapp v. City of Brooklyn*, 28 Hun 500 [1882]).

⁴ *Dahlman v. City of Milwaukee*, 131 Wis. 427, 110 N. W. 479, 111 N. W. 675 [1907].

¹ *Heiser v. The Mayor, Aldermen and Commonalty of the City of New York*, 104 N. Y. 68, 9 N. E. 866 [1887]; *Thurston v. City of Elmira*, 10 Abb. Pr. N. S. 119 [1868].

² *City of Highlands v. Johnson*, 24 Colo. 371, 51 Pac. 1004 [1897]; *Norton v. City of Boston*, 119 Mass. 194 [1875]; *Whiting v. Mayor, Aldermen of City of Boston*, 106 Mass. 89 [1870]; *Brewer v. City of Springfield*, 97 Mass. 152 [1867]; *Heiser*

v. The Mayor, Aldermen and Commonalty of New York, 104 N. Y. 68, 9 N. E. 866 [1887].

³ *Guest v. City of Brooklyn*, 69 N. Y. 506 [1877].

⁴ *Hannewinkle v. Georgetown*, 15 Wall (U. S.) 547, 21 L. 231 [1872]; *Murphy v. Mayor and Council of the City of Wilmington*, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345 [1880]; *Harkness v. Board of Public Works*, 1 McArthur (D. C.) 121 [1873]; *Dusenbury v. Mayor and Common Council of Newark*, 25 N. J. Eq. (10 C. E. Gr.) 295 [1874]; *Liebstein v. Mayor and Common Council of the City of Newark*, 24 N. J. Eq. (9 C. E. Gr.) 200 [1873]; *County of Monroe v. City of Rochester*, 154 N. Y. 570, 49 N. E. 139

§ 1424. Multiplicity of suits and irreparable injuries.

The mere fact that there are several property owners similarly affected by an assessment is not a ground of equitable jurisdiction under the doctrine of preventing a multiplicity of suits.¹ The fact that several property owners attack an assessment as invalid, does not show that equity can prevent a multiplicity of suits by injunction, if it does not appear that the cause of action is the same as to all the plaintiffs.² The fact that an assessment is made payable in installments does not show that a multiplicity of suits will exist if equity does not give relief by injunction, since, ordinarily, a decision upon one installment would be final as to all.³ However, if the ground of objection is common to all the property owners, equitable relief may be given upon the theory that a multiplicity of suits can thereby be prevented.⁴ An illegal assessment of realty and an attempted sale thereunder, neither of them amount to an irreparable injury.⁵

§ 1425. Assessment as cloud on title.

If the assessment is void upon its face, or if its validity must necessarily be disclosed in any proceeding which the public corporation may bring to enforce such assessment, equity will not grant relief on the theory that the assessment is a cloud on the title.¹ If the plaintiff must show facts extrinsic to the record in order to show the validity of his title under the sale, and such extrinsic evidence must disclose the defect complained of, a

[1898]; *Heywood v. City of Buffalo*, 14 N. Y. 534 [1856]; *Lutes v. Briggs*, 5 Hun 67 [1875]; *Mace v. Trustees of the Village of Newburg*, 15 Howard (N. Y.) 161 [1857]; *Blake v. City of Brooklyn*, 26 Barb. 301 [1857]; *Wilson v. Town of Philippi*, 39 W. Va. 75, 19 S. E. 553 [1894]; *Douglass v. Town of Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548 [1876].

¹ *Bouton v. City of Brooklyn*, 15 Barb. (N. Y.) 375 [1853].

² *Michael v. City of St. Louis*, 112 Mo. 610, 20 S. W. 666 [1892].

³ *Guest v. City of Brooklyn*, 69 N. Y. 506 [1877].

⁴ *Drainage Commissioners District*

Number Two v. Kinney, 233 Ill. 67, 84 N. E. 34 [1908].

⁵ *Liebstein v. Mayor and Common Council of the City of Newark*, 24 N. J. Eq. (9 C. E. Gr.) 200 [1873]; *Guest v. City of Brooklyn*, 69 N. Y. 506 [1877].

¹ *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433 [1900]; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289 [1878]; *Guest v. City of Brooklyn*, 69 N. Y. 506 [1877]; *Tilden v. Mayor, Aldermen and Commonalty of the City of New York*, 56 Barb. (N. Y.) 340 [1870]; *Van Ressellear v. Kidd*, 4 Barb. (N. Y.) 17 [1847]; *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874].

cloud on the title does not exist.² If the defect does not appear of record, and need not be shown by the party seeking to enforce the assessment,³ or if the deed issued on the sale is *prima facie* evidence of its own validity,⁴ a cloud on the title exists. If an assessment, while really invalid, appears valid upon the face of the record, and extrinsic evidence is necessary to prove its invalidity, relief will be granted against such assessment in equity, in the absence of some specific statutory provision, even in jurisdictions in which the power of equity is most limited.⁵ In some jurisdictions the converse of this proposition is held to be true, and it is said that an injunction will not be allowed if the assessment is void upon the face of the proceedings.⁶ An injunction will be allowed if a tax bill is issued which is *prima facie* evidence of the regularity of the proceeding,⁷ or if the deed which issues at a public sale to satisfy the assessment is *prima facie* evidence of the regularity of antecedent proceedings.⁸ If the statute under which it is sought to levy the assessment is unconstitutional, it is held in some jurisdictions that an injunction will not be granted against levying or enforcing such assessment, on the theory that it cannot be a cloud upon the title, since the record of the proceedings will show on its face that such proceedings are conducted under an unconstitutional statute.⁹ In other jurisdictions injunction is regarded as the proper remedy against an assessment which it is sought to levy under an uncon-

² Marsh v. City of Brooklyn, 59 N. Y. 280 [1874].

³ Clark v. Village of Dunkirk, 12 Hun (N. Y.) 181 [1877].

⁴ Hatch v. City of Buffalo, 38 N. Y. 276 [1868]; Scott v. Onderdonk, 14 N. Y. 9 [1856].

⁵ Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881 [1894]; Murphy v. City of Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345 [1880]; Sewall v. City of St. Paul, 20 Minn. 511 [1874]; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468 [1874]; Allen v. City of Buffalo, 39 N. Y. 386 [1868]; (distinguished in Tilden v. Mayor, Aldermen and Commonalty of the City of New York, 56 Barb. (N. Y.) 340 [1870]); Clark v. Village of Dunkirk, 12 Hun (N. Y.) 181 [1877];

Baldwin v. City of Buffalo, 29 Barb. (N. Y.) 396 [1859].

⁶ See § 1427.

⁷ Rich v. Braxton, 158 U. S. 375, 39 L. 1022, 15 S. 1006 [1895]; Bayha v. Taylor, 36 Mo. App. 427 [1889].

⁸ Chase v. Treasurer of the City of Los Angeles, 122 Cal. 540, 55 Pac. 414 [1898]; Weller v. City of St. Paul, 5 Minn. 95 [1861]; Nichols v. Voorhis, 9 Hun (N. Y.) 171 [1876]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874].

⁹ Williams v. Corcoran, 46 Cal. 553 [1873]; Wells v. City of Buffalo, 80 N. Y. 253 [1880]. See also Greenhood v. MacDonald, 183 Mass. 342, 67 N. E. 336 [1903].

stitutional statute;¹⁰ and it has been said that such an assessment constitutes a cloud upon the title.¹¹ This difference of judicial opinion is in part due to the fact that the courts are not agreed as to what constitutes a cloud upon the title. An injunction against an unconstitutional assessment has been denied where the improvement was ordered, the bonds issued, and the expenses incurred after the supreme court had held such statutes to be constitutional, and before the change of judicial decision holding them to be unconstitutional.¹² It has been said that an injunction will issue against a general tax only where it is shown to be not merely unconstitutional but inequitable, since there is a general antecedent duty to pay taxes,¹³ while in case of local assessments, it is sufficient to show merely that the statute is unconstitutional since there is no antecedent duty to pay such assessments.¹⁴

§ 1426. Equitable relief granted if cloud on title exists.

Equitable relief is frequently sought against an invalid assessment in the form of an injunction to prevent the sale of the property assessed to satisfy the assessment, or in the form of a suit to set aside the assessment or the sale as a cloud upon the title of the owner. Equitable relief is ordinarily given in such cases if the assessment is a lien upon the property, and if its existence, or the fact of a sale to satisfy such assessment, either of them constitutes a cloud upon the title.¹ In jurisdictions in

¹⁰ *Wilson v. Lambert*, 168 U. S. 611, 42 L. 599, 18 S. 217 [1897]; (reversing, *Craighill v. Van Riswick*, 8 App. D. C. 185 [1896]); *Wright v. Thomas*, 26 O. S. 346 [1875]; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903]; *Arnold v. Mayor and Aldermen of City of Knoxville*, 115 Tenn. 195, 90 S. W. 469 [1905]; *Dietz v. City of Neenah*, 91 Wis. 422, 65 N. W. 500, 64 N. W. 299 [1895].

¹¹ *White v. Gove*, 183 Mass. 333, 67 N. E. 359 [1903].

¹² *Shoemaker v. City of Cincinnati*, 68 O. S. 603, 68 N. E. 1 [1903].

¹³ *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445 [1892].

¹⁴ *Dietz v. City of Neenah*, 91 Wis. 422, 65 N. W. 500, 64 N. W. 299 [1895].

¹ *Hannewinkle v. Georgetown*, 15

Wall (U. S.) 547, 21 L. 231 [1872]; *Nevada National Bank of San Francisco v. Poso Irrigation District*, 140 Cal. 344, 73 Pac. 1056 [1903]; *Chase v. Scheerer*, 136 Cal. 248, 68 Pac. 768 [1902]; *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881 [1894]; *Quint v. McMullen*, 103 Cal. 381, 37 Pac. 381 [1894]; *Alexander v. Dennison*, 2 McArthur (D. C.) 562 [1876]; *Skelton v. Sharp*, 161 Ind. 383, 67 N. E. 535 [1903]; *Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705 [1884]; *Chaffee v. City of Detroit*, 53 Mich. 573, 19 N. W. 191 [1884]; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876]; *Scofield v. City of Lansing*, 17 Mich. 437 [1868]; *Sewall v. City of St. Paul*, 20 Minn. 511 [1874]; *Leslie v. City of St. Louis*, 47 Mo. 474 [1871]; *Lock-*

which the right of equity to relieve against invalid assessments is based upon the theory of a cloud upon the title, equitable relief cannot be given against an irregular or defective assessment if no cloud exists.²

§ 1427. Nature of cloud on title.

While the courts are apparently harmonious in announcing and enforcing this principle, the harmony is apparent rather than real, since there is a wide divergency of authority upon the question of what constitutes a cloud upon the title. In some jurisdictions it is held that in order to constitute a cloud upon the title, the assessment, or the sale thereunder, must be apparently valid upon its face, and that the defects which exist must be such as will be disclosed only if extrinsic evidence is adduced, and will not necessarily be disclosed by the party seeking to enforce the assessment, or to uphold the sale, in making out his case.¹

wood v. City of St. Louis, 24 Mo. 20 [1856]; Horbach v. City of Omaha, 54 Neb. 83, 74 N. W. 434 [1898]; Ives v. Irey, 51 Neb. 136, 70 N. W. 961 [1897]; Duncan v. City of Elizabeth, 25 N. J. Eq. (10 C. E. Green) 430 [1874]; Town of Albuquerque v. Zeiger, 5 N. M. 674, 27 Pac. 315 [1891]; Alvord v. City of Syracuse, 163 N. Y. 158, 57 N. E. 310 [1900]; Rumsey v. City of Buffalo, 97 N. Y. 114 [1884]; Newell v. Wheeler, 48 N. Y. 486 [1872]; Ireland v. City of Rochester, 51 Barb. 414 [1868]; New York & Harlem R. R. Co. v. Board of Trustees of the Town of Morrisania, 7 Hun, 652 [1876]; Lennon v. Mayor, etc., of City of New York, 5 Daly (N. Y.) 347 [1874]; Dietz v. City of Neenah, 91 Wis. 422, 65 N. W. 500, 64 N. W. 299 [1895]; Liebermann v. City of Milwaukee, 89 Wis. 336, 61 N. W. 1112 [1895]; Beaser v. City of Ashland, 89 Wis. 28, 61 N. W. 77 [1894]; Dean v. Borchsenius, 30 Wis. 234 [1872]; Jenkins v. Board of Supervisors of Rocke County, 15 Wis. 11 [1862]; Dean v. City of Madison, 9 Wis. 402 [1859].

²Brown v. Hammond, 2 Chan. Cases 249 [1678]; Hannewinkle v. Georgetown, 15 Wall (U. S.) 547,

21 L. 231 [1872]; Bucknall v. Story, 46 Cal. 589, 13 Am. Rep. 220 [1873]; Craft v. Kochersperger, 173 Ill. 617, 50 N. E. 1061 [1898]; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468 [1873-4]; (followed without opinion in Ankeny v. Palmer, 20 Minn. 477 [1874]); Conde v. City of Schenectady, 164 N. Y. 258, 58 N. E. 130 [1900]; Dederer v. Voorhies, 81 N. Y. 154 [1880]; Marsh v. The City of Brooklyn, 59 N. Y. 280 [1874]; Haywood v. City of Buffalo, 14 N. Y. 534 [1856]; Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. 553 [1894].

¹Nevada National Bank of San Francisco v. Poso Irrigation District, 140 Cal. 344, 73 Pac. 1056 [1903]; Byrne v. Drain, 127 Cal. 663, 60 Pac. 433 [1900]; Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881 [1894]; Quint v. McMullen, 103 Cal. 381, 37 Pac. 381 [1894]; Sewall v. City of St. Paul, 20 Minn. 459 [1874]; Minnesota Linseed Oil Company v. Palmer, 20 Minn. 468 [1874]; Marsh v. City of Brooklyn, 59 N. Y. 280 [1874]; (distinguishing and limiting Scott v. Onderdonk, 14 N. Y. 9 [1856]); Newell v. Wheeler, 84 N. Y. 486 [1872]; Ire-

Under this theory the fact that an assessment is made a lien does not of itself make it a cloud on the title.² If the defect appears on the record,³ or if the party who seeks to enforce the assessment will be forced to introduce evidence to establish extrinsic facts necessary to his case, and such evidence will necessarily disclose the particular defect,⁴ and the assessment is not itself made *prima facie* evidence of its own validity,⁵ a cloud on the title exists. If the defect does not appear on the face of the record a cloud on the title exists.⁶ If the assessment,⁷ or the deed or certificate of sale is *prima facie* valid, and extrinsic evidence is necessary to rebut the presumption of its validity,⁸ a cloud

land v. City of Rochester, 51 Barb. 414 [1868]; Baldwin v. City of Buffalo, 29 Barb. (N. Y.) 396 [1859]; Astor v. Mayor, Aldermen and Commonalty of the City of New York, 37 N. Y. Sup. Ct. Rep. 539 [1874]. A cloud on the title exists under this theory, "when the claim or lien purports to affect real estate, and appears on its face to be valid; when the defect in it can be made to appear only by extrinsic evidence, which will not necessarily appear in proceedings to enforce the lien." County of Monroe v. City of Rochester, 154 N. Y. 570, 579, 49 N. E. 139 [1898]; (quoting Marsh v. City of Brooklyn, 59 N. Y. 281 [1874].

² Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. 553 [1894].

³ Hanneinkle v. Georgetown, 15 Wall. (U. S.) 547, 21 L. 231 [1872]; Bucknall v. Story, 46 Cal. 589, 13 Am. Rep. 220 [1873]; Haywood v. City of Buffalo, 14 N. Y. 534 [1856]; Conde v. City of Schenectady, 164 N. Y. 258, 58 N. E. 130 [1900]; Craft v. Kochersperger, 173 Ill. 617, 50 N. E. 1061 [1898]; Murphy v. City of Wilmington, 6 Houst. (Del.) 108, 22 Am. St. Rep. 345 [1880]; Blanchard v. City of Barre, 77 Vt. 420, 60 Atl. 970 [1905].

⁴ Dederer v. Voorhies, 81 N. Y. 154 [1880]; Guest v. City of Brooklyn, 69 N. Y. 506 [1877]; Marsh v. The City of Brooklyn, 59 N. Y. 280

[1874]; Blanchard v. City of Barre, 77 Vt. 420, 60 Atl. 970 [1905].

⁵ Dederer v. Voorhies, 81 N. Y. 154 [1880].

⁶ Bayha v. Taylor, 36 Mo. App. 427 [1889]; Rumsey v. City of Buffalo, 97 N. Y. 114 [1884]; Allen v. City of Buffalo, 39 N. Y. 386 [1868]; Van Ressellear v. Kidd, 4 Barb. (N. Y.) 17 [1847]; Clark v. Village of Dunkirk, 12 Hun (N. Y.) 181 [1877].

⁷ Rich v. Braxton, 158 U. S. 375, 39 L. 1022, 15 S. 1006 [1895]; Bayha v. Taylor, 36 Mo. App. 427 [1889]; Rumsey v. City of Buffalo, 97 N. Y. 114 [1884].

⁸ Chase v. Treasurer of the City of Los Angeles, 122 Cal. 540, 55 Pac. 414 [1898]; Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535 [1903]; White v. Gove, 183 Mass. 333, 67 N. E. 359 [1903]; Weller v. City of St. Paul, 5 Minn. 95 [1861]; Alvord v. City of Syracuse, 163 N. Y. 158, 57 N. E. 310 [1900]; Allen v. City of Buffalo, 39 N. Y. 386 [1868]; (distinguished in Tilden v. Mayor, etc., of the City of New York, 56 Barb. (N. Y.) 340 [1870]); Nichols v. Voorhis, 9 Hun (N. Y.) 171 [1876]; Lennon v. Mayor, etc., of the City of New York, 5 Daly (N. Y.) 347 [1874]; Dietz v. City of Neenah, 91 Wis. 422, 65 N. W. 500, 64 N. W. 299 [1895]; Jenkins v. Board of Supervisors of Rocke Co., 15 Wis. 11 [1882]; Dean v. City of Madison, 9 Wis. 402 [1859].

on the title exists. Under this rule, however, a cloud on the title does not exist if the defect which is alleged appears upon the face of the proceeding, no matter how difficult it may be as a question of law to determine the invalidity of the assessment from such record. In other jurisdictions it seems to be held that if the assessment is an apparent lien upon the property, or if the sale apparently passes a valid title, a cloud on the title exists, even if it ultimately is decided by the court that the record of the proceedings itself shows its invalidity.⁹ If a contract for an improvement unlawfully delegates power to the superintendent of streets to increase or lessen the expense of the work materially, such delegation of power invalidates the proceedings, and an assessment for such improvement is void, and an action to quiet title will lie.¹⁰ If the amount which is justly due as the proportionate share of the property owner can be determined readily, a property owner must pay, or offer to pay, such amount, in order to have his title quieted as against an assessment sale.¹¹

§ 1428. Statutes affecting the right to sue to quiet title.

A curative statute which provides for arbitration of invalid assessments on the basis of the benefits received, precludes a property owner from a suit to quiet title, and he is obliged to pursue the remedy given by statute.¹ The fact that the legislature has, by statute, given ample provision for relief, may prevent a property owner from maintaining a suit to quiet title which he otherwise would have been entitled to bring.² Under a statute

⁹ Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768 [1902]; The Mayor of Baltimore v. The Grand Lodge of Maryland of the Independent Order of Odd Fellows, 44 Md. 436 [1875]; Chaffee v. City of Detroit, 53 Mich. 573, 19 N. W. 191 [1884]; Frost v. Leatherman, 55 Mich. 33, 20 N. W. 705 [1884]; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535 [1876]; Scofield v. City of Lansing, 17 Mich. 437 [1868]; Fowler v. City of St. Joseph, 37 Mo. 228 [1866]; Horbach v. City of Omaha, 54 Neb. 83, 74 N. W. 434 [1898]; Ives v. Irey, 51 Neb. 136, 70 N. W. 961 [1897]; Lieberman v. City of Milwaukee, 89 Wis. 336, 61 N. W. 1112 [1895]; Beaser

v. City of Ashland, 89 Wis. 28, 61 N. W. 77 [1894].

¹⁰ Chase v. Scheerer, 136 Cal. 248, 68 Pac. 768 [1902].

¹¹ Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495 [1887]. See also Weber v. City of San Francisco, 1 Cal. 455 [1851].

¹ Baldwin v. City of Elizabeth, 42 N. J. Eq. (15 Stew.) 11, 6 Atl. 275 [1886]; Smith v. Mayor and Common Council of the City of Newark, 32 N. J. Eq. (5 Stew.) 1 [1880].

² Scudder v. Mayor, Aldermen and Commonalty of the City of New York, 146 N. Y. 245, 40 N. E. 734 [1895].

providing an ample and exclusive method of vacating an assessment, a property owner cannot bring a suit to quiet title or to remove a cloud, but must seek the relief provided for by the statute.³ A right of appeal to the common council from any act of the street commissioners in making a local assessment, does not preclude the property owner from bringing suit to set aside a sale for such assessment.⁴ The right to maintain an action to quiet title is conferred by some statutes which define and extend the right to bring such suit.⁵

§ 1429. Doctrine of collateral attack as precluding suit to quiet title.

A decree of a court of competent jurisdiction may bar a property owner from his right to bring a suit to quiet title. Thus, after a decree foreclosing a lien of an alleged assessment, property owners who are made parties to such suit cannot sue to quiet title.¹ If confirmation is had before a court of competent jurisdiction, property owners who have been properly notified of such suit cannot subsequently attack such assessment and decree of confirmation in a suit to quiet title.² It has been held that if a council or other similar body has jurisdiction to make the improvement to levy the assessment, and to assess the land which has, in fact, been assessed, such assessment cannot be attacked collaterally by a suit to quiet title.³ If a court has appointed certain commissioners, this has been held equivalent to adjudication that they are qualified as freeholders, and such adjudication cannot be collaterally attacked in a suit to quiet title.⁴ On the other hand, it has been held that a court which confirms an assessment acts as a court of limited jurisdiction, and in the absence of

³ See § 1451 *et seq.*

⁴ *Weller v. City of St. Paul*, 5 Minn. 95 [1860-1861].

⁵ *Mayor and Common Council of City of Newark v. Schuh*, 34 N. J. Eq. (7 Stew.) 262 [1881]; *McClave v. Mayor and Common Council of the City of Newark*, 31 N. J. Eq. (4 Stew.) 472 [1879]; *Bogert v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Greene) 568 [1876]; (reversing *Bogert v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Greene) 426 [1874]).

¹ *Crane v. Cummings*, 137 Cal. 201, 69 Pac. 984 [1902]; *Wood v. Jordan*, 125 Cal. 261, 57 Pac. 997 [1899].

² *Gage v. Parker*, 103 Ill. 528 [1882].

³ *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431 [1889]; *McNamee v. City of Tacoma*, 24 Wash. 591, 64 Pac. 791 [1901].

⁴ *Dederer v. Voorhies*, 81 N. Y. 154 [1880].

statute such decree of confirmation does not prevent the property owner from suing to quiet the title.⁵

§ 1430. Exercise of discretion of public officers as affecting equitable relief.

If certain matters are left within the discretion of the public officers by whom the assessment is levied, a court of equity will not attempt to control the exercise of such discretion by injunction,¹ either as to the nature of the improvement,² or as to the existence,³ or the apportionment of benefits,⁴ if no fraud or gross abuse of discretion is shown to exist.⁵ Where an injunction was allowed by the trial court in such case, a writ of prohibition issued by the Supreme Court and forbidding the trial court from proceeding in such case, was held to be the proper remedy, the statutory remedy of appeal from such injunction not being regarded as speedy or adequate.⁶ If the public officers have adopted as a rule of law in governing their action, a rule contrary

¹ *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874].

² *Clayton v. Lafargue*, 23 Ark. 137 [1861]; *Boskowitz v. Thompson*, 144 Cal. 724, 78 Pac. 290 [1904]; *Murphey v. Mayor and Council of the City of Wilmington*, 5 Del. Ch. 281 [1879]; *Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428 [1896]; *Reynolds v. Milks Grove Special Drainage District*, 34 Ill. App. 302 [1889]; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899]; *Robinson v. City of Valparaiso*, 136 Ind. 616, 36 N. E. 644 [1893]; *De Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016 [1892]; *Anderson v. Claman*, 123 Ind. 471, 24 N. E. 175 [1889]; *Ricketts v. Spraker*, 77 Ind. 371 [1881]; *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499 [1880]; *State ex rel. Young v. City of Neodesha*, 3 Kans. App. 319, 45 Pac. 122 [1896]; *Goodwillie v. City of Detroit*, 103 Mich. 283, 61 N. W. 526 [1894]; *Richardson v. City of Omaha*, — Neb. —, 110 N. W. 648 [1907].

³ *Murphey v. Mayor and Council of Wilmington*, 5 Del. Ch. 281 [1879]; *Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428 [1896]; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899]; *State ex rel. Young v. City of Neodesha*, 3 Kan. App. 319, 45 Pac. 122 [1896].

⁴ *Clayton v. Lafargue*, 23 Ark. 137 [1861].

⁵ *Richardson v. City of Omaha*, — Neb. —, 110 N. W. 648 [1907]; *O'Reilly v. City of Kingston*, 39 Hun 285 [1886]; *Meserole v. Mayor and Common Council of Brooklyn*, 8 Paiges' Chan. (N. Y.) 198 [1840]; *Turnquist v. Cass County Drain. Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902]; *Mechlem v. City of Cincinnati*, 28 Ohio C. C. 211 [1905]; *Benham v. City of Cincinnati*, 26 Ohio C. C. 17 [1904].

⁶ *Richardson v. City of Omaha*, — Neb. —, 110 N. W. 648 [1907]; *Turnquist v. Cass County Drain Commissioners*, 11 N. D. 514, 92 N. W. 852 [1902]; *Benham v. City of Cincinnati*, 26 Ohio C. C. 17 [1904].

⁷ *State v. Fisk*, 15 N. D. 219, 107 N. W. 191 [1906].

to that prescribed by statute, injunction will lie.⁷ If the discretion of the public officials has been abused grossly, an injunction may be granted.⁸ On this theory injunction has been allowed where the city paved the street up to the lot line, thereby depriving the property owner of a sidewalk.⁹

§ 1431. Comparative effect of jurisdictional defects and technical irregularities.

If an assessment is levied without statutory authority, and the proceedings are entirely void, an injunction will be allowed.¹ If the public corporation has acquired jurisdiction to levy the assessment in question, an injunction is not given for technical irregularities or informalities if the property owner has received a substantial benefit, as long as the statutory provisions which are violated are not made mandatory,² especially if relief against

⁷ *Clark v. Village of Dunkirk*, 75 N. Y. 612 [1878]; (no opinion; affirming *Clark v. Village of Dunkirk*, 12 Hun (N. Y.) 181 [1877]).

⁸ *The President and Fellows of Yale College v. City of New Haven*, 57 Conn. 1, 17 Atl. 139 [1889]; *Carter v. City of Chicago*, 57 Ill. 283 [1870]; *Mills v. Village of Norwood*, 6 Ohio C. C. 305 [1892].

⁹ *Carter v. City of Chicago*, 57 Ill. 283 [1870]; *Mills v. Village of Norwood*, 6 Ohio C. C. 305 [1892].

¹ *McKee v. Town of Pendleton*, 154 Ind. 652, 57 N. E. 532 [1900]; *Guckien v. Rothrock*, 137 Ind. 355, 37 N. E. 17 [1893]; *Board of Commissioners of Wells County v. Gruver*, 115 Ind. 224, 17 N. E. 290 [1888]; *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867 [1885]; *Bennett v. City of Emmetsburg*, — Ia. —, 115 N. W. 582 [1908]; *Diver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542 [1905]; *Chicago, Milwaukee and St. Paul Railway Co. v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900]; *Barker v. Board of Commissioners of Wyandotte Co.*, 45 Kan. 681, 26 Pac. 585 [1891]; *The Mayor and City Council of Baltimore v. The Grand Lodge of Maryland of the Independent Order of Odd*

Fellows, 44 Md. 436 [1875]; *Mayor and City Council of Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686 [1861]; *Lasbury v. McCagne*, 56 Neb. 220, 76 N. W. 862 [1898]; *Glenn v. Waddel*, 23 O. S. 605 [1873]; *Culbertson v. City of Cincinnati*, 16 Ohio, 574 [1847]; *Kadlerly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222 [1903-1904]; *Leake v. City of Philadelphia*, 171 Pa. St. 125, 32 Atl. 1110 [1895]; *Vreeland v. City of Tacoma*, — Wash. —, 94 Pac. 192 [1908].

² *Lent v. Tillson*, 72 Cal. 404, 14 Pac. 71 [1887]; *Weber v. City of San Francisco*, 1 Cal. 455 [1851]; *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899]; *Cason v. City of Lebanon*, 153 Ind. 567, 55 N. E. 768 [1899]; *Pittsburg, Cincinnati, Chicago and St. Louis Ry. Co. v. Town of Crown Point*, 150 Ind. 536, 50 N. E. 741 [1897]; *Terre Haute and Logansport R. R. Co. v. Soice*, 128 Ind. 105, 27 N. E. 429 [1890]; *McEneney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540 [1890]; *Montgomery v. Wasem*, 116 Ind. 343, 19 N. E. 184, 19 N. E. 184, 15 N. E. 795 [1888]; *Davis v. Lake Shore & Michigan Southern Ry. Co.*, 114 Ind. 364, 16 N. E. 639 [1887]; *Trimble v. Mc-*

such irregularities could have been obtained on appeal.³ This rule is sometimes stated in the form that an injunction will not be given where there is no moral obligation to pay the assessment.⁴ The meaning of the term moral obligation, is so vague and indefinite that it is an unsafe method of explaining a rule which can be sufficiently explained by definite and well recognized legal principles.

§ 1432. Specific defects.

In turning from a discussion of the general principles which control the granting of an injunction against the levying or enforcement of an assessment to a consideration of the specific defects in an assessment for which an injunction will be given, it will be noted that the same difference in judicial opinion which is found in a discussion of the general principles applicable to injunction manifests itself in the determination of the specific defects for which an injunction will or will not be given. An injunction has been granted where the assessment has been levied for a purpose not authorized by statute,¹ or where the assessment

Gee, 112 Ind. 307, 14 N. E. 83 [1887]; Sunier v. Miller, 105 Ind. 393, 4 N. E. 867 [1885]; Foster v. Paxton, 90 Ind. 122 [1883]; Argo v. Barthand, 80 Ind. 63 [1881]; Center and Warren Gravel Road Co. v. Black, 32 Ind. 468 [1870]; Owens v. City of Marion, 127 Ia. 469, 103 N. W. 381 [1905]; Patterson v. Baumer, 43 Ia. 477 [1876]; Barnes v. City of Parsons, — Kan. —, 94 Pac. 151 [1908]; City of Lawrence v. Killam, 11 Kan. 499 [1873]; Parker v. Challiss, 9 Kan. 155 [1872]; Seward v. Rheiner, 2 Kan. App. 95, 43 Pac. 423 [1895]; Township of Flynn v. Woolman, 133 Mich. 508, 95 N. W. 567 [1903]; Redick v. City of Omaha, 35 Neb. 125, 52 N. W. 847 [1892]; Darst v. Griffin, 31 Neb. 668, 48 N. W. 819 [1891]; Jones v. Mayor and Common Council of the City of Newark, 11 N. J. Eq. (3 Stock.) 452 [1857]; County of Monroe v. City of Rochester, 154 N. Y. 570, 49 N. E. 139 [1898]; Lyth v. City of Buffalo, 48 Hun (N. Y.) 175

[1888]. (Publication of assessment begun a few days before approval thereof.) O'Reilly v. City of Kingston, 39 Hun (N. Y.) 285 [1886]; Morse v. City of Buffalo, 35 Hun (N. Y.) 613 [1885]; Kelsey v. King, 11 Abb. Prac. (N. Y.) 180 [1860]; Thurston v. City of Elmira, 10 Abb. Pr. N. S. (N. Y.) 119 [1868]; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66 [1906]; Upington v. Oviatt, 24 O. S. 232 [1873]; Taylor v. Village of Wapakoneta, 26 Ohio C. C. 285 [1904]; Beaser v. Barber Asphalt Paving Co., 120 Wis. 599, 98 N. W. 525 [1904]; Gleason v. Waukesha County, 103 Wis. 225, 79 N. E. 249.

³ Lent v. Tillson, 72 Cal. 404, 14 Pac. 71 [1887]. See § 1358.

⁴ Esterbrook v. O'Brien, 98 Cal. 671, 33 Pac. 765 [1893].

¹ President and Fellows of Yale College v. City of New Haven, 57 Conn. 1, 17 Atl. 139 [1889]; Cain v. City of Elkins, 57 W. Va. 9, 49 S. E. 898 [1905].

has been levied before the improvement has been completed, and the statute authorizes the levy of the assessment only after the improvement is completed,² or where the board of public improvements has not recommended the proposed improvement, and such recommendation is mandatory,³ or where a full estimate has not been made and the assessment greatly exceeds the estimate as actually made,⁴ or where plans have not been made and the specifications do not show the grade of the sewer or the depth of excavation or the manner and style of the construction of the man-holes⁵ and power is delegated improperly to subordinate officials to decide the character of the improvement,⁶ or where the contract is not let as required by statute,⁷ or where the petition of the property owners required by statute has not been filed, and such petition is mandatory or jurisdictional, and the public corporation is not empowered to pass upon its sufficiency,⁸ or where a remonstrance of the property owners has been ignored and the statute provides that if such remonstrance is filed the improvement shall not be made for a certain time thereafter,⁹ or where the taxing district has not been fixed in advance as required by statute.¹⁰ An injunction has been denied where the grade was not fixed in advance, although required by statute.¹¹ An injunction has been granted where land has been omitted from the assessment, thereby increasing the burden upon the property owners whose lands are included,¹² although it has been held

² *Sanborn v. City of Mason City*, 114 Ia. 189, 86 N. W. 286 [1901].

³ *Butler v. City of Detroit*, 43 Mich. 552, 5 N. W. 1078 [1880].

⁴ *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781 [1885].

⁵ *Wells v. Burnham*, 20 Wis. 112 [1865].

⁶ *Wells v. Burnham*, 20 Wis. 112 [1865].

⁷ *Kneeland v. Furlong*, 20 Wis. 437 [1866]; (where the public corporation reserved the right to divide the bids.)

⁸ *Hager v. City of Burlington*, 42 Ia. 661 [1876]; *Board of Commissioners of Wyandotte County v. Barker*, 45 Kan. 699, 26 Pac. 591 [1891]; *Bouldin v. Mayor and City Council of Baltimore*, 15 Md. 18 [1859]; *Morse v. City of Omaha*, 67 Neb. 426,

93 N. W. 734 [1903]; *Armstrong v. Ogden City*, 12 Utah, 476, 43 Pac. 119 [1895]; *Canfield v. Smith*, 34 Wis. 381 [1874]. If the public corporation has power to pass upon its sufficiency injunction will not lie. *Hume v. The Little Flat Rock Draining Association*, 72 Ind. 499 [1880]; *Quinlan v. Myers*, 29 O. S. 500 [1876].

⁹ *Hensley v. City of Butte*, 33 Mont. 206, 83 Pac. 481 [1905].

¹⁰ *Dehail v. Morford*, 95 Cal. 457, 30 Pac. 593 [1892].

¹¹ *Barnes v. City of Parsons*, — Kan. —, 94 Pac. 151 [1908].

¹² *Forgey v. Northern Gravel Road Co.*, 37 Ind. 118 [1871]; *Greencastle and Bowling Green Turnpike Co. v. Albin*, 34 Ind. 554 [1870]; *New Haven and Ft. Wayne Turnpike Co. v.*

that such property owners cannot have an injunction until the amount which is properly due is paid.¹³ If an improvement has been constructed at the cost of the property benefited, and is subsequently used in connection with another improvement, as where a drain or sewer is connected with one which has been paid for by the property benefited, it has been held that injunction will not lie, since, if the property owner has the right to compel the public corporation to enlarge the boundaries of the assessment district, his remedy is by mandamus.¹⁴ The fact that land is improperly omitted from the assessment district, is not ground for an injunction against the construction of the improvement, if the fact that the public corporation has on hand funds sufficient to pay for the cost of such improvement is consistent with the showing made.¹⁵ An injunction will be given, if it is attempted to assess land which is exempt from the assessment,¹⁶ or which is not within the assessment district as fixed by statute,¹⁷ or where the decision of the public corporation as to benefits is not conclusive, if the property which is assessed is not benefited.¹⁸ or if the public corporation attempts to impose a lien in gross upon two or more distinct tracts of land, and to sell them as an entire tract.¹⁹ An injunction is given where there is a defective apportionment of the assessment which is substantially unjust,²⁰ as where the property is assessed in excess of benefits, and enough has been paid in to equal the benefits,²¹ although an

Bird, 33 Ind. 325 [1870]; *Turner v. Thorntown and Mechanicsburg Gravel Road Co.*, 33 Ind. 317 [1870]; *Copeutt v. City of Yonkers*, 83 Hun, 178, 31 N. Y. S. 659 [1894]. *Contra*, if the public officials have power to determine what land to include. *Ricketts v. Spraker*, 77 Ind. 371 [1881].

¹³ *City of Ottawa v. Barney*, 10 Kan. 270 [1872].

¹⁴ *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898]; *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761 [1893].

¹⁵ *Hoke v. Perdue*, 62 Cal. 545 [1881].

¹⁶ *City of Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091 [1895].

¹⁷ *City of Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 468 [1894];

City of Cincinnati v. Batsche, 52 O. S. 324, 27 L. R. A. 536, 40 N. E. 21 [1895].

¹⁸ *Buckley v. Commissioners of Lorain County*, 1 Ohio C. C. 251 [1885].

¹⁹ *Fowler v. City of St. Joseph*, 37 Mo. 228 [1866]; *Duncan v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Green) 430 [1874].

²⁰ *Bidwell v. Huff*, 103 Fed. 362 [1900]; *Charles v. City of Marion*, 98 Fed. 166 [1899]; *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899]; *Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

²¹ *Lanfersiek v. City of Cincinnati*, 28 Ohio C. C. 822 [1904].

injunction is not given for an error in frontage in an assessment levied by the front foot if such error does not, in fact, increase the assessment upon the property.²² An injunction will be granted if the apportionment is not made upon actual view of the premises, as required by statute.²³ An injunction has been denied where an assessment was levied according to frontage, even if, under the constitution as construed by the court, it must be apportioned according to benefits, since in the absence of a showing to the contrary, it will be presumed that the city determined that benefits were apportioned according to frontage.²⁴ An injunction is granted if the notice required by statute is not given,²⁵ although if a property owner is actually present at the hearing, notice of which is omitted, he cannot take advantage of failure to give notice.²⁶ If, by statute, notice must be given to the property owner to give him an opportunity to do the work himself, an injunction will be granted if the notice, even when taken in connection with the acts of such public corporation, does not give adequate information to the property owner of the work that he is required to do.²⁷ If the council, or other public body, has authority to determine the sufficiency of the notice,²⁸ or if notice is given to the holder of the legal title,²⁹ or if notice is given to the guardian of an insane property owner, and the record shows that the proceeding is to enforce the assessment against the property of such insane owner,³⁰ an injunction will not be given. An injunction has been denied where the council

²² *Morse v. City of Buffalo*, 35 Hun (N. Y.) 613 [1885].

²³ *Watkins v. City of Milwaukee*, 52 Wis. 98, 8 N. W. 823 [1881]; *Johnson v. City of Milwaukee*, 40 Wis. 315 [1876].

²⁴ *McKee v. Town of Pendleton*, 162 Ind. 667, 69 N. E. 997 [1904].

²⁵ *Davis v. Lake Shore and Michigan Southern Ry. Co.*, 114 Ind. 364, 16 N. E. 639 [1887]; *Spring Steel Fence & Wire Co. v. City of Anderson*, 32 Ind. App. 138, 69 N. E. 404 [1903]; *Hoffman v. Shell*, — Mich. —, 115 N. W. 979 [1908]; *Thayer Lumber Co. v. City of Muskegon*, — Mich. —, 115 N. W. 957 [1908]; *Sewall v. St. Paul*, 20 Minn. 511 [1874]; *Johnson v. City of Oshkosh*,

21 Wis. 184 [1866]. See also *City Council v. Pinckney*, 1 Treadway (S. C.) 42.

²⁶ *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867 [1885].

²⁷ *Myrick v. City of La Crosse*, 17 Wis. 442 [1863]. See also *Horbach v. City of Omaha*, 54 Neb. 83, 74 N. W. 434 [1898].

²⁸ *Dennison v. City of Kansas*, 95 Mo. 416, 8 S. W. 429 [1888].

²⁹ *Roman Catholic Archbishop of San Francisco v. Shipman*, 79 Cal. 288, 21 Pac. 830 [1889]; *Kelly v. Mendelsohn*, 105 La. 490, 29 So. 894 [1901].

³⁰ *Hunter v. Kansas City Safe Deposit and Savings Bank*, 158 Mo. 262, 58 S. W. 1053 [1900].

did not grant a hearing to the property owners.³¹ An injunction may be allowed against enforcing an assessment after a sale notice of which was not given to the property owner as required by statute.³² If a sale is to be had under a void precept,³³ as where the precept is signed by the temporary president of the council, instead of by the mayor,³⁴ injunction will lie. An injunction will be given if the improvement is ordered by resolution instead of by ordinance,³⁵ or if the assessment exceeds the amount fixed by statute.³⁶ In some jurisdictions an injunction is given if the contract is invalid, as where it contains a provision for the future maintenance of the street which is improved,³⁷ or where proper notice of the letting of such contract is not given.³⁸ In other jurisdictions, an injunction is not given where the contract is irregular or defective,³⁹ and the property owner is left to his remedy at law.⁴⁰ This view is entertained where the property owners do not avail themselves of their right to an appeal.⁴¹ Injunction has been refused where the contract was entered into irregularly but the contract price was not excessive.⁴² If the contract is let for a price which is grossly extravagant, or if fictitious items are included in the amount of the assessment, an

³¹ *Nixon v. City of Burlington*, — Ia. —, 115 N. W. 239 [1908].

³² *Kean v. Asch*, 27 N. J. Eq. (12 C. E. Greene) 57 [1876].

³³ *City of Jeffersonville v. Patterson*, 32 Ind. 140 [1869].

³⁴ *City of Jeffersonville v. Patterson*, 32 Ind. 140 [1869].

³⁵ *Newman v. City of Emporia*, 32 Kan. 456, 4 Pac. 815 [1884].

³⁶ *Birdseye v. Village of Clyde*, 61 O. S. 27, 55 N. E. 169 [1899]; *Brooks v. Village of Norwood*, 12 Ohio C. C. 257 [1896]. *Contra*, where such objection should have been made to the commissioners. *Methodist Episcopal Church of Harlem v. Mayor, etc., of the City of New York*, 55 Howard (N. Y.) 57 [1877].

³⁷ *City Council of Montgomery v. Barnett*, — Ala. —, 43 So. 92 [1907].

³⁸ *Mayor and City Council of Baltimore v. Johnson*, 62 Md. 225 [1884].

³⁹ *Lewis v. City of Elizabeth*, 25 N.

J. Eq. (10 C. E. Gr.) 298 [1874]; *Beaser v. Barber Asphalt Paving Co.*, 120 Wis. 599, 98 N. W. 525 [1904].

⁴⁰ *Lewis v. City of Elizabeth*, 25 N. J. Eq. (10 C. E. Gr.) 298 [1874]; *Beaser v. Barber Asphalt Paving Co.*, 120 Wis. 599, 98 N. W. 525 [1904].

⁴¹ *Nixon v. City of Burlington*, — Ia. —, 115 N. W. 239 [1908]. (Notice for proposals not sufficiently definite.)

⁴² *Fisher v. Georgia Vitriified Brick & Clay Co.*, 121 Ga. 621, 49 S. E. 679 [1904]. (Maintenance for ten years a clause of contract.) *City of Lawrence v. Killam*, 11 Kan. 499 [1873]. (Improvement constructed by partnership, a partner wherein became a member of the city council after the contract was let.) (See also *Diver v. Keokuk Savings Bank*, 126 Ia. 691, 102 N. W. 542 [1905]; *Taylor v. Village of Wapakoneta*, 26 Ohio C. C. 285 [1904].)

injunction is held to be the proper remedy,⁴³ although, if the excess can readily be ascertained an injunction will not be granted,⁴⁴ or, if granted, will be conditioned upon the property owner's paying the amount fairly due.⁴⁵ An injunction is, in some jurisdictions, denied where the improvement does not conform to the ordinance on the theory that the remedy of the property owner is in mandamus to compel such conformity.⁴⁶ It has been said that a court of equity will probably require payment made upon an invalid assessment to be credited upon a second and valid assessment for the same improvement.⁴⁷ If, however, credit for work done should be presented to the taxing officials, failure to obtain such credit at the proper stage of the proceedings cannot be made grounds for a subsequent injunction.⁴⁸ An injunction has been granted where the assessors failed to act as a body.⁴⁹ If, under the proper rule as to application of payments, the full amount due upon the assessment has been paid, equity will enjoin the collection of the remainder of such assessment which is not properly due.⁵⁰ Injunction will be granted against an attempt to enforce a personal liability where there is no statutory authority therefor.⁵¹ Injunction will not be granted where the regularity of the formation of the taxing district is attacked.⁵² The remedy in such cases is said to be in *quo warranto*.⁵³ It is

⁴³ *Dixon v. City of Detroit*, 86 Mich. 516, 49 N. W. 628 [1891]; *Cook v. City of Racine*, 49 Wis. 243, 5 N. W. 352 [1880]. Injunction is the proper remedy if there is actual fraud in the assessment. *Hinkley v. Bishop*, — Mich. —, 114 N. W. 676 [1908].

⁴⁴ *Kansas Town Co. v. City of Argentine*, 5 Kans. App. 50, 47 Pac. Rep. 542 [1896].

⁴⁵ *Cook v. City of Racine*, 49 Wis. 243, 5 N. W. 352 [1880].

⁴⁶ *Lyman v. City of Chicago*, 211 Ill. 209, 71 N. E. 832 [1904].

⁴⁷ *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766 [1888].

⁴⁸ *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12 [1896].

⁴⁹ *Astor v. Mayor, Aldermen and Commonalty of the City of New York*, 37 N. Y. Sup. Ct. Rep. 539 [1874].

⁵⁰ *City of Cincinnati v. James*, 55 O. S. 180, 44 N. E. 925 [1896]; *Lanfersiek v. City of Cincinnati*, 28 Ohio C. C. 822 [1904]; *Metcalf v. Carter*, 19 Ohio C. C. 196 [1900]. *Contra*, on the ground that such application cannot be made, and that installments due thereafter can be reduced but an excess on those paid in cannot be applied to those not yet paid. *Brooks v. Village of Norwood*, 12 Ohio C. C. 257 [1896].

⁵¹ *Craw v. Village of Tolono*, 96 Ill. 255, 36 Am. Rep. 143 [1880].

⁵² *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514 [1894]; *Clinton Township v. Teachout*, 150 Mich. 124, 111 N. W. 1052 [1907].

⁵³ *The People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294 [1892]; *Bodman v. Lake Fork Special Drainage*, 132 Ill. 439, 24 N. E. 630 [1891]; *Evans v. Lewis*, 121 Ill. 478, 13 N. E. 246 [1889]; *Keigwin*

not granted where the public agents have acted without authority in constructing a street wider than its proper limits, thereby encroaching upon the land of the abutting property owner.⁵⁴ Injunction is not given for an inaccuracy in naming the owner of the land which is assessed,⁵⁵ or because of the disqualification of one of the assessors,⁵⁶ or because of an irregularity in the method of passing the ordinance,⁵⁷ or because of the failure of certain public officers to make plans of the improvement,⁵⁸ at least in the absence of any showing that the property owner has been damaged by such omission. In some cases an injunction has been given where the public corporation has failed to pay to the property owner the damages occasioned by the improvement for which the assessment is levied,⁵⁹ while in other jurisdictions an injunction has been denied in such a case.⁶⁰ An injunction will be granted in case of fraud,⁶¹ as where parties who have objected to confirmation on the ground that the city has not acquired any right to the alleged street in which the sewer is to be constructed but that it belonged to the objectors, have been induced to withdraw such objections upon the city's promise to condemn, and the city has, after obtaining the assessment by such promise, vacated the condemnation judgment and dismissed the proceedings,⁶² except in cases where, by statute, a specific and exclusive method of attack has been provided in such cases.⁶³

§ 1433. Defective performance of improvement contract.

If the improvement contract has not been performed in a proper manner, it is held in some jurisdictions that injunction

v. Drainage Commissioners of Ham-
ilton Township, 115 Ill. 347, 5 N. E.
575 [1886].

⁵⁴ Davis v. Silvertown, 47 Ore. 171,
82 Pac. 16 [1905].

⁵⁵ Murphey v. Mayor and Council
of Wilmington, 5 Del. Ch. 281
[1879].

⁵⁶ Thurston v. City of Elmira, 10
Abb. Pr. N. S. (N. Y.) 119 [1868].

⁵⁷ Balfe v. Lammers, 109 Ind. 347,
10 N. E. 92 [1886].

⁵⁸ Warner v. Knox, 50 Wis. 429,
7 N. W. 372 [1880]; Kneeland v.
Milwaukee, 18 Wis. 411 [1864].
Contra, where the estimate is defect-
ive as not showing the items enter-
ing into the assessment. Frieden-

wald v. Shipley, 74 Md. 220, 31 Atl.
790, 24 Atl. 156 [1891].

⁵⁹ Graden v. City of Parkville, 114
Mo. App. 527, 90 S. W. 115 [1905];
City of San Antonio v. Sullivan, 23
Tex. Civ. App. 658, 57 S. W. 45
[1900].

⁶⁰ City of Indianapolis v. Gilmore,
30 Ind. 414 [1868]; Robinson v.
City of Milwaukee, 61 Wis. 585, 21
N. W. 610 [1884].

⁶¹ Dederer v. Voorhies, 81 N. Y.
154 [1880].

⁶² Dempster v. City of Chicago,
175 Ill. 278, 51 N. E. 710 [1898].

⁶³ Heiser v. Mayor, Aldermen and
Commonalty of the City of New
York, 104 N. Y. 68, 9 N. E. 866
[1887].

will not lie,¹ especially if such defect is immaterial. This holding rests, in some cases, upon the ground that the remedy of the property owner is to apply to the court for an order compelling the proper performance of the contract;² or to sue for damages,³ and in some cases on the ground that the decision of the city is final.⁴ It has been said that the remedy of the property owner, even if the city is acting fraudulently, is not to enjoin the collection of the assessment, but to enjoin the payment of the funds to the contractor.⁵ So, if an assessment has been levied for an improvement of a street, and the public corporation has not acquired an easement in the land upon which such street is to be constructed, it has been said that the remedy is to enjoin the public corporation from expending money in the improvement until the street has been opened properly.⁶ In other cases, it has been held that the remedy of the property owner is an action either on the bond of the public official whose duty it is to pass upon the improvement, or upon the bond of the contractor.⁷ In other cases, it has been held that if there has been a substantial departure from the contract in the performance thereof, and the property owner has objected promptly, he may enjoin the levy and collection of the assessment.⁸ Upon the same principle a property owner may enjoin the performance of a contract where it is not begun within the time specified by a mandatory provision of the statute.⁹

¹ *Fenwick Hall Company v. Town of Old Saybrooke*, 69 Conn. 32, 36 Atl. 1068 [1897]; *Murphey v. Mayor and Council of Wilmington*, 5 Del. Ch. 281 [1879]; *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898]; *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899]; *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933 [1898]; *Robinson v. City of Valparaiso*, 136 Ind. 616, 36 N. E. 644 [1893]; *Montgomery v. Wasem*, 116 Ind. 343, 19 N. E. 184, 15 N. E. 795 [1888].

² *Fenwick Hall Company v. Town of Old Saybrooke*, 69 Conn. 32, 36 Atl. 1068 [1897].

³ *Astoria Heights Land Co. v. City of New York*, 179 N. Y. 579, 72 N. E. 1139 [1904]; (affirming, 86 N. Y. S. 651, 89 App. Div. 512 [1903]).

⁴ *Murphey v. Mayor and Council of Wilmington*, 5 Del. Ch. 281

[1879]; *Montgomery v. Wasem*, 116 Ind. 343, 19 N. E. 184, 15 N. E. 795 [1888].

⁵ *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898].

⁶ *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15 [1892].

⁷ *Commissioners of Putnam County v. Krauss*, 53 O. S. 628, 42 N. E. 831 [1895].

⁸ *Millikan v. Wall*, 133 Ind. 51, 32 N. E. 828 [1892]; (where the proceedings for securing an outlet for a ditch were declared void after the time for taking an appeal had expired.) *Stone v. Viele*, 38 O. S. 314 [1882]; *McCain v. City of Des Moines*, 128 Iowa, 331, 103 N. W. 979 [1905]; *Schumm v. Seymour*, 24 N. J. Eq. (9 C. E. Gr.) 143 [1873].

⁹ *Rose v. Trestrail*, 62 Mo. App. 352 [1895].

§ 1434. Effect of curative statutes.

The right to have an injunction for substantial irregularities or defects, has been held to be prevented by curative statutes, even if enacted after the proceedings were begun,¹ or by statutes which authorize re-assessments where the assessment complained of is not in substantial excess of the benefits.²

§ 1435. Necessity of tendering amount fairly due.

He who seeks equity must do equity. Accordingly, if the assessment is irregular but not void, and the amount, which is the proportionate share of the property owner who seeks relief, can be determined readily, such property owner cannot seek relief in equity unless he pays, or offers to pay, the amount which is fairly due as such proportionate share.¹ With what degree of certainty

¹Constantine v. City of Albion, 148 Mich. 403, 111 N. W. 1068 [1907]; Upington v. Oviatt, 24 O. S. 232 [1873]; (defective advertisement for bids.)

Such statutes do not apply to a total failure to give an opportunity to the property owner to do the work. Johnson v. City of Oshkosh, 21 Wis. 184 [1866].

²Thompson v. Mitchell, 133 Iowa, 527, 110 N. W. 901 [1907]; Townsend v. City of Manistee, 88 Mich. 408, 50 N. W. 321 [1891]; Bryam v. City of Detroit, 50 Mich. 56, 14 N. W. 698, 12 N. W. 912 [1883].

¹Treat v. City of Chicago, 130 Fed. 443, 64 C. C. A. 645 [1904]; (affirming, 125 Fed. 644 [1903]); Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301 [1901]; Quint v. Hoffman, 103 Cal. 506, 37 Pac. 514 [1894]; Esterbrook v. O'Brien, 98 Cal. 671, 33 Pac. 765 [1893]; Hallett v. United States Security & Bond Co., — Colo. —, 90 Pac. 683 [1907]; Spalding v. City and County of Denver, 33 Colo. 172, 80 Pac. 126 [1905]; City of Denver v. Londoner, 33 Colo. 104, 80 Pac. 117 [1904]; City of Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122 [1904]; 80 Pac. 467 [1905]; Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890];

Jackson v. Smith, 120 Ind. 520, 22 N. E. 431 [1889]; City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342 [1889]; Montgomery v. Wasem, 116 Ind. 343, 19 N. E. 184, 15 N. E. 795 [1888]; Prezinger v. Harness, 114 Ind. 491, 16 N. E. 495 [1887]; Ricketts v. Spraker, 77 Ind. 371 [1881]; City of Evansville v. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214 [1870]; Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898]; Grimmell v. City of Des Moines, 57 Ia. 144, 10 N. W. 330 [1881]; Morrison v. Hershire, Treasurer, 32 Ia. 271 [1871]; City of Paola v. Russell, 75 Kan. 826, 89 Pac. 651 [1907]; City of Lawrence v. Killam, 11 Kan. 499 [1873]; City of Ottawa v. Barney, 10 Kan. 270 [1872]; Nowlen v. City of Benton Harbor, 134 Mich. 401, 96 N. W. 450 [1903]; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800 [1892]; State ex rel. Stifel v. Flad, 26 Mo. App. 500 [1887]; Redick v. City of Omaha, 35 Neb. 125, 52 N. W. 847 [1892]; Darst v. Griffin, 31 Neb. 668, 48 N. W. 819 [1891]; Barker v. City of Omaha, 16 Neb. 269, 20 N. W. 382 [1884]; Ehni v. City of Columbus, 3 Ohio C. C. 494 [1889]; Appeal of the City of Pittsburg, 118 Pa. St. 458, 12 Atl. 366 [1888]; Annie

the amount justly due can be ascertained is a question upon which there is some conflict. The rule as laid down in some cases applies only where a definite part of the tax is fairly due,² or where the tax is not void as to an amount susceptible of mathematical calculation.³ If two or more assessments have been levied, one of which is valid,⁴ or a specified item of the assessment is objected to,⁵ as where an official without legal authority, increased the assessment by a certain definite per cent.⁶ or a part of the assessment is invalid because the total exceeds the percentage of the tax valuation of the property fixed by statute as the maximum limit of assessments,⁷ it is easy to ascertain the amount legally due, and tender of such amount must be made or payment secured.⁸ If the assessment as levied is made on an erroneous basis, and the amount fairly due can be determined only by ascertaining the benefits as a question of fact, there is greater difficulty in determining whether a tender should be made. In some cases it is said that even under such facts the amount of benefits should be paid or tendered,⁹ while in other cases it is said that such facts excuse a tender, as it is the duty of the public corporation to determine the amount of the assessment on a proper basis and not the duty of the property owner.¹⁰

Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444 [1900]; *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Wells v. Western Paving & Supply Co.*, 96 Wis. 116, 70 N. W. 1071 [1897]; *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248 [1896]; *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

² "Where a definable portion of the tax is legal, and the balance illegal, equity will refuse to interfere unless that which is legal be first paid," *City of Lawrence v. Killam*, 11 Kan. 499, 509 [1873].

³ *City of Denver v. Kennedy*, 33 (Colo.) 80, 80 Pac. 122, 80 Pac. 467 [1905].

⁴ *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432 [1898]; *Yates v. City of Milwaukee*, 92 Wis. 352, 66 N. W. 248 [1896].

⁵ *Wells v. Western Paving & Supply Co.*, 96 Wis. 116, 70 N. W. 1071 [1897].

⁶ *Ricketts v. Spraker*, 77 Ind. 371 [1881].

⁷ *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *Nowlen v. City of Benton Harbor*, 134 Mich. 401, 96 N. W. 450 [1903].

⁸ See also *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514 [1894].

⁹ *Montgomery v. Wasem*, 116 Ind. 343, 19 N. E. 184, 15 N. E. 795 [1888]; *City of Ottawa v. Barney*, 10 Kan. 270 [1872]; *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800 [1892]; *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819 [1891]; *Barker v. City of Omaha*, 16 Neb. 269, 20 N. W. 382 [1884]; *Appeal of the City of Pittsburg*, 118 Pa. St. 458, 12 Atl. 366 [1888].

¹⁰ *Iowa Pipe & Tile Co. v. Callanan*, 125 Ia. 357, 106 Am. St. Rep. 311, 67 L. R. A. 408, 101 N. W. 141 [1904]; *Hutchinson v. City of Omaha*, 52 Neb. 345, 72 N. W. 218 [1897]; *Clements v. Village of Norwood*, 2 Ohio N. P. 274 [1895]; *Ar-*

If the amount of the assessment has been increased by the improper omission of land subject to the assessment, it is not necessary that the property owners tender their share of the assessment.¹¹ So if the assessment is totally void, it is said that no duty of tendering any amount exists as a condition precedent to a suit to set the assessment aside,¹² especially where the court is not authorized to determine what amount is actually due.¹³ Whether it is necessary to make tender before suing in equity or whether it is sufficient to make such offer in the pleadings is not entirely clear from the authorities. Tender is in some cases said to be a condition precedent to the right to sue.¹⁴ It has been said that failure to plead such tender is fatal to the cause of action, and failure to make such tender will prevent any recovery of costs.¹⁵ If failure to make such tender and to aver the same is not taken advantage of by demurrer or by plea in abatement it is thereby waived.¹⁶ Payment is generally said to be precedent to obtaining an injunction.¹⁷ If the amount is uncertain, it has been held that the property owner must offer in his petition to pay such amount as may ultimately be found to be fairly due as his share of the assessment; while if the amount is known it must be tendered and brought into court.¹⁸ In some cases it seems to be assumed that equity may grant an injunction condi-

drey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726 [1896]; *Howell v. City of Tacoma*, 3 Wash. 711, 28 Am. St. Rep. 83, 29 Pac. 447 [1892]; *Hayes v. Douglas Co.*, 92 Wis. 429, 53 Am. St. Rep. 926, 31 L. R. A. 213, 65 N. W. 482 [1896].

¹¹ *Hassan v. City of Rochester*, 67 N. Y. 528 [1876]; (assessment increased by improper omission of property belonging to state).

¹² *Woollacott v. Meekin*, 151 Cal. 701, 91 Pac. 612 [1907]; *Chase v. Treasurer of the City of Los Angeles*, 122 Cal. 540, 55 Pac. 414 [1898]; *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511 [1902].

¹³ *Jones v. Holzapfel*, 11 Okla. 405, 68 Pac. 511 [1902].

¹⁴ *Esterbrook v. O'Brien*, 98 Cal. 671, 33 Pac. 765 [1893]; *City of Evansville v. Pfisterer*, 34 Ind. 36, 7 Am. Rep. 214 [1870].

¹⁵ *Wells v. Western Paving & Supply Co.*, 96 Wis. 116, 70 N. W. 1071 [1897].

¹⁶ *Wells v. Western Paving & Supply Co.*, 96 Wis. 116, 70 N. W. 1071 [1897].

¹⁷ *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887 [1890]; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431 [1889]; *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495 [1887]; *Morrison v. Hershire*, 32 Ia. 271 [1871]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *Grimmell v. City of Des Moines*, 57 Ia. 144, 10 N. W. 330 [1881]; *City of Paola v. Russell*, 75 Kan. 826, 89 Pac. 651 [1907].

¹⁸ *Montgomery v. Wasem*, 116 Ind. 343, 19 N. E. 184, 15 N. E. 795 [1888].

tioned upon the subsequent payment of the amount fairly due.¹⁹ If the property owner has not paid, nor offered to pay, such share, and the court in granting an injunction does not make such injunction conditioned upon such payment, such decree is erroneous and should be reversed.²⁰ However, it has been held that an unconditional decree is not erroneous in the absence of a demand for a conditional decree.²¹ Failure to keep the tender good has been held not to make plaintiff's complaint invalid in the absence of a demand by defendant, when judgment is rendered for the defendant, that plaintiff keep the tender good.²² One who has acquired property in such a way as to have priority over an assessment, may have a sale to satisfy such assessment set aside as a cloud on his title, without offering to pay the amount which may properly be held to be due.²³ Equitable relief has been granted after a sale to satisfy the lien of an assessment and a subsequent conveyance to a *bona fide* grantee on condition that the owner pay to such grantee the amount paid by him for such tax titles with interest.²⁴

§ 1436. At what stage of improvement proceedings injunction can be had—Effect of delay till performance.

If the property owner who seeks equitable relief has known of the defects and irregularities in the assessment proceeding, or is charged with knowledge thereof, and has acquiesced in the construction of the improvement; and then after the improvement has been constructed, and he has received the benefits thereof, he has for the first time attacked the proceeding which results in the assessment, an injunction will not be granted upon his application,¹ at least if he does not pay, or offer to pay, his pro-

¹⁹ Cook v. City of Racine, 49 Wis. 243, 5 N. W. 352 [1880]; Howes v. City of Racine, 21 Wis. 514 [1867]; Mills v. Charleton, 29 Wis. 400, 9 Am. Rep. 578 [1872].

²⁰ Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301 [1901].

²¹ Coleman v. Rathbun, 40 Wash. 303, 82 Pac. 540 [1905].

²² Coleman v. Rathbun, 40 Wash. 303, 82 Pac. 540 [1905].

²³ Simons v. Drake, 179 Ill. 62, 53 N. E. 574 [1899].

²⁴ Kean v. Asch, 27 N. J. Eq. (12 Greene) 57 [1876].

¹ Treat v. City of Chicago, 130 Fed. 443, 64 C. C. A. 645 [1904]; (affirming 125 Fed. 644 [1903]); Ross v. City of Portland, 105 Fed. 682 [1901]; Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759 [1903]; Weber v. City of San Francisco, 1 Cal. 455 [1856]; Spalding v. City of Denver, 33 Colo. 172, 80 Pac. 126 [1905]; Floyd v. Atlanta Banking Co., 109 Ga. 778, 35 S. E. 172 [1899]; De Puy v. City of Wabash, 133 Ind. 336, 32 N. E. 1016 [1892]; Montgomery v. Wasem, 116 Ind. 343, 19 N. E. 184, 15 N. E. 795 [1888]; Davis v.

portionate share of such assessment.² In such a case, equity will leave the property owner to his remedy at law.³ In such cases, equitable relief is denied especially to property owners who have petitioned for the improvement if the irregularity complained of

Lake Shore & Michigan Southern Ry. Co., 114 Ind. 364, 16 N. E. 639 [1887]; City of Evansville v. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214 [1870]; Hellenkamp v. City of Lafayette, 30 Ind. 192 [1868]; Thompson v. Mitchell, 133 Iowa, 527, 110 N. W. 901 [1907]; Wood v. Hall, — Ia. —, 110 N. W. 270 [1907]; Diver v. Keokuk Savings Bank, 126 Ia. 691, 102 N. W. 542 [1905]; Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898]; Falloon v. City of Hiawatha, 66 Kan. 769, 71 Pac. 1127 [1903]; The Board of Commissioners of Wyandotte v. Arnold, 49 Kan. 279, 30 Pac. 486 [1892]; Downs v. Board of Commissioners of Wyandotte Co., 48 Kan. 640, 29 Pac. 1077 [1892]; Board of Commissioners of Wyandotte County v. Hoag, 48 Kan. 413, 29 Pac. 758 [1892]; Stewart v. Board of Commissioners of Wyandotte Co., 45 Kan. 708, 23 Am. St. Rep. 746, 26 Pac. 683 [1891]; Steeper v. Bullen & Dustin, 6 Kan. 300 [1870]; Kansas Town Co. v. City of Argentine, 5 Kans. App. 50, 47 Pac. 542 [1896]; Jones v. Gable, 150 Mich. 30, 113 N. W. 577 [1907]; Nowlen v. City of Benton Harbor, 134 Mich. 401, 96 N. W. 450 [1903]; Gates v. City of Grand Rapids, 134 Mich. 96, 95 N. W. 998 [1903]; Wilson v. Woolman, 133 Mich. 350, 94 N. W. 1076 [1903]; Farr v. City of Detroit, 136 Mich. 200, 99 N. W. 19 [1904]; Moore v. McIntyre, 110 Mich. 237, 68 N. W. 130 [1896]; Fitzhugh v. City of Bay City, 109 Mich. 581, 67 N. W. 904 [1896]; Atwell v. Barnes, 109 Mich. 10, 66 N. W. 583 [1896]; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526 [1894]; Brown v. City of Grand Rapids, 83 Mich. 101, 47 N. W. 117 [1890]; Byram v. City of Detroit, 50 Mich. 56, 12 N. W. 912, 14 N. W.

698 [1883]; Harwood v. Drain Commissioners, 51 Mich. 639, 17 N. W. 216 [1883]; Jackson v. City of Detroit, 10 Mich. 248 [1862]; Dousman v. City of St. Paul, 23 Minn. 394 [1877]; Leslie v. City of St. Louis, 47 Mo. 474 [1871]; Redick v. City of Omaha, 35 Neb. 125, 52 N. W. 847 [1892]; Darst v. Griffin, 31 Neb. 668, 48 N. W. 819 [1891]; Barker v. City of Omaha, 16 Neb. 269, 20 N. W. 382 [1884]; Turnquist v. Cass County Drain Commissioners, 11 N. D. 514, 92 N. W. 852 [1902]; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841 [1902]; Kellogg v. Ely, 15 O. S. 64 [1864]; Wright v. City of Tacoma, 3 Wash. Terr. 410, 19 Pac. 42 [1888]; Beaser v. Barber Asphalt Paving Co., 120 Wis. 599, 98 N. W. 525 [1904]; (citing State ex rel. Hallauer v. Gosnell, 116 Wis. 606, 93 N. W. 542; State ex rel. Schintgen v. Mayor and Common Council of the City of La Crosse, 101 Wis. 208, 77 N. W. 167 [1898]; Hixon v. Oneida County, 82 Wis. 515, 52 N. W. 445; Cook v. City of Racine, 49 Wis. 243, 5 N. W. 352 [1880]; Knapp v. Heller, 32 Wis. 467 [1873]); Smith v. City of Milwaukee, 18 Wis. 63 [1864]; Wells v. Western Paving and Supply Co., 96 Wis. 116, 70 N. W. 1071 [1897]; Contra, Metcalf v. Carter, 19 Ohio C. C. 196 [1900].

² Treat v. City of Chicago, 130 Fed. 443, 64 C. C. A. 645 [1904] (affirming, 125 Fed. 644 [1903]); Redick v. City of Omaha, 35 Neb. 125, 52 N. W. 847 [1892]; Darst v. Griffin, 31 Neb. 668, 48 N. W. 819 [1891]; Barker v. City of Omaha, 16 Neb. 269, 20 N. W. 382 [1884].

³ Wright v. City of Tacoma, 3 Wash. Terr. 410, 19 Pac. 42 [1888].

followed necessarily from the granting of the petition.⁴ So delay until the improvement has been paid for by the city will prevent a property owner from obtaining relief on the ground of defective performance.⁵ Delay until an improvement is completed does not prevent a property owner from obtaining equitable relief, if he has not known of the improvement until it is completed,⁶ or if, knowing of it, he has given written notice to the proper officials that he would resist payment of the assessment, even if he has not begun an injunction suit until the improvement was completed.⁷ Failure to object to an assessment until the improvement is completed does not prevent a property owner from obtaining an injunction against a second assessment for the same improvement.⁸ Delay which may not be an absolute bar to relief may prevent the property owner from obtaining relief unless he shows clearly and beyond question that the assessment exceeds the benefits.⁹

§ 1437. Right to sue before assessment is levied.

Since the property owner may be prevented from obtaining equitable relief because of his delay until after the improvement has been constructed, it has been held that property owners, or general taxpayers, may obtain an injunction to prevent the public corporation from incurring debts,¹ or from issuing bonds,² where such acts are unauthorized, or the public authorities are proceeding in a manner which is substantially irregular. On the same principle, the property owner,³ or in some cases an unsuc-

⁴The Board of Commissioners of Wyandotte County v. Arnold, 49 Kan. 279, 30 Pac. 486 [1892]; Downs v. Board of Commissioners of Wyandotte Co., 48 Kan. 640, 29 Pac. 1077 [1892]; Board of Commissioners of Wyandotte County v. Hoag, 48 Kan. 413, 29 Pac. 758 [1892]; Stewart v. Board of Commissioners of Wyandotte Co., 45 Kan. 705, 23 Am. St. Rep. 746, 26 Pac. 683 [1891]; Bryam v. City of Detroit, 50 Mich. 56, 14 N. W. 698 [1883]; Turnquist v. Cass County Drain Commissioners, 11 N. D. 514, 92 N. W. 852 [1902].

⁵Hellenkamp v. City of Lafayette, 30 Ind. 192 [1868]; Fitzhugh v. City of Bay City, 109 Mich. 581, 67 N. W. 904 [1896]; Dusenbury v. Mayor and

Council of the City of Newark, 25 N. J. Eq. (10 C. E. Gr.) 295 [1874]; Liebstein v. Mayor and Common Council of the City of Newark, 24 N. J. Eq. (9 C. E. Gr.) 200 [1873].

⁶Teegarden v. Davis, 36 O. S. 601 [1881].

⁷Keys v. City of Neodesha, 64 Kans. 681, 68 Pac. 625 [1902].

⁸Tallant v. City of Burlington, 39 Ia. 543 [1874].

⁹Price v. City of Toledo, 25 Ohio Cir. Ct. R. 617 [1903].

¹Inge v. Board of Public Works of Mobile, 135 Ala. 187, 93 Am. St. Rep. 20, 33 So. 678 [1902]; Schumacker v. Toberman, 56 Cal. 508 [1880].

²Frantz, Jr. v. Jacob, 88 Ky. 525. 11 S. W. 654 [1889].

³City Council of Montgomery v.

cessful bidder,⁴ may enjoin the city from entering into a contract for a public improvement where the public corporation has no authority to make such contract, or is acting in violation of statute, and the fact that the contract is performed before the suit is heard does not prevent the property owner from obtaining relief.⁵ In some cases, it is held that a property owner need not wait until the assessment is actually levied, but may bring suit to enjoin such levy in advance.⁶ It has, however, been held that a property owner cannot have a public improvement enjoined on the ground that his property will be assessed therefor, since such improvement is no violation of his rights, his ground of complaint being against the assessment alone.⁷ So it has been held that a property owner cannot sue to obtain an injunction until steps are taken by the public corporation to make the levy,⁸ unless it is admitted that it is the intention of the public corporation to proceed to make such levy.⁹ It has also been held that a property owner cannot have an injunction where the public corporation has not complied with its charter in ordering the improvement, and in advertising for bids, since the property owner is not entitled to an injunction until the assessment has been levied.¹⁰ A property owner is not allowed to enjoin the contract in advance where, by statute, he has a full and complete remedy by bringing a suit to enjoin the assessment after it is levied.¹¹ If the amount

Barnett, — Ala. —, 43 So. 92 [1907]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898]; *Putnam v. City of Grand Rapids*, 58 Mich. 416, 25 N. W. 330 [1885].

⁴ *Mohr v. City of Chicago*, 114 Ill. App. 283 [1904].

⁵ *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

⁶ *Thayer Lumber Co. v. City of Muskegon*, — Mich. —, 115 N. W. 957 [1908]; *Cavanaugh v. Sanderson*, — Mich. —, 115 N. W. 955 [1908]; *Potter v. Village of Norwood*, 21 Ohio C. C. 461 [1901].

⁷ *Flickinger v. Fay*, 119 Cal. 590, 51 Pac. 855 [1898]; *Merritt v. City of Duluth*, — Minn. —, 114 N. W. 758 [1908]; *Morris v. Mayor and Council of Bayonne*, 25 N. J. Eq. (10 C. E. Green) 345 [1874].

⁸ *Holmquist v. Anderson*, 67 Kan.

861, 74 Pac. 227 [1903]; *City of Kansas City v. Smiley*, 62 Kan. 718, 64 Pac. 613 [1900]; *Mason v. City of Independence*, 61 Kan. 188, 59 Pac. 272 [1899]; *Blake v. City of Brooklyn*, 26 Barb. 301 [1857]; *Lutman v. Lake Shore & Michigan Southern R. R. Co.*, 56 Ohio St. 433, 47 N. E. 248 [1897]; *Ballard v. City of Appleton*, 26 Wis. 67 [1870].

⁹ *Lutman v. Lake Shore & Michigan Southern R. R. Co.*, 56 Ohio St. 433, 47 N. E. 248 [1897].

¹⁰ *Ballard v. City of Appleton*, 26 Wis. 67 [1870].

¹¹ *Flickinger v. Fay*, 119 Cal. 590, 51 Pac. 855 [1898]; *Merritt v. City of Duluth*, — Minn. —, 114 N. W. 758 [1908]; *Wood v. Village of Pleasant Ridge*, 12 Ohio C. C. 177 [1896].

of the assessment has been ascertained, and notice thereof has been given to the property owners, an injunction suit is not prematurely brought, even under the latter theory.¹² While some reason can be assigned for these last rules, since the property owner has no especial ground of complaint if the cost of the improvement is to be paid for by general taxation, the working out of such rule is apparently inconsistent with the rule forbidding the property owner to have an injunction if he waits without objection until the improvement is completed. He must, apparently, under assessment statutes in which the improvement is constructed before the assessment is levied, give notice of his objections before liabilities are incurred, and then sue when the assessment is levied if he wishes to protect his rights under the latter theory; or else he is charged with the duty of suing to compel compliance with the statutes and due performance of the contract.

§ 1438. Effect of confirmation.

If an opportunity is given for presenting objections at confirmation, and a decree of confirmation is entered by a court having jurisdiction of the subject matter and the parties, such decree cannot be attacked collaterally if it is made conclusive by statute,¹ and, accordingly, injunction will not lie,² though if the defect is such as to deprive the court or the public officials who attempt to confirm the assessment of jurisdiction to confirm it,³ or if the decree or order of confirmation is not made binding as to such defect,⁴ injunction may be had.

§ 1439. Estoppel by decree.

If the validity of the assessment is passed upon by a court of competent jurisdiction in a proceeding to confirm the assessment, the property owner cannot have an injunction thereafter for defects which might have been urged at confirmation, since his

¹² *Andrews v. Love*, 50 Kan. 701, 31 Pac. 1094 [1893].

¹ See § 927 *et seq.*, § 986 *et seq.*, § 1340 *et seq.*

² *Morrell v. Union Drainage District No. 1*, 118 Ill. 139, 8 N. E. 675 [1887]; *Mayor v. Mayor, Aldermen and Commonalty of the City of New York*, 101 N. Y. 284, 4 N. E. 336

[1886]; *Methodist Episcopal Church of Harlem v. Mayor, etc., of the City of New York*, 55 Howard (N. Y.) 57 [1877].

³ *Hassan v. Rochester*, 57 N. Y. 528 [1876].

⁴ *Dederer v. Voorhies*, 81 N. Y. 154 [1880]; (a case of fraud).

remedy is to resist confirmation and prosecute error if the assessment is confirmed.¹ A property owner who has taken the position that an assessment is invalid, cannot subsequently claim that it is valid in a proceeding to enjoin the making of a re-assessment upon such property.²

§ 1440. Limitations.

Statutes of limitation apply in most states to proceedings in equity by their express terms, or by necessary implication, and in many states some period is fixed within which suits to enjoin an assessment may be brought.¹ If no time is fixed as applicable to assessments, the period of limitations applicable in general to equitable relief applies.² Frequently a very short period is fixed within which property owners must make objection to the assessment proceedings,³ and statutes of this class apply to injunction suits or other application for relief in equity. If the assessment is regular upon its face, and is not absolutely void, suit to enjoin such assessment must be brought within the time limited.⁴ Under a statute providing that an assessment must be attacked within thirty days from the date when it was ascertained, and an ordinance determining the amount of the assessment went into effect September first, an action to set aside the assessment commenced on the second day of October was too late, even if October first was a Sunday, and by statute the last day is to be excluded if it is Sunday, since the day on which the cost of the

¹ *Lyman v. City of Chicago*, 211 Ill. 209, 71 N. E. 832 [1904]; *Craft v. Kochersperger*, 173 Ill. 617, 50 N. E. 1061 [1898]; *Brown v. City of Chicago*, 117 Ill. 21, 7 N. E. 108 [1887]; *Kedzie v. Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886]; (distinguished in *Derby v. West Chicago Park Commissioners*, 154 Ill. 213, 40 N. E. 438 [1894]; as a case of direct attack on appeal) The same effect follows where a decree as to benefits and damages is rendered in a proceeding in eminent domain; *Wilkinson v. District of Columbia*, 22 App. D. C. 289 [1903]; or where the decree sought would interfere with a decree of a Federal court. *Lea v. City of Memphis*, 9 Baxter (Tenn.) 103 [1877].

² *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624 [1906].

³ *London and Northwest American Mortgage Co. v. Gibson*, 77 Minn. 394, 80 N. W. 777, 205 [1899].

⁴ *Clowes v. Mayor, Aldermen and Commonalty of the City of New York*, 47 Hun, 539 [1888].

⁵ See § 1337.

⁶ *City of Leavenworth v. Jones*, 69 Kan. 857, 77 Pac. 273 [1904]; *Holmquist v. Anderson*, 67 Kan. 861, 74 Pac. 227 [1903]. (A case where the original petition was filed prematurely before the assessment was apportioned and the amendment was made too late, after the statutory period had expired). *City of Kansas City v. Trotter*, 9 Kans. App. 222, 59 Pac. 679 [1900].

improvement was ascertained, and the ordinance took effect, was to be included, the provision of the code of civil procedure to the effect that the first day is to be excluded, not applying to such proceeding.⁵ A statute fixing a ninety-day period of limitations for attacking assessments under "this article," is not applicable to an assessment levied under a different statute.⁶ A statute imposing a short period of limitations does not apply to assessments levied prior to the enactment of such statute, in the absence of some statutory provision making it expressly applicable to such assessments.⁷ A statute fixing a short period of limitations for proceedings to set aside an assessment, does not apply where the assessment is absolutely void.⁸ A vendee who by cross petition seeks a decree declaring him to be the owner of the property under a deed issued on an assessment sale waives the statute of limitations upon which he might have relied had he merely resisted an attack upon his title.⁹

§ 1441. Laches.

Delay in suing for equitable relief while the adversary parties change their position in reliance upon the apparent validity of the assessment may prevent the property owner from obtaining relief, even if the period of limitations fixed by statute has not elapsed.¹ Delay in suing, if not in excess of the period of limitations, does not amount to laches if the property owner is a non-resident, and does not know of the intention to construct the improvement until about the time it is completed.² Delay does not amount to laches if the right to re-assess exists and full justice can thereby be obtained.³

§ 1442. Parties plaintiff.

A party cannot bring an action to enjoin an assessment, or to set aside a cloud upon the title, unless he is especially injured by

⁵ *City of Leavenworth v. Jones*, 69 Kan. 857, 77 Pac. 273 [1904].

⁶ *City of Denver v. Dunning*, 33 Colo. 487, 81 Pac. 259 [1905].

⁷ *Waples v. City of Dubuque*, 116 Ia. 167, 89 N. W. 194 [1902]; *Citizen's State Bank v. Jess*, 127 Ia. 450, 103 N. W. 471 [1905].

⁸ *City of Kansas City v. Breyfogle*, 8 Kans. App. 276, 55 Pac. 508 [1898]; *Steinmiller v. City of Kan-*

sas City, 3 Kan. App. 45, 44 Pac. 600 [1896].

⁹ *London and Northwest American Mortgage Co. v. Gibson*, 77 Minn. 394, 80 N. W. 777, 205 [1899].

¹ See § 1016

² *O'Malley v. Olyphant Borough*, 198 Pa. St. 525, 48 Atl. 483 [1901].

³ *Carter v. Cemansky*, 126 Ia. 506, 102 N. W. 438 [1905].

such assessment or sale.¹ The fact that other property owners who do not complain are injured cannot be taken advantage of by him.² Accordingly, a general taxpayer cannot maintain an action to enjoin the levy of a local assessment,³ his remedy being to enjoin the payment of the public funds upon such contract;⁴ though he may in proper cases sue to restrain improvements which will result in increased taxation.⁵ A taxpayer may obtain an injunction against issuing bonds which will exceed the constitutional limit of the indebtedness of the public corporation issuing them, if such bonds are the personal debt of such public corporation, even if the public corporation expects to levy an assessment and to reimburse itself for the amount of the bonds thus issued.⁶ A property owner cannot maintain an action to enjoin an assessment by reason of the failure to include all the property which is subject to assessment, unless the assessment on his lot is increased thereby,⁷ his remedy being to sue as general taxpayer to enjoin the levy of the increased taxes due to such omission.⁸ The owner of property which is assessed cannot enjoin such assessment on the ground that the share of the assessment imposed upon the city is excessive;⁹ nor can he enjoin an assessment on the ground that the improvement of a street infringes the rights of a plank road company.¹⁰ An owner of realty which has been assessed cannot sue to enjoin an assessment for the omission of a non-jurisdictional requirement unless he can show that he has been especially injured thereby.¹¹ A wife cannot sue to enjoin an assessment upon her husband's land,¹² at least if such land is not used as a homestead.¹³ A subsequent grantee may sue to enjoin a prior assessment,¹⁴ unless he is estopped by the form of his

¹ *Page v. City of St. Louis*, 20 Mo. 136 [1854].

² *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117 [1904].

³ *Cawker v. City of Milwaukee*, — Wis. —, 113 N. W. 419 [1907].

⁴ *Cawker v. City of Milwaukee*, — Wis. —, 113 N. W. 419 [1907].

⁵ *Putnam v. Grand Rapids*, 58 Mich. 416, 25 N. W. 330 [1885].

⁶ *Schumacker v. Toberman*, 56 Cal. 508 [1880]; *Fowler v. City of Superior*, 85 Wis. 411, 54 N. W. 800 [1893].

⁷ *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

⁸ *Wilson v. City of Cincinnati*, 5 Ohio N. P. 68 [1897].

⁹ *Boehme v. City of Monroe*, 106 Mich. 401, 64 N. W. 204 [1895].

¹⁰ *Bagg v. City of Detroit*, 5 Mich. 336 [1858].

¹¹ *Warner v. Knox*, 50 Wis. 429, 7 N. W. 372 [1880].

¹² *Steffins v. Stewart*, 53 Kans. 92, 36 Pac. 55 [1894].

¹³ *Steffins v. Stewart*, 53 Kans. 92, 36 Pac. 55 [1894].

¹⁴ *Batty v. City of Hastings*, 63 Neb. 26, 88 N. W. 139 [1901].

deed from attacking the validity thereof.¹⁵ A grantor who has conveyed with covenants of warranty has such an interest that he may sue to have an assessment upon the property conveyed set aside.¹⁶ An unsuccessful bidder may sue to enjoin the improper letting of a contract.¹⁷ An injunction suit cannot be brought in the name of the state as plaintiff if the relief sought is an injunction against enforcing an assessment against private property.¹⁸ In some cases it is held that owners of different tracts may join as plaintiffs to enjoin an assessment if there is a reason common to all for attacking the validity of the assessment.¹⁹ It is said to be proper, but not necessary, for them to join.²⁰ Owners cannot join unless they show a common interest.²¹ It has been doubted in other cases if two or more owners of distinct tracts of property can join,²² and it has been held in some cases that they cannot join.²³ If, however, they join, it has been held that the defendant is not materially prejudiced thereby.²⁴ In the absence of a statute requiring all the property owners to join, it is held that one or more owners may sue without joining the remaining owners.²⁵ A tenant in common may sue to remove a cloud upon his title, even though his co-tenant does not join.²⁶ It has been held in some cases that a property owner must sue, not merely for himself but for and on behalf of parties similarly situated;²⁷ but in other cases that he may sue for him-

¹⁵ See § 985.

¹⁶ *Pier v. Fond du Lac County*, 53 Wis. 421, 10 N. W. 686 [1881]. *Contra, In re Phillips v. Mayor, Aldermen and Commonalty of the City of New York*, 2 Hun (N. Y.) 212 [1874].

¹⁷ *Mohr v. City of Chicago*, 114 Ill. App. 283 [1904].

¹⁸ *State v. Shufford*, — Kan. —, 94 Pac. 137 [1908].

¹⁹ *Quick v. Templin*, — Ind. —, 85 N. E. 121 [1908]; *Stoddard v. Johnson*, 75 Ind. 20 [1881]; *Robbins v. Sand Creek Turnpike Company*, 34 Ind. 461 [1870].

²⁰ *Pier v. Fond du Lac County*, 53 Wis. 421, 10 N. W. 686 [1881]; *Barnes v. Beloit*, 19 Wis 93 [1865].

²¹ *Michael v. City of St. Louis*, 112 Mo. 610, 20 S. W. 666 [1892].

²² *Bruner v. Bay City*, 46 Mich. 236, 9 N. W. 263 [1881].

²³ *Jones v. Cardwell*, 98 Ind. 331 [1884]; *Thurston v. City of Elmira*, 10 Abb. Pr. N. S. 119 [1868]; *Paulson v. City of Portland*, 16 Ore. 450, 1 L. R. A. 673, 19 Pac. 450 [1888]; (affirmed *Paulson v. Portland*, 149 U. S. 30, 37 L. 637, 13 S. 750 [1893]).

²⁴ *Woollacott v. Meekin*, — Cal. —, 91 Pac. 612 [1907].

²⁵ *Gilmore v. Fox*, 10 Kan. 509 [1872].

²⁶ *Bates v. District of Columbia*, 7 Mackey (D. C.) 76 [1889].

²⁷ *Mann v. Board of Education of Union Free District No. 2 of the Town of Ononadaga*, 53 Howard (N. Y.) 289 [1877].

self and others who are similarly situated.²⁸ If one property owner sues on behalf of himself and others, it has been held that the court can enjoin the assessment only as to such property owners as are actually made parties to the proceeding.²⁹ An objection, that parties who are united in interest are not all made plaintiffs is waived if not set up in the pleadings.³⁰

§ 1443. Parties defendant.

If an assessment is levied for the benefit of the public corporation which has constructed the improvement, such public corporation is a necessary defendant in an action to enjoin such assessment.¹ Whatever public corporation or body is, by statute, put in charge of the improvement is a necessary defendant, if liable to the extent of the funds entrusted to it, and, therefore, if the improvement is not under the control of the common council it is not a proper defendant.² The city is a proper party to such suit, even if the improvement is constructed by a board of public works, as long as it is not itself a corporation.³ A decree is not binding on the city if it is not made a party to the suit,⁴ and it may have such decree vacated by a bill of review.⁵ The city may appeal even if not personally liable for the cost of the improvement.⁶ If suit is brought against the city marshal alone and the city is a necessary party, the city may be made a party by amendment.⁷ If the city cannot be held personally liable for the cost of the improvement if the assessment fails, the city is not a necessary party to an injunction suit.⁸ Whether public officials are necessary parties depends upon the effect of the local statutes which prescribe their powers and duties, and which sometimes

²⁸ *Upington v. Oviatt*, 24 O. S. 232 [1873]; *Glenn v. Waddell*, 23 O. S. 605 [1873].

²⁹ *Knell v. City of Buffalo*, 54 Hun (N. Y.) 80, 7 N. Y. Sup. 233 [1889].

³⁰ *Ireland v. City of Rochester*, 51 Barb. (N. Y.) 414 [1868].

¹ *Maxwell v. Auditor General*, 125 Mich. 621, 84 N. W. 1112 [1901]; *Heinroth v. Kochersperger*, 173 Ill. 205, 50 N. E. 171 [1898]; *Smith v. Kochersperger*, 173 Ill. 201, 50 N. E. 187 [1898]; *Gilmore v. Fox*, 10 Kan. 509 [1872]; *Dahlman v. City of Milwaukee*, 131 Wis. 427, 110 N. W. 479 [1907].

² *Brady v. The Mayor of the City of New York*, 35 Howard, 81 [1868].

³ *Lutes v. Briggs*, 5 Hun (N. Y.) 67 [1875].

⁴ *Lienen v. Elter*, 43 Hun (N. Y.) 249 [1887].

⁵ *Maxwell v. Auditor General*, 125 Mich. 621, 84 N. W. 1112 [1901].

⁶ *State ex rel. Schintgen v. Mayor and Common Council of the City of La Crosse*, 101 Wis. 208, 77 N. W. 167 [1898].

⁷ *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535 [1876].

⁸ *Cohn v. Parcels*, 72 Cal. 367, 14 Pac. 26 [1887].

provide specifically who shall be made defendants in such suits. In a suit to have a township drain tax declared void, the township treasurer and drain commissioners are proper defendants, even if the tax has already been returned as unpaid to the county treasurer.⁹ Commissioners whose authority is exhausted by the return of the assessment to the council are not necessary parties to a suit to set aside the sale.¹⁰ The city clerk, however, is not a necessary party to a suit to enjoin the collection of an illegal assessment.¹¹ It has been held that if the county treasurer is made a defendant the county is not a necessary party.¹² In a suit to cancel a water tax as a cloud on the title the tax collector and the water company are not necessary parties.¹³ If fraud and unlawful acts of city officials are charged the city is the only necessary party.¹⁴ A contractor who has agreed to look for his payment to the assessments exclusively, is a necessary party in a suit to enjoin such assessments.¹⁵ If the contractor may hold the city personally liable, he is not a necessary party.¹⁶ The purchaser at a sale to satisfy the lien of an assessment is a proper party to a suit to set aside the sale, and the party in whose favor the decree, upon which the sale is made, has been rendered is not a necessary party.¹⁷ The holder of a certificate secured by assessments is a necessary party,¹⁸ and different holders of certificates of sale against different lots belonging to the plaintiff may be joined in one action together with the city and the treasurer.¹⁹ A vendee at a tax sale who has purchased after the suit is brought is not a necessary party.²⁰ If the plaintiff conveys to his wife, *pendente lite*, she is not a necessary party.²¹

⁹ Frost v. Leatherman, 55 Mich. 33, 20 N. W. 705 [1884].

¹⁰ Carpenter v. Mayor and Council of the City of Hoboken, 33 N. J. Eq. (6 Stewart) 27 [1880].

¹¹ City of Kansas City v. Hanson, 8 Kans. App. 290, 55 Pac. 513 [1898].

¹² Davis v. Lake Shore & Michigan Southern Ry. Co., 114 Ind. 364, 16 N. E. 639 [1887].

¹³ Regan Land Co. v. City of Carthage, — Mo. App. —, 108 S. W. 589 [1908].

¹⁴ Heinroth v. Kochersperger, 173 Ill. 205, 50 N. E. 171 [1898]. See also Smith v. Kochersperger, 173 Ill. 201, 50 N. E. 187 [1898].

¹⁵ In the Matter of Bridgeford, 65 Hun (N. Y.) 227, 20 N. Y. Supp. 281 [1892].

¹⁶ Chicago, Milwaukee & St. Paul R. R. Co. v. Phillips, 111 Ia. 377, 82 N. W. 787 [1900]; Wilkins v. City of Detroit, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427 [1881].

¹⁷ Cox v. Bird, 88 Ind. 142 [1882].

¹⁸ Dahlman v. City of Milwaukee, 131 Wis. 427, 110 N. W. 479 [1907].

¹⁹ Watkins v. City of Milwaukee, 52 Wis. 98, 8 N. W. 823 [1881].

²⁰ Comstock v. Eagle Grove City, — Iowa, —, 111 N. W. 51 [1907].

²¹ Glos v. Hanford, 212 Ill. 261, 72 N. E. 439 [1904].

§ 1444.—Pleadings—Bill.

The bill in equity must state facts establishing the right of the property owner to an injunction.¹ If equitable relief can be given only if the assessment is regular on its face, such facts must be alleged in the petition.² The specific facts upon which the plaintiff intends to rely in applying for an injunction must be alleged in his bill in equity by which such relief is sought. Facts which are not pleaded cannot be shown at the hearing as ground for attacking the assessment.³ Thus, if the property owner does not allege that the assessor was disqualified,⁴ or that the drainage district was defectively organized,⁵ he cannot show such facts at the hearing.⁶ A property owner who seeks relief must aver facts which show that he has been injured by the irregularities complained of.⁷ Thus, a bill which avers certain irregularities not going to the jurisdiction of the public corporation, and which does not aver that plaintiff's property is assessed for more than its proportionate share of the cost, does not make out any case for equitable relief.⁸ If relief can be had only in case the defect does not appear upon the face of the record, the plaintiff must aver that such defect does not so appear.⁹ Facts must be averred positively.¹⁰ The want of direct averments cannot be supplied by argument or inference.¹¹ An averment that a former assessment "appeared to be and remained a lien" is not sufficient to show the validity of such assessment.¹² Facts, and not conclusions of law, must be alleged. Thus, an averment that the assessment was unequal and unjust,¹³ or unfair,¹⁴ or that it was irregu-

¹ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853].

² *Clark v. Village of Dunkirk*, 12 Hun (N. Y.) 181 [1877].

³ *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889].

⁴ *O'Reilly v. City of Kingston*, 114 N. Y. 439, 21 N. E. 1004 [1889].

⁵ *Morrell v. Union Drainage District No. 1*, 118 Ill. 139, 8 N. E. 675 [1887].

⁶ Petition held sufficient; *Forgey v. Northern Gravel Road Co.*, 37 Ind. 118 [1871]; *Moale v. Mayor and City Council of Baltimore*, 61 Md. 224 [1883]; *Regan Land Co. v. City of Carthage*, — Mo. App. — 108 S. W. 589 [1908]; Petition held insufficient; *Clayton v. Lafargue*, 23 Ark. 137 [1861]; (attacking the proprie-

ty of the improvement); *Cauldwell v. Curry*, 93 Ind. 363 [1883].

⁷ *Owens v. City of Milwaukee*, 47 Wis. 461, 3 N. W. 3 [1879].

⁸ *Owens v. City of Milwaukee*, 47 Wis. 461, 3 N. W. 3 [1879].

⁹ *Haywood v. City of Buffalo*, 14 N. Y. 534 [1857].

¹⁰ *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624 [1906].

¹¹ *Cleneay v. Norwood*, 137 Fed. 962 1905]; *Rogers v. Milwaukee*, 13 Wis. 610 [1861].

¹² *Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624 [1906].

¹³ *Meggett v. City of Eau Claire*, 81 Wis. 326, 51 N. W. 566 [1892].

¹⁴ *Watson v. City of Elizabeth*, 35 N. J. Eq. (8 Stew.) 345 [1882].

lar,¹⁵ or that no proper or legal notice of certain proceedings was given,¹⁶ or that the property assessed is exempt¹⁷ is, in each case, insufficient. On the other hand, it has been held that an averment to the effect that the assessment was illegal and void, was sufficient as against a general demurrer.¹⁸ An averment that the assessment was not based on benefits and that it was therefore in violation of the Fourteenth Amendment to the Constitution of the United States has been held to be sufficient.¹⁹ If the plaintiff relies on failure to give notice as required by statute, he must aver, if such be the fact, that no notice was given.²⁰ It is sufficient, if he aver that no notice whatever was given.²¹ On the other hand, it has been held that an averment that the plaintiff had "no notice" is insufficient, and that plaintiff must allege "what, if anything, in relation to notice is shown by the record of the proceedings that are collaterally assailed."²² An averment that constructive notice by publication was not given, is insufficient if there is no averment that personal notice was not given, and if under the law in force personal notice would be sufficient.²³ If the plaintiff apparently concedes that some kind of notice was given, but denies its sufficiency in law, he must set forth the facts which render said notice insufficient. An averment that "no sufficient notice"²⁴ or that "no proper or legal notice"²⁵ has been given, is in each case insufficient. An averment that the provision in a city charter was unconstitutional "by reason of not providing for any sufficient notice," is not equivalent to an aver-

¹⁵ *Williams v. Mayor, etc., of Detroit*, 2 Mich. 560 [1853].

¹⁶ *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873 [1887].

¹⁷ *Johnson v. City of Oshkosh*, 21 Wis. 184 [1866].

¹⁸ *New York & Harlem R. R. Co. v. Board of Trustees of the Town of Morrisania*, 7 Hun 652 [1876].

¹⁹ *City Council of Montgomery v. Birdsong*, 126 Ala. 632, 28 So. 522 [1899].

²⁰ *Brown v. City of Chicago*, 117 Ill. 21, 7 N. E. 108 [1887]; *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 27 N. E. 725 [1890].

²¹ *Board of Commissioners of Wells County v. Gruver*, 115 Ind. 224, 17 N. E. 290 [1888]. See also

Rogers v. Milwaukee, 13 Wis. 610 [1861].

²² *Sarber v. Rankin*, 154 Ind. 236, 240, 56 N. W. 225 [1899]; (citing *Thompson v. Harlow*, 150 Ind. 450, 50 N. E. 474; *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156; *Bailey v. Rinker*, 146 Ind. 129, 45 N. E. 38; *Pickering v. State*, 106 Ind. 228, 6 N. E. 611; *Baltimore & Ohio & C. R. R. Company v. North*, 103 Ind. 486, 3 N. E. 144; *Exchange Bank v. Ault*, 102 Ind. 322, 1 N. E. 562).

²³ *Sarber v. Rankin*, 154 Ind. 236, 56 N. E. 225 [1899].

²⁴ *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280, 2 N. E. 182 [1886].

²⁵ *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873 [1887].

ment that notice was not, in fact, given.²⁶ In the absence of an averment that notice was not given, notice will be presumed if required by law,²⁷ since the validity of official acts, and the regularity of official proceedings, is always to be presumed. If actual knowledge as well as notice would prevent a property owner from maintaining an injunction suit, he must aver both a want of notice and a want of actual knowledge.²⁸ An averment that material alterations have been made in a written contract, wrongfully and fraudulently increasing the price for which work is to be done, is a sufficient averment of fraud.²⁹ If the plaintiff alleges two grounds for equitable relief, one of which is sufficient and the other of which is not, the insufficiency of the latter ground does not render insufficient the averments as to the former ground.³⁰ If the plaintiff avers that the front foot rule was adopted by the city in apportioning an assessment, he must also allege that the benefits to his property were not in proportion to the frontage.³¹ If cities are divided into grades and classes, and the court cannot take judicial knowledge of the grade or class to which a specified city belongs, such facts must be alleged.³² A petition must ordinarily show that the officers who are acting on behalf of a corporation have authority to bind it. Thus, in an action against a village, an averment that some person or persons styling themselves the council of such village, endeavored to pass a certain pretended ordinance, is not sufficient as a basis for enjoining the public corporation.³³ On the other hand, if the averments show that an officer is attempting to collect certain taxes which have been authorized by ordinance, such averment makes a sufficient ground for injunction, although the public corporation is referred to as a pretended corporation.³⁴ If it is alleged that the superintendent of streets has advertised the property for sale, it is not necessary to allege that he has

²⁶ *Shannon v. City of Portland*, 38 Ore. 382, 62 Pac. 50 [1900].

²⁷ *White v. Fleming*, 114 Ind. 560. 16 N. E. 487 [1887].

²⁸ *Hewes v. Village of Winnetka*, 60 Ill. App. 654 [1895].

²⁹ *Miller's Case*, 12 Abb. Prac. 121 [1861].

³⁰ *Moore v. Mayor, Aldermen and Commonalty of the City of New York*, 73 N. Y. 238, 29 Am. Rep. 134

[1878]; *Rogers v. Milwaukee*, 13 Wis. 610 [1861].

³¹ *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410 [1903].

³² *Bolten v. City of Cleveland*, 35 O. S. 319 [1880].

³³ *Hewes v. Village of Winnetka*, 60 Ill. App. 654 [1895].

³⁴ *Winkler v. Halstead*, 36 Mo. App. 25 [1889].

authority to sell where such authority is conferred by statute.³⁵ Plaintiff must show either an assessment against his property or a personal liability which it is intended to enforce against himself.³⁶ If a bill avers that plaintiff owns certain property without disclosing the method whereby it is acquired, it will be presumed that such property is owned in fee, even though the plaintiff is a railroad corporation and its tracks run across such land.³⁷ Averments as to the character of a resolution passed by authority of a statute are not to be regarded as determining the constitutionality of such statute, but the court will take judicial knowledge of the terms of such statute.³⁸ A bill which seeks to enjoin an assessment on the ground that the estimate of cost as submitted to council was in gross, is insufficient unless it avers in negative terms that information in detail was not also submitted.³⁹ Where it is necessary that plaintiff should pay or tender the amount of the assessment which is fairly due from him, such facts must be averred in the bill.⁴⁰ If, however, the bill avers that plaintiff's land was sold "for the amount of said assessment," it may be presumed that all of the taxes upon such property have been paid, or at least that the property was not sold for any taxes except such assessments.⁴¹ Failure to file a demurrer, or filing an answer after a demurrer has been overruled, may operate as a waiver of the defects attacked by the demurrer. General averments which may be obnoxious to a demurrer, may be sufficient if no demurrer is filed.⁴² If the bill contains allegations that there was "want of compliance with the statute," "no notice" and other vague allegations, and a demurrer thereto is overruled, filing an answer in which such averments are denied operates as a waiver of the demurrer.⁴³ Plaintiff may set up, by sup-

³⁵ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899].

³⁶ *Terre Haute and Logansport R. Co. v. Soice*, 128 Ind. 105, 27 N. E. 429 [1890].

³⁷ *Minneapolis & St. Louis Ry. Co. v. Lindquist*, 119 Ia. 144, 93 N. W. 103 [1903].

³⁸ *City of Indianapolis v. Holt*, 155 Ind. 222, 57 N. E. 966, 988, 1100 [1900].

³⁹ *Cuming v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881].

⁴⁰ *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933 [1898]. See also § 1435.

⁴¹ *Gilman v. City of Milwaukee*, 61 Wis. 589, 21 N. W. 640 [1884].

⁴² *Gage v. Webb*, 141 Ill. 533, 31 N. E. 130 [1893]. (Averments that notice was not served upon the owner of the land.)

⁴³ *Glos v. Hanford*, 212 Ill. 261, 72 N. E. 439 [1904].

plemental bill or petition, facts which have arisen since the original suit was begun,⁴⁴ as where the city constructed the improvement, and levied the assessment after the injunction proceedings were instituted.⁴⁵ The levy of an irregular or unauthorized assessment, followed by an attempt to enforce the same, is the cause of action.⁴⁶ It is not proper to make each irregular or illegal act a separate cause of action.⁴⁷ A creditor's bill, brought to subject assets to the liens of the plaintiffs, may also ask for the cancellation of tax deeds on different portions of the property, the apportionment of the taxes between the portions of the property covered by the different liens, and the vacation of special assessments for street improvements, and the officers of the city and the holders of tax deeds may be joined as defendants.⁴⁸

§ 1445. Answer and other pleadings.

Facts not denied by the answer and alleged in the bill, must be regarded as admitted. A general denial in an answer in a proceeding for injunction raises an issue,¹ and prevents plaintiff from obtaining a judgment upon the pleadings.² If plaintiff's petition does not state a cause of action, a denial of the averments of the petition is to be treated as surplusage, and no issue is raised for trial.³ An answer in which the defense of estoppel is set up, must aver knowledge of the plaintiff in connection with conduct on his part which is sufficient to constitute an estoppel.⁴ An averment of such facts in connection with a sufficient averment of notice is sufficient.⁵ If a public corporation means to rely upon the waiver of notice, it must allege such waiver, and it cannot plead the giving of notice, and then prove the facts which amount to a waiver.⁶ If, by statute, payment of

⁴⁴ *Potter v. Village of Norwood*, 21 Ohio C. C. 461 [1901].

⁴⁵ *Potter v. Village of Norwood*, 21 Ohio C. C. 461 [1901].

⁴⁶ *Tyler v. City of Columbus*, 6 Ohio C. C. 224 [1892].

⁴⁷ *Tyler v. City of Columbus*, 6 Ohio C. C. 224 [1892].

⁴⁸ *Bidwell v. Huff*, 103 Fed. 362 [1900].

¹ *McCrea v. City of Leavenworth*, 46 Kan. 767, 27 Pac. 129 [1891].

² *McCrea v. Leavenworth*, 46 Kan. 767, 27 Pac. 129 [1891].

³ *Chicago, Milwaukee & St. Paul R. R. Co. v. Phillips*, 111 Ia. 377, 82 N. W. 787 [1900].

⁴ *Troyer v. Dvar*, 102 Ind. 396, 1 N. E. 728 [1885]; *Marion & Monroe Gravel Road Co. v. McClure*, 66 Ind. 468 [1879].

⁵ *Trustees of the United Brethren in Christ Church v. Rausch*, 122 Ind. 167, 23 N. E. 717 [1889].

⁶ *Eddy v. City of Omaha*, 72 Neb. 550, 101 N. W. 25 [1904]; (modified on rehearing, 102 N. W. 70, and 103 N. W. 692 [1905]).

general taxes is a condition precedent to an action to void a special assessment, the city must take advantage of the omission of such allegations from the petition by demurrer or by plea in abatement, or it will be held to have waived such defense.⁷ If the plaintiff's petition shows facts coming within one of the recognized grounds of equitable jurisdiction, the public corporation must by demurrer or answer take advantage of the fact that there is a remedy at law, or that other circumstances exist which would induce the court to refuse equitable relief in this case.⁸ If not so taken advantage of, such objection is waived. If not all the parties united in interest are made plaintiffs, such defect, if not apparent on the face of the bill, must be set up by answer or it will be regarded as waived.⁹ The fact that the holder of the tax certificate was a stranger to the proceedings under which the improvement was made and did not know of the defects when he purchased at the tax sale, is no defense.¹⁰ If the averments of the answer are equivalent in legal effect to a denial, a reply is not necessary.¹¹ If equity has power to enforce an assessment in a suit brought for that purpose, such relief may be given in a cross petition in a suit to enjoin the collection of an assessment. In an action to enjoin the collection of an assessment, the city may by counter claim ask judgment for such tax, and if the tax is valid, such judgment should be entered.¹² In an action to enjoin the collection of an assessment, the holder of an assessment certificate may intervene and have his lien, if valid, enforced, even if the city has elected to have such property sold by the county treasurer as a method of enforcing such lien.¹³ A cross petition cannot be made the means of obtaining relief which could not have been granted upon an original petition.¹⁴ Thus, if a court of equity has no power in a direct proceeding, to determine that bonds issued by an irrigation district constitute a lien upon the lands within such

⁷ Wells v. Western Paving & Supply Co., 96 Wis. 116, 70 N. W. 1071 [1897].

⁸ Williams v. Mayor, etc., of Detroit, 2 Mich. 560 [1853]. The same rule applies where there is an adequate and exclusive remedy by statute. Albrecht v. City of St. Paul, 47 Minn. 531, 50 N. W. 608 [1891].

⁹ Ireland v. City of Rochester, 51 Barb. (N. Y.) 414 [1868].

¹⁰ Canfield v. Smith, 34 Wis. 381 [1874].

¹¹ Corry v. Gaynor, 21 O. S. 277 [1871].

¹² Kendig v. Knight, 60 Ia. 29, 14 N. W. 78 [1882].

¹³ Smith v. City of Des Moines, 106 Ia. 590, 76 N. W. 836 [1898].

¹⁴ Boskowitz v. Thompson, 144 Cal. 724, 78 Pac. 290 [1904].

district or to decree the enforcement of such lien, it cannot make such adjudication and decree upon a cross petition filed by bond holders in a suit brought by land owners to enjoin the collection of a tax levied to pay interest on such bonds, especially if the district is not a party.¹⁵

§ 1446. Jurisdiction and conditions precedent.

Under some statutes a court of equity cannot have jurisdiction if the amount in dispute is less than one hundred dollars. Under such statute, a court of equity cannot take jurisdiction if the amount claimed on each issue is less than one hundred dollars, even if the entire amount in dispute exceeds one hundred dollars.¹ A statute which requires tax payers to demand that a city solicitor bring a suit, before proceeding to sue on behalf of the state, does not apply to an action by owners of land to enjoin an assessment, since such right of action is a private one.² A charter which has been adopted by a city under a constitutional provision authorizing cities to frame their own charters in conformity to the general laws of the state, cannot contain a provision requiring a property owner to pay the assessment into court as a condition precedent to bringing an action to test the validity of such assessment, if no authority for such provision is found in the general laws of the state, and if such provision is inserted it is invalid.³

§ 1447. Decree.

On a hearing for the granting of a temporary injunction, it is error to make the injunction perpetual;¹ but if the record shows that the city had no power to levy the assessment in question, such decree will not be reversed for such error.² A decree enjoining the collection of an assessment is no bar to a re-assessment under proper statutory authority.³ Hence, the decree

¹⁵ *Boskowitz v. Thompson*, 144 Cal. 724, 78 Pac. 290 [1904].

¹ *Wallace v. Sortor*, 52 Mich. 159, 17 N. W. 798 [1883].

² *Stone v. Viele*, 38 O. S. 314 [1882]; *Mills v. Village of Norwood*, 6 Ohio C. C. 305 [1892].

³ *Wilson v. City of Seattle*, 2 Wash. 543, 27 Pac. 474 [1891].

¹ *Mayor of Annapolis v. Harwood and wife*, 32 Md. 471, 3 Am. Rep. 151 [1870].

² *Mayor of Annapolis v. Harwood and wife*, 32 Md. 471, 3 Am. Rep. 151 [1870].

³ *Fountain v. Mayor and Common Council of the City of Newark*, 57 N. J. Eq. (12 Dick.) 76, 40 Atl. 212 [1898]; *Raymond v. Cleveland*, 42 O. S. 522 [1885]; (original assessment enjoined in *Chamberlain v. City of Cleveland*, 34 O. S. 551 [1879]); *Lester v. City of Seattle*, 42 Wash. 539, 85 Pac. 14 [1906].

should not seek to enjoin the city from collecting any further amount on account of the improvement,* or from levying a re-assessment.⁵ The legislature cannot set aside the decree of a court of competent jurisdiction enjoining the collection of an assessment.⁶ An injunction against the collection of an assessment is no excuse for a delay in the performance of a contract.⁷ In a suit to remove a cloud from the title, the court has not the power to make a finding as to the amount fairly due, under a statute conferring such power in case of an attack on an assessment.⁸

§ 1448. Procedure.

If an injunction has been denied,¹ or if once granted has subsequently been dissolved,² a subsequent appeal does not revive such injunction, or amount to the granting of an injunction. If the holder of an invalid tax title refuses to accept the tender of the amount which he is entitled to receive, and the property owner is obliged to sue in equity to set aside such tax title, the holder of the tax title may be required to pay the costs of such proceeding.³ If the assessment is valid, but the sale is invalid, it is proper to require the property owner to pay the amount actually paid at the sale, together with all taxes and assessments subsequently paid, and the interest thereon at six per cent. per annum.⁴ He cannot be required to pay the statutory penalty that could be exacted if the sale had been valid.⁵

§ 1449. Power to compel performance.

In most cases the property owner seeks equitable relief of a negative character in the form of an injunction or a decree removing a cloud from the title. He may in some cases have relief of an affirmative character as well. A property owner or one

* *Lester v. City of Seattle*, 42 Wash. 539, 85 Pac. 14 [1906].

⁵ *Fountain v. Mayor and Common Council of the City of Newark*, 57 N. J. Eq. (12 Dick.) 76, 40 Atl. 212 [1898].

⁶ *Searcy v. Patriot and Barkworks, Turnpike Company*, 79 Ind. 274 [1881].

⁷ *Butler v. City of Detroit*, 43 Mich. 552, 5 N. W. 1078 [1880].

⁸ *Field v. Inhabitants of the Town-*

ship of West Orange, 39 N. J. Eq. (12 Stew.) 60 [1884].

¹ *Smith v. Tobener*, 32 Mo. App. 601 [1888].

² *Brevort v. City of Detroit*, 24 Mich. 322 [1872].

³ *Gage v. Dupuy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386 [1892].

⁴ *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543 [1889].

⁵ *Gage v. Dupuy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386 [1892].

especially interested in the performance of an improvement contract may apply to a court of equity, and may obtain an order requiring the contractor to perform the contract in compliance with its terms.¹ If the bill in equity alleges collusion between certain officials and the contractors to defraud the tax payers in a proceeding preventing the officials from accepting the work, such averment is a sufficient excuse for the failure of the plaintiffs to demand action in the premises from such officials.²

§ 1450. Evidence.

The ordinary rules of evidence apply in proceedings to enjoin an assessment. The regularity of official action will be presumed unless such action is shown to be irregular.¹ If the council has found that an improvement petition is sufficient, the genuineness of the signatures must be presumed unless disproved.² No presumption can be indulged in as to facts which must appear on the face of the record, and their absence cannot be supplied by such presumptions.³ The burden of proof rests upon the party averring facts which are denied by the adversary party.⁴ Thus, the burden of proof rests upon the defendant, where he has alleged new matter which is denied by the plaintiff.⁵ If the assessment proceedings are regular on their face, the burden of proof is upon the party who attacks them.⁶ Evidence tending to show fraud,⁷ as where the time for constructing the improve-

¹ *People ex rel. Raymond v. Whidden*, 191 Ill. 374, 56 L. R. A. 905, 61 N. E. 133 [1901]; *Hackett v. State ex rel. Martindale*, 113 Ind. 532, 15 N. E. 799 [1887].

² *Board of Comrs. of Laporte County v. Wolff*, — Ind. —, 72 N. E. 860 [1904].

³ *Lyman v. City of Chicago*, 211 Ill. 209, 71 N. E. 832 [1904]; *City of Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342 [1889]; *Hobbs v. Board of Commissioners of Tipton Co.*, 116 Ind. 376, 19 N. E. 186 [1888]; *White v. Fleming*, 114 Ind. 560, 16 N. E. 487 [1887]; *Cuming v. City of Grand Rapids*, 46 Mich. 150, 9 N. W. 141 [1881]; *Lasbury v. McCague*, 56 Neb. 220, 78 N. W. 862 [1898]; *Tingue v. Village of Port Chester*, 101 N. Y. 294, 4 N. E. 625

[1886]; *Lyth v. City of Buffalo*, 48 Hun (N. Y.) 175 [1888]; *In re Phillips v. Mayor, Aldermen and Commonalty of the City of New York*, 2 Hun (N. Y.) 212 [1874]; *Westenhaver v. Village of Hoytsville*, 28 Ohio C. C. 357 [1905].

² *Hendrickson v. City of Toledo*, 23 Ohio C. C. 256 [1901].

³ *Blanchard v. City of Barre*, 71 Vt. 420, 60 Atl. 970 [1905].

⁴ *Lasbury v. McCague*, 56 Neb. 220, 78 N. W. 862 [1898].

⁵ *Brewster v. Mayor and Common Council of City of Newark*, 11 N. J. Eq. (3 Stockton) 114 [1856].

⁶ *Beaumont v. City of Wilkes Barre*, 142 Pa. St. 198, 21 Atl. 888 [1891].

⁷ *Foote v. City of Milwaukee*, 18 Wis. 270 [1864].

ment which must be given to the property owners is so short, and the amount of work required is so great that performance within such time is impossible,⁸ should be admitted, if corresponding to the pleadings. Evidence to the effect that the assessment is inequitable and unjust does not, however, establish an averment of fraud.⁹ Under an averment that "no petition was ever presented by the owners" of the required amount of frontage, evidence is admissible to show that some of the signers did not own the amount of frontage which they purport to own, and that the names of other owners were added without their authority.¹⁰ Evidence of open and notorious possession under claim of ownership and payment of taxes is admissible as tending to show that plaintiffs own the realty assessed.¹¹ A petition or bill cannot be used as an affidavit to prove the truth of the facts therein stated unless it is sworn to positively.¹² At the hearing of an application for a temporary injunction, the notice of which hearing is silent with reference to the nature of the evidence to be offered, oral evidence is admissible.¹³ Evidence extrinsic to the record of the assessment proceedings is necessarily admissible, since, in many jurisdictions, an injunction can be had only where the record itself is valid upon its face.¹⁴ Official returns and certificates are admissible in actions of this sort as in other cases.¹⁵ A certificate of sale is admissible to show the official acts of the officer in making the sale.¹⁶ A record which shows that a precept of sale has issued against one lot is not admissible to show that such precept issued against another lot,¹⁷ nor is oral evidence admissible to show that the council intended to order the precept against such other lot.¹⁸

⁸ Foote v. City of Milwaukee, 18 Wis. 270 [1864].

⁹ Owens v. City of Marion, Iowa, 127 Ia. 469, 103 N. W. 381 [1905].

¹⁰ Canfield v. Smith, 34 Wis. 381 [1874].

¹¹ Gilmore v. Norton, 10 Kan. 491 [1872].

¹² City of Atchison v. Bartholow, 4 Kan. 124 [1866].

¹³ Olsson v. City of Topeka, 42 Kan. 709, 21 Pac. 219 [1889].

¹⁴ Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535 [1903]; City of New Whatcom v. Bellingham Bay Improvement Co., 8 Wash. 639, 38 Pac. 163 [1894].

¹⁵ See § 1299, 1300.

¹⁶ Clarke v. Meade, 102 Cal. 516, 36 Pac. 862 [1894].

¹⁷ Langhor v. Smith, 81 Ind. 495 [1882].

¹⁸ Langhor v. Smith, 81 Ind. 495 [1882].

F.—STATUTORY SUITS TO VACATE ASSESSMENT.

§ 1451. Nature and scope of statutory provisions for suits to vacate assessments.

In some states provision is made by statute for suits to vacate assessments for the specific grounds therein set forth. These grounds are generally fraud, substantial error, and under some of the earlier statutes legal irregularities. These statutes are usually, by their terms, exclusive as to affirmative relief available to the property holder,¹ and prevent him from bringing a suit in equity,² as well as from resorting to proceedings granted by prior statutes. As long as the property owner is left free to attack the sale to satisfy the lien of the assessment, the legislature has power to restrict the methods whereby he may have the validity of the assessment determined in advance.³ They do not, however, prevent the property owner from interposing a defense in an action to enforce an assessment, where such defense could have been made had such statute not been passed.⁴ Such statutes are ordinarily applicable only where such assessment is a lien upon the realty assessed when the action is brought, and they do not apply where the assessment is void and is not a lien,⁵ or where the assessment has been paid and ceases to be a lien.⁶ An action provided for by this statute is a special proceeding.⁷ However, in the lower courts it has been held to be

¹ In the Matter of Livingston, 121 N. Y. 94, 24 N. E. 290 [1890]; In the Matter of the Petition of Santiago Lima, 77 N. Y. 170 [1879]; Eno v. Mayor, Aldermen and Commonalty of the City of New York, 68 N. Y. 214 [1877]; Lennon v. The Mayor, Aldermen and Commonalty of the City of New York, 55 N. Y. 361 [1874]; In the Matter of the Petition of Eager, 46 N. Y. 100 [1871]; In the Matter of the Petition of Beekman, 19 Howard, 518 [1860]; Matter of 80th Street, 17 Abb. Pr. 324 [1864].

² Lennon v. Mayor, Aldermen and Commonalty of the City of New York, 55 N. Y. 361 [1874].

Such statute is not by its terms

applicable to the city of Brooklyn. Knapp v. City of Brooklyn, 97 N. Y. 520 [1884]; (reversing Knapp v. City of Brooklyn, 28 Hun 500 [1882]).

³ Lennon v. The Mayor, Aldermen and Commonalty of the City of New York, 55 N. Y. 361 [1874].

⁴ Chase v. Chase, 95 N. Y. 373 [1884].

⁵ Diefenthaler v. Mayor, Aldermen and Commonalty of the City of New York, 47 Hun (N. Y.) 627 [1888].

⁶ In the Matter of the Petition of Santiago Lima, 77 N. Y. 170 [1879].

⁷ In the Matter of the Protestant Episcopal Public School, 86 N. Y. 396 [1881].

a motion, and not a special proceeding.⁸ Such statutes, if applicable to assessments for certain classes of improvements, have no application to assessments for other kinds of improvements.⁹ A statute appointing a commission as a temporary expedient for disposing of special cases then existing, does not repeal a statute authorizing a proceeding to vacate an assessment.¹⁰ An error in computing the amount of the installments of an assessment by including in each the interest upon all the unpaid installments instead of the interest on the particular installment which is to be collected, is to be reviewed by a proceeding under the statute, and not by mandamus.¹¹ A statute which provides that an assessment for a "local improvement" or "public works" can be vacated only for fraud, includes assessments for opening streets.¹²

§ 1452. Legal irregularity.

Under some statutes legal irregularity is a ground for vacating the assessment.¹ Assessment of property which has never been valued for taxation under a statute which limits the amount of the assessment to one-half of the value for general taxation,² or the omission of the assessors to submit to the board of revision the objections submitted to them,³ or the omission to advertise for bids for the work,⁴ or the levy of an assessment before the whole is completed,⁵ have all been held to be irregularities, and the assessment may be vacated or reduced in amount as provided by statute. The fact that the contract has not been let to the lowest bidder,⁶ or that the grade of the improvement has been fixed irregularly,⁷ or that the apportionment of the assessment does not conform to the terms of the petition for the improvement,⁸ or the fact that the contract has not been per-

⁸ In the Matter of Jetter, 14 Hun (N. Y.) 93 [1878].

⁹ In the Matter of Arnold, 60 N. Y. 26 [1875]; (distinguished in *Astor v. Mayor*, 62 N. Y. 580 [1875]).

¹⁰ In the Matter of Livingston, 121 N. Y. 94, 24 N. E. 290 [1890].

¹¹ *In re Hagemeyer*, 99 N. Y. S. 369 [1906].

¹² *Astor v. Mayor*, 62 N. Y. 580 [1875].

¹ Matter of Application of Mayor of New York City, 49 N. Y. 150 [1872].

² In the Matter of Second Avenue M. E. Church, 66 N. Y. 395 [1876].

³ In the Matter of Dunning, 60 Barb. (N. Y.) 377 [1871].

⁴ Matter of McCormack, 60 Barb. 128 [1870].

⁵ Beckman's Petition, 19 Abb. Prac. 244 [1865].

⁶ Horn's Case, 12 Abb. Prac. 124 [1861].

⁷ In the Matter of Buhler, 19 Howard, 317 [1859].

⁸ Rich's Case, 12 Abb. Prac. 118 [1861].

formed properly,⁹ or that the required proof is not annexed to the assessment roll,¹⁰ or the fact that the assessment has not been apportioned properly on account of an error of a judgment on the part of the officers apportioning such assessment,¹¹ are none of them legal irregularities within the meaning of such statute. Under statutes which forbid vacation for irregularities, the failure of the city to enforce the bond of the contractor and to apply the amount thus collected in reduction of the assessment,¹² or the failure of the commissioners to take the oath required by statute,¹³ or failure to publish notice of the final passage of the resolution authorizing the improvement,¹⁴ are not grounds for setting the assessment aside.

§ 1453. Substantial error.

Under some of the statutes, relief may be given by such statutory proceedings for substantial error, even if no fraud exists.¹ Omission to give notice of the time and place of receiving bids,² or omission to publish the resolution and report of a committee of either board of the common council, as required by statute,³ or the improper delegation of power to subordinate officers,⁴ or including improper items in the assessment,⁵ are legal irregularities for which the assessment may be vacated by such a proceeding. If the assessment is not entirely invalid, but is in excess of the fair value of the work done, the assessment should be reduced in amount, but not entirely vacated.⁶ The fact that

⁹ In the Matter of Lewis, 35 Howard, 162 [1868].

¹⁰ In the Matter of Lewis, 35 Howard, 162 [1868].

¹¹ In the Matter of Eager, 46 N. Y. 100 [1871]. That the adoption of the wrong principle is not a legal irregularity, see In the Matter of Eager, 10 Abb. Pr. N. S. 229 [1871]; Matter of McCormack, 10 Abb. Pr. N. S. 234 [1870].

¹² *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 68 N. Y. 214 [1877]. Some relief, however, must be given to the property owner, though the precise nature thereof was not decided in this case.

¹³ In the Matter of Dennis, 22 Hun (N. Y.) 607 [1880].

¹⁴ In the Matter of Agnew, 4 Hun, 435 [1875].

¹ In the Matter of 127th Street, 46 Howard, 60 [1878].

² In the Matter of Pennie, 108 N. Y. 364, 15 N. E. 611 [1888]; In the Matter of Pennie, 45 Hun 391 [1887]; In the Matter of Pennie, 19 Abb. N. C. 117.

³ In the Matter of Anderson, 60 N. Y. 457 [1875].

⁴ In the Matter of Trustees of Presbytery of New York, 57 Howard (N. Y.) 500 [1879].

⁵ In the Matter of Van Buren, 55 Howard, 513 [1878].

⁶ In the Matter of Meade, 13 Hun 349 [1878]. (Under special statutes providing for such reduction.)

the land which is assessed is not subject to assessment,⁷ or that the grade of the improvement has not been changed irregularly, where the city bears the increased cost due to such change,⁸ or omission to award damages for a change of grade,⁹ or an unauthorized provision in the notice inviting bids, to the effect that one-fourth of the price bid for rock excavation would be allowed for earth excavation, it not being shown that any harm was in fact done thereby,¹⁰ or that the wrong principle of apportionment has been adopted by the assessors,¹¹ are none of them legal irregularities for which the assessment should be vacated.

§ 1454. Fraud.

By the terms of these statutes an assessment may be vacated in case of fraud.¹ An order vacating an assessment is applicable only to the lands described in the proceeding to vacate, and is not applicable to other lands included in the same assessment.² A failure to advertise for bids,³ or to re-advertise if the original contract has been abandoned,⁴ or the fact that the improvement contracted for is less in extent than that provided for by the ordinance,⁵ or the fact that the improvement is constructed by the city without letting the contract,⁶ none of them amount to fraud in the absence of other facts tending to establish the existence of fraud. The fact that the contract is awarded to one who eventually proves to be one of the highest bidders, the bids being according to the quantity of the different kinds of work to be done, does not of itself show the existence of fraud in the absence of collusion between the street commissioners and the successful contractor.⁷ The fact that an excessive price is charged

⁷ In the Matter of Farniss, 4 Hun (N. Y.) 624 [1875].

⁸ In the Matter of The Mutual Life Insurance Company, 89 N. Y. 530 [1882].

⁹ In the Matter of Cruger, 84 N. Y. 619 [1881].

¹⁰ In the Matter of Marsh, 83 N. Y. 431 [1881].

¹¹ In the Matter of Marsh, 83 N. Y. 431 [1881].

¹ *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 68 N. Y. 214 [1877]; In the Matter of Delaney, 52 N. Y. 80 [1873].

² In the Matter of Delaney, 52 N. Y. 80 [1873]; *Wilkes v. Mayor, Aldermen and Commonalty of the City of New York*, 8 Daly (N. Y.) 407 [1878].

³ Matter of McCormack, 10 Abb. Pr. N. S. 234 [1870]. (Since the excess may be deducted.)

⁴ In the Matter of Seeds, 53 N. Y. 400 [1873].

⁵ In the Matter of Pinckney, 22 Hun, 474 [1880].

⁶ *Miller's Case*, 12 Abb. Prac. 121 [1861].

⁷ In the Matter of 80th Street, 31 Howard, 99 [1865].

for the improvement where no competitive bidding has been had,⁸ or that the estimate of the amount to be assessed for work done prior to the date of the contract greatly exceeds its value,⁹ or that a false certificate is made by the street commissioner as to the rate at which work is to be done under a contract,¹⁰ are each of them ground for vacating the assessment for fraud.

§ 1455. Specific facts authorizing vacation.

An assessment cannot be vacated on the ground that the improvement does not in fact confer a benefit,¹ or that the assessment as apportioned is unequal and unjust if the proper principle has been applied,² or that an approximate method of determining the amount of a proper item was used,³ or that power was reserved by the public officials to increase the extent and cost of the improvement, no fraud being shown,⁴ or that the work done was not properly done, as long as no fraud is shown,⁵ or that the land which was not subject to assessment was omitted.⁶ An assessment may be vacated or reduced if improper items are included,⁷ or if an excessive charge for interest is included,⁸ or if a patented article is required by the specifications, and a lump bid for the entire improvement is called for,⁹ or if a contract is not let for the improvement under a statute requiring the improvement to be made by letting a contract therefor,¹⁰ or if a public easement has not been secured, and cannot be secured in the realty upon which the improvement is to be

⁸ In the Matter of Righter, 92 N. Y. 111 [1883]; Matter of Leake and Watts Orphan Home, 92 N. Y. 116 [1883]. (The amount of the assessment was here reduced.) To the same effect see In the Matter of Pelton, 85 N. Y. 651 [1881]; In the Matter of Merriam, 84 N. Y. 596 [1881]; In the Matter of Manhattan Institution, 82 N. Y. 142 [1880].

⁹ In the Matter of Livingston, 121 N. Y. 94, 24 N. E. 290 [1890].

¹⁰ In the Matter of Beekman, 18 Howard, 460 [1859].

¹ Matter of Brainerd, 51 Hun 380, 3 N. Y. Sup. 889 [1889].

² In the Matter of Munn, 165 N. Y. 149, 58 N. E. 881 [1900]; (reversing In the Matter of Munn, 49 App. Div. 232 [1900]).

³ In the Matter of Lowden, 89 N. Y. 548 [1882].

⁴ In the Matter of Merriam, 84 N. Y. 596 [1881].

⁵ Matter of Lewis, 52 Barb. 82 [1868].

⁶ In the Matter of Churchill, 82 N. Y. 288 [1880].

⁷ In the Matter of Murphy, 20 Hun 346 [1880].

⁸ In the Matter of Willis, 30 Hun (N. Y.) 13 [1883].

⁹ In the Matter of Eager, 46 N. Y. 100 [1871]; In the Matter of Eager, 58 Barb. 557 [1871]; Matter of Eager, 10 Abb. Pr. N. S. 229 [1871]; In the Matter of Eager, 12 Abb. Pr. 151 [1871].

¹⁰ In the Matter of Lange, 85 N. Y. 307 [1881].

constructed.¹¹ The assessment cannot be vacated, however, on the latter ground, unless it is shown clearly that the improvement is constructed upon private property.¹² It has been held that if an improvement ordinance is passed without legal authority, the remedy of the property owner is to apply to the court to prevent the construction of the improvement, and that if he omits so to do, he cannot subsequently have the assessment vacated.¹³ A sale to satisfy the lien of an assessment may be vacated for fraud or irregularity,¹⁴ while if no fraud or irregularity in the assessment is shown, the court may, at the same time, refuse to vacate the assessment.¹⁵ If the statute forbids the vacation of an assessment for any irregularity except in case of fraud, an assessment cannot be vacated on the ground that a commissioner was not appointed legally, and that notice of presenting the petition was not given.¹⁶

§ 1456. Vacation of assessments for repaving.

By the terms of some of these statutes, they are not applicable to cases where an assessment has been paid for a former paving.¹ In such cases, an assessment may be set aside for irregularities for which the assessment could have been attacked had it not been for the passage of such statute. It, accordingly, is important to determine what a prior paving is. If an assessment is levied for paving the traveled portion of a street, no prior improvement can be said to exist unless there has been a substantial paving of that part of the street.² Accordingly, the fact that a street has been curbed and guttered, and a narrow strip on either side laid with cobble stones to protect the gutter, does not constitute a prior paving.³ Within the meaning of these statutes, paving includes laying sidewalks, and if a sidewalk has once been laid at the cost of the property owners, the statutes restricting the right to vacate the assessment do not

¹¹ In the Matter of Cheesbrough, 78 N. Y. 232 [1879].

¹² In the Matter of Ingraham, 64 N. Y. 310 [1876].

¹³ In the Matter of Smith, 67 Howard (N. Y.) 501 [1884].

¹⁴ In the Matter of Lester, 21 Hun (N. Y.) 130 [1880]; In the Matter of Deering, 55 Howard (N. Y.) 296 [1878].

¹⁵ In the Matter of Lester, 21 Hun (N. Y.) 130 [1880].

¹⁶ Astor v. The Mayor, Aldermen and Commonalty of the City of New York, 62 N. Y. 580 [1875].

¹ In the Matter of Astor, 53 N. Y. 617 [1873].

² In the Matter of Brady, 85 N. Y. 268 [1881].

³ In the Matter of Brady, 85 N. Y. 268 [1881].

apply to a subsequent assessment for relaying the sidewalk,⁴ or for relaying a cross walk,⁵ or to widening the sidewalk, though the original paving is left undisturbed.⁶ If the assessment for the prior improvement has been paid by the city which at that time owned the property, an assessment for repaving does not fall within the exception to the statute.⁷ If it is not shown that the former assessment was paid except by the presumption of payment arising from the lapse of time, the case is not within this exception.⁸ If the property owners have constructed an improvement voluntarily, at their own expense, a subsequent paving has been held not to be a repaving within the meaning of the statutory exception.⁹

§ 1457. Effect of confirmation upon proceedings to vacate.

Under some statutes it was held that the confirmation of the report of the commissioners was final and prevented actions to vacate an assessment, unless such fraud was shown as would justify the setting aside of a judgment.¹ Under other statutes it is assumed that the statute applies to relief after confirmation and that confirmation does not, accordingly, preclude such relief.²

§ 1458. Reduction of assessment.

Under some statutes, errors or irregularities, and the like, which increase the amount of an assessment, and which, under earlier statutes, were grounds for vacating it, were made grounds for reducing the amount of the assessment instead of vacating it.¹

⁴ In the Matter of Burmeister, 76 N. Y. 174 [1879]; (reversing Matter of Burmeister, 9 Hun 613 [1877]); In the Matter of Burmeister, 56 Howard, 416 [1879]; In the Matter of Phillips, 60 N. Y. 16 [1875].

⁵ In the Matter of Burke, 63 N. Y. 224 [1875].

⁶ In the Matter of Smith, 99 N. Y. 424, 2 N. E. 52 [1885].

⁷ In the Matter of Welsh, 30 Hun 372 [1883].

⁸ In the Matter of Serrill, 9 Hun 233 [1876].

⁹ Petition of Astor, 2 Sup. Ct. T. & C. 488 [1874].

¹ Dotan v. Mayor, Aldermen and

Commonalty of the City of New York, 62 N. Y. 472 [1875]; In the Matter of Kiernan, 62 N. Y. 457 [1875].

² In the Matter of Mayor of New York City, 49 N. Y. 150 [1872]; In the Matter of the Sewer in 24th Street, 31 Howard (N. Y.) 42 [1863].

¹ In the Matter of Feust, 121 N. Y. 299, 24 N. E. 479 [1890]; In the Matter of Meade, 74 N. Y. 216 [1878]; In the Matter of McCormack, 60 Barb. 128 [1870]; In the Matter of Meade, 13 Hun 349 [1878].

Such statutes are not retrospective, and do not apply to assessments theretofore levied; and, accordingly, such assessments were to be vacated and not reduced in amount, even after such statute was enacted.² Reduction cannot be allowed if it is not shown that the total amount assessed exceeds the fair value of the work.³ Since each proceeding is separate as to each lot owner, an assessment may be vacated at the instance of one lot owner, where irregularities are shown, but no evidence is offered tending to show what amount of the assessment was legal and what illegal,⁴ while in a proceeding by another lot owner attacking the same assessment, the assessment may be vacated if the record shows the means of separating the legal items from the illegal.⁵ A statute which authorizes the vacation or rejection of an assessment for fraud, or defect in the work, or substantial error, has been held not to be retrospective in its effect in the absence of provisions tending to show that such was the intention of the legislature, and, accordingly, assessments which have been made prior to the enactment of such statute cannot be vacated thereunder.⁶

§ 1459. In what court action to be brought.

Application to vacate an assessment must be made to a court authorized by law to entertain such application.¹ Jurisdiction of this sort is judicial power, and hence a statute conferring jurisdiction of such cases upon the Supreme Court does not violate a constitutional provision forbidding the judges of that court to hold any other office or public trust.² An assessment is not a proceeding affecting the title to realty, and hence if, by statute, an action cannot be appealed if the amount in controversy is less than five hundred dollars, except actions affecting the title to realty or an interest therein, an action to vacate an assess-

² In the Matter of Eager, 46 N. Y. 100 [1871]; In the Matter of Eager, 41 Howard, 107 [1870]; In the Matter of Pelton, 85 N. Y. 651 [1881]; In the Matter of Merriam, 84 N. Y. 596 [1881].

³ In the Matter of Meade, 74 N. Y. 216 [1878].

⁴ In the Matter of the New York Protestant Episcopal School, 75 N. Y. 324.

⁵ In the Matter of Auchmuty, 90

N. Y. 685 [1882]; In the Matter of Auchmuty, 18 Hun 324 [1879].

⁶ Matter of Delaware and Hudson Canal Co., 129 N. Y. 105, 29 N. E. 237 [1891]. *Contra*, that it is retroactive In the Matter of Beams, 17 Howard, 459 [1859].

¹ In the Matter of the Trustees of the Presbytery of New York, 54 Howard (N. Y.) 226 [1877].

² In the Matter of Beekman, 19 Howard, 518 [1860].

ment cannot be appealed if the amount in controversy is less than five hundred dollars.³

§ 1460. Parties to suit to vacate.

An action to vacate an assessment can be brought under the statutes by a party aggrieved thereby. An owner of land which is not assessed is not aggrieved by an assessment upon the land of others.¹ The owner of the realty which is assessed is ordinarily the party aggrieved. However, any one who is liable for the amount of the assessment is a party aggrieved,² and, accordingly, a lessee who, by the terms of his lease, is bound to pay the assessments, may bring such action.³ A grantee who takes subject to the assessment, is a party aggrieved, although, if the city shows that he has assumed such assessment, or that the amount thereof is to be deducted from the purchase price, or if he is indemnified by the owner against such assessment, the *prima facie* inference that he is the party aggrieved is rebutted.⁴ A mortgagee whose mortgage is prior in time to the assessment, but is postponed thereto, is a party aggrieved if the land is sold for less than the amount of the mortgage and the assessment,⁵ even if he has bid such realty in.⁶ If a number of property owners have joined in a suit to vacate an assessment and some of them have thereafter paid their assessments, it has been held that their application to be allowed to serve separate petitions should be denied.⁷ A proceeding to vacate an assessment has been held to abate by the death of the owner, and not to be capable of revivor in the name of his executrix on the ground that it is a special proceeding.⁸ The vendee at a sale to satisfy

³ Nichols v. Voorhis, 74 N. Y. 28 [1878].

¹ In the Matter of Churchill, 82 N. Y. 288 [1880].

² In the Matter of Burke, 63 N. Y. 224 [1875].

³ In the Matter of Burke, 63 N. Y. 224 [1875].

⁴ In the Matter of Pennie, 108 N. Y. 364, 15 N. E. 611 [1888]; In the Matter of Gantz, 85 N. Y. 536 [1881]; In the Matter of Gantz, 23 Hun (N. Y.) 350 [1880]; In the Matter of Conley, 22 Hun (N. Y.) 603 [1880]; Bennett's Case, 12 Abb. Prac.

127 [1861]. *Contra*, to the effect that reimbursement will be presumed, In the Matter of Saunders, 21 Hun (N. Y.) 579 [1880].

⁵ In the Matter of Walter, 75 N. Y. 354 [1878].

⁶ In the Matter of Walter, 75 N. Y. 354 [1878].

⁷ In the Matter of Wood, 33 Hun (N. Y.) 4 [1884].

⁸ Matter of Barney, 53 Hun (N. Y.) 480, 6 N. Y. Sup. 401; In the Matter of Roberts, 53 Hun, 338, 6 N. Y. Supp. 195; (citing Leary v. Gardner, 63 N. Y. 624).

the lien of the assessment, is not a necessary party defendant in a suit to vacate an assessment.⁹

§ 1461. Time within which suit is to be brought.

A delay in bringing an action to set aside an assessment for a period less than that fixed by statute, is not of itself a bar to maintain such action,¹ while a delay beyond such period is a bar.² The statute of limitations is waived if such objection is not raised in some way before final judgment.³ A notice of a prior independent proceeding, given within the period of limitations, does not prevent the bar of the statute as to a subsequent proceeding brought after the period of limitations had expired.⁴ Since the proceeding is to be regarded as a separate one as to each tract of land, the bar of the statute is not obviated by the fact that the same assessment has been set aside as to other tracts.⁵ Whether a delay in the action after the suit is brought will constitute a bar to relief, if the property owner was entitled to relief when the suit was brought, is a question upon which there is a conflict of authority.⁶

§ 1462. Effect of payment.

The provisions of these statutes apply only to cases in which the assessment was a lien when the suit was brought.¹ Accordingly, voluntary payment of the assessment before the suit is brought prevents the property owner from obtaining relief.² Voluntary payment of part of the assessment before suit is brought, entitles the property owner to relief only as to such part of the assessment as remains unpaid.³ In order that voluntary payment

⁹ In the Matter of Jones, 18 Hun (N. Y.) 327 [1879].

¹ In the Matter of Manhattan Savings Institution, 82 N. Y. 142 [1880]; In the Matter of Lord, 78 N. Y. 109 [1879]; In the Matter of Lord, 21 Hun 555 [1880].

² In the Matter of Duffy, 133 N. Y. 512, 31 N. E. 517 [1892]; In the Matter of Striker, 23 Hun (N. Y.) 647 [1880].

³ In the Matter of Rosenbaum, 119 N. Y. 24, 23 N. E. 172 [1890].

⁴ In the Matter of Duffy, 133 N. Y. 512, 31 N. E. 517 [1892].

⁵ In the Matter of Delancey, 52 N. Y. 80 [1873].

⁶ Delay (and death of plaintiff) held to be a bar. *In re Roberts*, 53 Hun, 338, 6 N. Y. Supp. 195. Delay held not to be a bar, In the Matter of Hazleton, 58 Hun (N. Y.) 112, 11 N. Y. Sup. 557 [1890].

¹ *Diefenthaler v. Mayor*, 111 N. Y. 331, 19 N. E. 48 [1888].

² In the Matter of Hughes, 93 N. Y. 512 [1883]; In the Matter of Santiago Lima, 77 N. Y. 170 [1879]; *Shirley v. City of Waukesha*, 124 Wis. 239, 102 N. W. 576 [1905].

³ In the Matter of Hughes, 93 N. Y. 512 [1883].

may have this effect, the fact must be used by the city as a ground of resisting the relief prayed for, and if not so used it is waived.⁴ Payment after suit is brought does not affect the right of the property owner to relief,⁵ even if the suit was originally a joint one, brought by several property owners if one of the property owners paid the assessment after the bringing of such suit, and if after such payment the property owners asked for leave to sever, which application was granted.⁶

§ 1463. Pleadings.

In the absence of specific statutory provisions applicable thereto, the question of the necessary averments in the petition to vacate an assessment, is controlled by the ordinary rules of pleading.¹ The petition must set forth facts and not conclusions.² An averment that the assessment has been increased a certain amount "by reason of the illegal actions, frauds and irregularities" of the officers, is not sufficient, unless the facts which constitute such frauds and irregularities are set up.³ However, an averment that the city and its officers and agents failed and neglected to perform, or cause the work to be done in a careful, intelligent, proper and economical manner, and at a fair market value, and have included charges and expenses therein which were not lawfully or justly chargeable on account of said work, or against the property liable to assessments therefor, and that certain frauds or substantial errors have been committed in the proceedings, has been held to be sufficient in the absence of a motion to make definite and in the absence of any objection to evidence offered in support of such allegations.⁴ Defects in the proceedings which are not alleged in the petition cannot be regarded as ground for relief.⁵ If, under the statute, relief is to be granted, only in case the irregularity complained of, has

⁴ *Jones v. Mayor, Aldermen and Commonalty of the City of New York*, 37 Hun (N. Y.) 513 [1885].

⁵ *In the Matter of Hazleton*, 58 Hun, 112, 11 N. Y. Supp. 557 [1890].

⁶ *In the Matter of Mehrbach*, 97 N. Y. 601 [1885]; (reversing *In the Matter of Mehrbach*, 33 Hun (N. Y.) 136 [1884]).

¹ For requisites of such petition see *Matter of Keyser*, 10 Abb. Prac. 481 [1860].

² *Knapp v. City of Brooklyn*, 97 N. Y. 520 [1884]; *Miller's Case*, 12 Abb. Prac. 121 [1861].

³ *Knapp v. City of Brooklyn*, 97 N. Y. 520 [1884].

⁴ *In the Matter of Livingston*, 121 N. Y. 94, 24 N. E. 290 [1890].

⁵ *Horn's Case*, 12 Abb. Prac. 124 [1861]; *Rich's Case*, 12 Abb. Prac. 118 [1861]; *In the Matter of Clark*, 31 Hun (N. Y.) 198 [1883].

increased the assessment unduly, the petition must show that the assessment exceeds the fair value of the work.⁶ Under a petition which contains proper averments tending to show the irregularity of the assessment as to one specified tract, relief cannot be given as to other tracts.⁷ Under some statutes an assessment may be vacated on motion, if the proceeding is entirely unauthorized by law.⁸ Averments in the petition which are not denied in the answer are to be regarded as true,⁹ such as averments of fact, which show that the plaintiff is a party aggrieved.¹⁰

§ 1464. Notice.

Notice of an application to vacate an assessment must be given to the adversary party.¹ If a copy of the petition must be served upon the defendant, the service of a copy which is in some respects defective, has been held to be sufficient if the defendant does not appear to have been misled or prejudiced thereby, and if such defect is not complained of at the trial, it cannot be used as a ground for reversing an order affecting such assessment.²

§ 1465. Procedure.

If the defendant urges certain facts which do not traverse the truth of the allegations of the petition, but which, if true, would prevent the plaintiff from recovering the relief sought, the court may determine such questions first, and render judgment for the defendant if such facts are established.¹ The court may refer an application to vacate an assessment to a referee, to take the testimony and report to the court.² Proceedings to vacate an assessment are special proceedings, costs are in the discretion of the court, and in the absence of special facts, costs follow the granting of relief.³

⁶ In the Matter of Meade, 74 N. Y. 216 [1878].

⁷ Harriman v. City of Yonkers, 95 N. Y. S. 816, 109 App. Div. 246 [1905].

⁸ In re 138th Street, 61 Howard, 284 [1881].

⁹ In the Matter of Gantz, 85 N. Y. 536 [1881]; In the Matter of Burke, 62 N. Y. 224 [1875].

¹⁰ In the Matter of Gantz, 85 N. Y. 536 [1881]; In the Matter of Burke, 62 N. Y. 224 [1875].

¹ Williamson v. Mayor of New York, 3 Hun (N. Y.) 65 [1874].

² Williamson v. Mayor of New York, 3 Hun (N. Y.) 65.

³ In the Matter of Bernheimer, 47 Hun 567 [1888].

² Matter of Bohm, 4 Hun (N. Y.) 558 [1875].

⁸ In the Matter of the Protestant Episcopal Public School, 86 N. Y. 396 [1881]. *Contra*, that this is not a special proceeding and that general costs cannot be allowed. In

§ 1466. Evidence.

The rules of evidence applicable to ordinary suits apply to suits to vacate in assessment, except where modified by specific statutory provisions. The burden of proof is upon the party who attacks the validity of the assessment.¹ It will be presumed, in the absence of evidence to the contrary, that official acts were performed regularly in substantial compliance with the statute.² Under a statute which forbids an assessment in excess of one-half of the valuation of the property for taxation, if it is shown that there was a prior valuation of such property, the city need not show the amount of such valuation, but it will be presumed in the absence of evidence that the assessment did not exceed the limit fixed by statute.³ In the absence of evidence it will be presumed that the public corporation has secured an easement for the land upon which the improvement was constructed.⁴ If, however, irregularities are shown in one board of the council sufficient to make the assessment invalid, evidence need not be offered as to the existence of irregularities in the other board.⁵ Evidence that a contract was let without general competitive bidding at an excessive price, is competent as bearing upon the question of fraud and collusion between the public officers and the persons who were invited to compete at such bidding.⁶ It is necessary for the plaintiff to show that the assessment has been increased by fraud or substantial error and the amount of such increase in order to obtain a reduction or a vacation of the assessment.⁷ Evidence in the form of an affidavit to the effect that the petitioner "at the time of the confirmation of the above named assessment . . . was and still

the Matter of Jetter, 14 Hun (N. Y.) 93 [1878].

¹ In the Matter of Voorhis, 90 N. Y. 668 [1882]; In the Matter of Hebrew Benevolent Orphan Asylum, 70 N. Y. 476 [1877]; (affirming Matter of Hebrew Benevolent and Orphan Asylum, 10 Hun, 112 [1877]); In the Matter of Bassford, 50 N. Y. 509 [1872]; In the Matter of Keteltas, 48 Howard, 116 [1874]; In the Matter of Brady, 85 N. Y. 268 [1881].

² In the Matter of Voorhis, 90 N. Y. 668 [1882]; In the Matter of Brady, 85 N. Y. 268 [1881]; In the

Matter of Keteltas, 48 How. Pr. 116 [1874]; In the Matter of Babcock, 23 Howard, 118 [1862].

³ In the Matter of Hebrew Benevolent Orphan Asylum, 70 N. Y. 476 [1877].

⁴ In the Matter of Ingraham, 64 N. Y. 310 [1876].

⁵ In the Matter of Little, 60 N. Y. 343 [1875]; (reversing, In the Matter of Little, 3 Hun (N. Y.) 215 [1874].

⁶ In the Matter of Righter, 92 N. Y. 111 [1883].

⁷ In the Matter of Smith, 67 Howard (N. Y.) 501 [1884].

is liable for the payment of the assessment," without the statement of the facts creating such liability is insufficient.⁸ If the property owner wishes to attack an assessment under the exception to the statute permitting attack where an assessment upon the property for paving the street has once been paid, the property owner must introduce affirmative evidence of such payment, and cannot rely upon a presumption of payment.⁹

§ 1467. Nature and effect of decree.

Under statutes authorizing the vacation of an assessment, the proceedings are separate and independent as to each property owner, and a judgment vacating an assessment as to one property owner cannot be taken advantage of by another.¹ The fact that relief is denied to one property owner, is not binding upon others.² Under the doctrine of *stare decisis*, however, a judgment by the court of last resort, declaring an assessment invalid, on the ground of total want of statutory power to levy such assessment, is to be regarded as establishing the invalidity thereof, so that as between a vendor who is not a party to such suit, and his vendee, an assessment upon the property sold must be regarded as conclusively determined to be invalid, although no judgment has been rendered as to such property.³

G.—MANDAMUS.

§ 1468. Nature and scope of mandamus.

The extraordinary common law writ of mandamus is occasionally invoked in order to enforce the levy and collection of an assessment. Mandamus lies to compel the performance by a public corporation or public officer of some plain non-discretionary legal duty, which such corporation or officer has refused or neglected to perform, and, accordingly, it lies where a public corporation or a public officer has refused or neglected to take

⁸ *Matter of Little*, 3 Hun (N. Y.) 215 [1874].

⁹ In the *Matter of Willet*, 70 N. Y. 490 [1877].

¹ *Chase v. Chase*, 95 N. Y. 373 [1884]; *Pursell v. Mayor, Aldermen and Commonalty of the City of New York*, 85 N. Y. 330 [1881]; *Matter of Delancey*, 52 N. Y. 80 [1873].

² In the *Matter of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172 [1890]; In the *Matter of Rosenbaum*, 53 Hun, 478, 6 N. Y. Supp. 184.

³ *Chase v. Chase*, 95 N. Y. 373 [1884]; assessment theretofore held invalid in In the *Matter of Deering*, 85 N. Y. 1 [1881].

some necessary steps in an assessment proceeding imposed upon him by law, and not involving the exercise of his discretion.¹ A writ of mandamus is said to be discretionary with the court to which application is made.² By this is ordinarily meant not an arbitrary and uncontrolled discretion, but merely a discretion to deny the writ, if the granting of it would work practical injustice. There is some divergence of authority as to the relation between proceedings in mandamus and suits in equity. It has been said that an aggrieved party cannot sue in equity if mandamus is an adequate remedy.³ Thus, if public officers have not levied or collected assessments, and have not sold lands upon which assessments have become delinquent, it has been said that equity has no jurisdiction in the matter, and that remedy is by mandamus.⁴ So, the fact that property which should have been incorporated in an assessment district has not been incorporated therein is not ground for an injunction, as the proper remedy is in mandamus.⁵ If the writ of mandamus is not an adequate remedy, equity may grant relief.⁶ Delay in levying an assessment for a period of eleven years, together with the absence of any showing that the public officers intended to make such levy, has been held equivalent to a refusal to act.⁷

§ 1469. Cases in which mandamus is granted.

Since mandamus lies to compel the performance of a clear, legal and non-discretionary duty, if the public corporation or officer which is bound to perform such duty refuses or neglects so to do,¹ it follows that where the facts are conceded, or established, which show the existence of the legal duty, the absence of the power of exercising a discretion in the matter and the failure or omission of the corporation or officer thereof to perform the duty, mandamus will lie to compel a public corpora-

¹ Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766 [1888]; People ex rel. Nostrand v. Wilson, 119 N. Y. 515, 23 N. E. 1064 [1890]; Ashton v. City of Rochester, 60 Hun, 372, 14 N. Y. Sup. 855 [1891].

² Sherwood v. Rynearson, 141 Mich. 92, 104 N. W. 392 [1905].

³ Woodruff v. State of Mississippi, 77 Miss. 68, 25 So. 483 [1899].

⁴ Woodruff v. State of Mississippi, 77 Miss. 68, 25 So. 483 [1899].

⁵ Heinroth v. Kochersperger, 173 Ill. 205, 50 N. E. 171 [1898]. See § 1413.

⁶ German-American Savings Bank v. City of Spokane, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542 [1897].

⁷ Espy Estate Co. v. Pacific County, 40 Wash. 67, 82 Pac. 129 [1905].

¹ See § 1468.

tion to require the proper construction of a public improvement,² to compel the opening of a street across a railroad if other property owners have been assessed, on the theory that the entire street was to be opened,³ to compel the omission of land which has been improperly included in an assessment district,⁴ even under a statute which provides that the judgment of the commissioners shall be final and conclusive,⁵ to compel the levy of a tax authorized and required by law, if the proper authorities refuse to levy such tax,⁶ even if a defective assessment has already been made,⁷ and even if the statute authorizing the levy of such tax has been repealed, if the effect of such repeal is to impair the obligation of pre-existing contracts.⁸ If the change of statute relates merely to matters of procedure, mandamus proceedings are governed by statutes in force when such proceedings were

² *Lawrence v. People ex rel. Foote*, 188 Ill. 407, 58 N. E. 991 [1900]; *Shannon v. Village of Hinsdale*, 180 Ill. 202, 54 N. E. 181 [1899]; *People ex rel. Mannen v. Green*, 158 Ill. 594, 42 N. E. 163 [1895].

³ *Barnet v. Board of Aldermen of the City of Paterson*, 69 N. J. L. (40 Vr.) 122, 54 Atl. 227 [1903]. (This question was regarded as doubtful, the court awarding an alternative writ of mandamus in order that the case might be in shape to permit of the decision of a court of last resort.)

⁴ *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064 [1890].

⁵ *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064 [1890].

⁶ *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. 1090 [1881]; (reversing, *State ex rel. Southern Bank v. Pillsbury*, 31 La. Ann. 1 [1879]); *City of Little Rock v. Board of Improvements*, 42 Ark. 152 [1883]; *Himmelman v. Cofran*, 36 Cal. 411 [1868]; *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904]; *Farrell v. City of Chicago*, 198 Ill. 558, 65 N. E. 103 [1902]; *People ex rel. Talbot Pav-*

ing Co. v. City of Pontiac, 185 Ill. 437, 56 N. E. 1114 [1900]; *Little v. City of Chicago*, 46 Ill. App. 534 [1892]; *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882]; *People on the Relation of Butler v. Board of Supervisors of Saginaw Co.*, 26 Mich. 22 [1872]; *Sheridan v. Fleming*, 93 Mo. 321, 5 S. W. 813 [1887]; *McDowell v. City of Asheville*, 112 N. C. 747, 17 S. E. 537 [1893]; *State of Commissioners*, 37 O. S. 526 [1882]; *Espy Estate Co. v. Pacific County*, 40 Wash. 67, 82 Pac. 129 [1905]; *Phillips v. City of Olympia*, 21 Wash. 153, 57 Pac. 347 [1899]; *State ex rel. Witherop v. Brown*, 19 Wash. 383, 53 Pac. 548 [1898]; *State ex rel. Burbank v. City of Superior*, 81 Wis. 649, 51 N. W. 1014 [1892]; See also *United States v. Memphis*, 97 U. S. 284, 24 L. 937 [1877].

⁷ *Himmelman v. Cofran*, 36 Cal. 411 [1868]; *People ex rel. Talbot Paving Co. v. City of Pontiac*, 185 Ill. 437, 56 N. E. 1114 [1900]; *Phillips v. City of Olympia*, 21 Wash. 153, 57 Pac. 347 [1899].

⁸ *Louisiana v. Pillsbury*, 105 U. S. 278, 26 L. 1090 [1881]; (reversing, *State ex rel. Southern Bank v. Pillsbury*, 31 La. Ann. 1).

instituted, even if they are enacted after the improvement is constructed and the original assessment has been levied.⁹ *Mandamus* lies to compel confirmation if, in the absence of appeal, it is the legal duty of the officials to confirm.¹⁰ *Mandamus* lies to compel the collection of an assessment already levied,¹¹ to compel the payment of the amount due out of the funds already collected,¹² to compel payment into court,¹³ and to compel restitution to property owners which is required by statute.¹⁴ It lies to compel the delivery of improvement certificates to the parties entitled thereto,¹⁵ to compel the drawing of warrants which are required by law to be issued, even if there are no funds available to pay them,¹⁶ to compel the auditor to countersign warrants, where it is his legal duty to do so¹⁷ and to compel the sale of property, assessments upon which have become delinquent.¹⁸ *Mandamus* lies to compel the payment of warrants in the proper order,¹⁹ even if this will result in the exclusion of the warrants which are to be paid last.²⁰ *Mandamus* will lie to compel the public officials to cancel an illegal lien for water,²¹ and, it has been held, to compel a trial judge to issue an injunction restraining a public

⁹ *People ex rel. Talbot Paving Co. v. City of Pontiac*, 185 Ill. 437, 56, N. E. 1114 [1900].

¹⁰ *Philadelphia, Wilmington & Baltimore Railroad Co. v. Shipley*, 72 Md. 88, 19 Atl. 1 [1890].

¹¹ *Higgins v. City of Chicago*, 18 Ill. 276 [1857]; *State ex rel. Monroe Gravel Road Co. v. Stout*, 61 Ind. 143 [1878]; *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899]; *German-American Savings Bank v. City of Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542 [1897]; *Fletcher v. City of Oshkosh*, 18 Wis. 228 [1864].

¹² *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890]; *County of McLean v. City of Bloomington*, 106 Ill. 209 [1883]; *Fisher v. Mayor, etc., of New York*, 4 Lansing, 451 [1871]; *People ex rel. Brooklyn Park Commissioners v. City of Brooklyn*, 3

Hun (N. Y.) 596 [1875]; *People of the State of New York ex rel. Ready v. Mayor and Common Council of the City of Syracuse*, 65 Hun, 321, 20 N. Y. Supp. 236 [1892].

¹³ *Fisher v. Mayor, etc., of New York*, 4 Lansing, 451 [1871].

¹⁴ *State ex rel. v. Hoffman*, 35 O. S. 435 [1880].

¹⁵ *Whalen v. La Crosse*, 16 Wis. 271 [1862].

¹⁶ *State ex rel. v. Hoffman*, 35 O. S. 435 [1880].

¹⁷ *Wood v. Strother*, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766 [1888].

¹⁸ *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920 [1899].

¹⁹ *Philadelphia Mortgage and Trust Co. v. City of New Whatcom*, 19 Wash. 225, 52 Pac. 1063 [1898].

²⁰ *Philadelphia Mortgage and Trust Co. v. City of New Whatcom*, 19 Wash. 225, 52 Pac. 1063 [1898].

²¹ *Hoboken Manufactures Co. v. Mayor, etc., of City of Hoboken*, — N. J. L. —, 68 Atl. 1098 [1908].

corporation from entering into a contract which will exceed the annual income of such corporation.²²

§ 1470. Necessity of judgment at law.

It has been said that an order to obtain a writ of mandamus to compel the payment of the share of an assessment due from a public corporation, a judgment at law must first be obtained;¹ but if such assessment has been confirmed by a court of competent jurisdiction, such confirmation has been held to be sufficient as a determination of the amount due, and a judgment at law is unnecessary.²

§ 1471. Cases in which mandamus is not granted.

Since mandamus lies as a method of enforcing a clear legal duty, it will not lie to compel an act which is not authorized by law or which is forbidden.¹ Thus, mandamus will not lie to compel the payment of orders payable out of the proceeds of an assessment after the assessment has been set aside,² or to compel the amendment of a report if no power to amend it exists,³ or to compel a summary sale after the statutory time therefor has elapsed,⁴ or to levy a tax except at the time fixed by law for levying taxes,⁵ or to compel the construction of an improvement by a public corporation, if such corporation has no funds available therefor, and has no legal power of raising such funds.⁶ Upon the same principle it has been held that mandamus will not lie to compel a street railway company to pave, if it has no money,

²² *State ex rel. Woulfe v. St. Paul*, 107 La. 777, 32 So. 88 [1901-1902].

¹ *Commissioners of Highways of the Town of Colfax v. Commissioners of East Lake Fork Special Drainage District*, 127 Ill. 581, 21 N. E. 206 [1890]; *County of McLean v. Bloomington*, 106 Ill. 209 [1883].

² *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576 [1904].

³ *Gray v. Richardson*, 124 Cal. 460, 57 Pac. 385 [1899]; *Rigney, Trustees v. Fischer*, 113 Ind. 313, 15 N. E. 594 [1887]; *State of Kansas ex rel. Shaw v. Mayor and Aldermen of the City of Wyandotte*, 4 Kan. 430 [1868]; *State of Maryland ex rel.*

Henderson v. Taylor, 59 Md. 338 [1882]; *People on the Relation of Butler v. Board of Supervisors of Saginaw Co.*, 26 Mich. 22 [1872].

² *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882].

³ *State ex rel. Wilson v. Longstreet*, 38 N. J. L. (9 Vr.) 312 [1876].

⁴ *State of Maryland ex rel. v. Taylor*, 59 Md. 338 [1882].

⁵ *State of Kansas ex rel. Shaw v. Mayor and Aldermen of the City of Wyandotte*, 4 Kan. 430 [1868]; (and also no official is in default till such time).

⁶ *Rigney, Trustees v. Fischer*, 113 Ind. 313, 15 N. E. 594 [1887].

and is unable to borrow any.⁷ The propriety of this holding is doubtful, if the railway company has the legal power to borrow money, and if mandamus would have been the proper remedy, if the railway company had had the money with which to construct the improvement. It has been held that if the contract is invalid, mandamus will not lie to compel a public officer to issue an assessment therefor.⁸ On the other hand, it has been held that if the contract is valid, upon its face, the assessment must be levied, and that a writ of mandamus will lie to compel its levy, leaving the property owner to resist the assessment on the ground of the invalidity of the contract if he is able to establish such fact.⁹ A contractor who has made default in performance can not have mandamus to compel the levy of an assessment for the difference between the contract price and the amount which the city has paid to another contractor for finishing the improvement.¹⁰ Mandamus will not lie to compel the payment of interest which is not yet due,¹¹ or to compel the levy of a re-assessment if the first assessment is valid,¹² or to compel the awarding of a contract to one not legally entitled thereto.¹³ If, however, the ordinance prescribes a defective method of apportionment, it has been held that a writ of mandamus will not be quashed, but that the council will be ordered to levy an assessment, since the council may equalize the assessment in accordance with the law, and thus pass a valid assessment ordinance.¹⁴ Mandamus does not lie as a method of correcting error.¹⁵ Accordingly, if a judge declines to assess damages and benefits on the ground that the return of the officer on the original order of notice to the parties upon which the order of application was made, was insufficient to

⁷ *City of Benton Harbor v. St. Joseph & Benton Harbor St. Ry. Co.*, 102 Mich. 386, 26 L. R. A. 245, 60 N. W. 758 [1894].

⁸ *Gray v. Richardson*, 124 Cal. 460, 57 Pac. 385 [1899].

⁹ *City of Greenfield v. State ex rel. Moore*, 113 Ind. 597, 15 N. E. 241 [1887].

¹⁰ *City of Auburn v. State ex rel. First National Bank*, — Ind. —, 83 N. E. 997 [1908].

¹¹ *Tacoma Bituminous Paving Co. v. Sternberg*, 26 Wash. 84, 66 Pac. 121 [1901].

¹² *Frick v. Morford*, 87 Cal. 576, 25 Pac. 764 [1891].

¹³ *Dickerson v. Peters*, 71 Pa. St. (21 P. F. Smith) 53 [1872].

¹⁴ *State ex rel. Christopher v. City of Portage*, 12 Wis. 562 [1860]. (This assessment was levied under a statute requiring the costs to be apportioned among the lots according to their front, or size, and the ordinance provided that the owner of each lot should pay for the work done in front thereof.)

¹⁵ *State ex rel. Kansas City v. Field*, 107 Mo. 445, 17 S. W. 896 [1891].

give jurisdiction, but does not dismiss the proceeding, and does not deny a motion to amend the return, and to issue an *alias* notice, mandamus will not lie, since his ruling, if erroneous, is either non-prejudicial or else subject to correction by error.¹⁶

§ 1472. Mandamus not means of controlling discretion.

Since mandamus lies only to enforce the performance of non-discretionary duties, it cannot be resorted to as a means of controlling the discretion conferred upon public corporations or officials, by statute.¹ Accordingly, if such discretion is conferred, mandamus will not lie to compel the construction of an improvement,² or to compel the levy of an assessment if the public corporation has discretion as to the method of paying for the improvement,³ or to direct the amount of the assessment,⁴ or to direct the action of the city council,⁵ or to compel the city council to pass an assessment ordinance if there is a dispute as to the performance of the contract.⁶ If an officer has discretion to act, but refuses to exercise his discretion, he may be required by mandamus to exercise his discretion, although the court will not determine what the result of such exercise must be.⁷ Thus, if the bond of a contractor is presented to the city comptroller, and he refuses to pass upon the question of its validity on the ground that certain objections have been made to the assessments levied for the cost of such improvement, mandamus will lie to compel the comptroller to pass upon the validity of such bond.⁸

§ 1473. Parties in mandamus.

The party upon whose application the writ of mandamus may issue, is indicated, in many jurisdictions, by statute. It is gen-

¹⁶ The State ex rel. Kansas City v. Field, 107 Mo. 445, 17 S. W. 896 [1891].

¹ Bromwell v. Flowers, 217 Ill. 174, 75 N. E. 466 [1905]; People ex rel. Thatcher v. Village of Hyde Park, 117 Ill. 462, 6 N. E. 33 [1887]; City of Indianapolis v. Patterson, 33 Ind. 157 [1870]; State ex rel. Kansas City v. Field, 107 Mo. 445, 17 S. W. 896 [1891]; City of Mt. Vernon v. State, 71 O. S. 428, 104 Am. St. Rep. 783, 73 N. E. 515 [1904]; Dickerson v. Peters, 71 Pa. St. (21 P. F. Smith) 53 [1872].

² Bromwell v. Flowers, 217 Ill. 174, 75 N. E. 466 [1905].

⁸ People ex rel. Thatcher v. Village of Hyde Park, 117 Ill. 462, 6 N. E. 33 [1887].

⁴ City of Indianapolis v. Patterson, 33 Ind. 157 [1870].

⁵ City of Mt. Vernon v. State, 71 O. S. 428, 104 Am. St. Rep. 783, 73 N. E. 515 [1904].

⁶ City of Mt. Vernon v. State, 71 O. S. 428, 104 Am. St. Rep. 783, 73 N. E. 515 [1904]. (Contractual rights cannot be tried in mandamus.)

⁷ People ex rel. McKown v. Green, 50 Howard (N. Y.) 500 [1875].

⁸ People ex rel. McKown v. Green, 50 How. Pr. (N. Y.) 500 [1875].

erally provided that the suit must be brought in the name of the state, upon the application of the party entitled thereto.¹ In some jurisdictions mandamus may issue upon the application of a contractor to compel an assessment for the purpose of raising funds to pay such contractor for the cost of a public improvement constructed by him,² especially where the contractor has agreed to look solely to the assessment for reimbursement, and where he has waived his claim against the city.³ The holder of warrants payable out of the fund to be raised by an assessment, may have mandamus to compel the levy and collection of such assessments.* The party in whose favor warrants should be drawn may sue in mandamus to compel their issue.⁵ While the assignee of a claim may have the same remedy in mandamus that his assignor might have had,⁶ he cannot have such remedy unless he has given notice of the assignment of such claim to the public officer whose action he seeks to control by mandamus.⁷ The relator in mandamus must show such interest as entitles him to such writ,⁸ and such facts must be pleaded,⁹ and, if controverted, must be proved.¹⁰ Thus, in case of a denial that the relator was the holder of certain warrants, the relator cannot have an absolute writ of mandamus unless he establishes the fact that he holds such warrants.¹¹ The defendant in a proceeding in mandamus

¹ *Sheridan v. Fleming*, 93 Mo. 321, 5 S. W. 813 [1887]. (Amendment here suggested to have the suit 'State ex rel. Sheridan')

² *United States v. Memphis*, 97 U. S. 284, 24 L. 937 [1877]; *Sheridan v. Fleming*, 93 Mo. 321, 5 S. W. 813 [1887]; *Farrell v. City of Chicago*, 198 Ill. 558, 65 N. E. 103 [1902].

³ *People of the State of New York ex rel. Ready v. Mayor and Common Council of the City of Syracuse*, 65 Hun, 321, 29 N. Y. Sup. 236 [1892].

⁴ *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882]; *German-American Savings Bank v. City of Spokane*, 17 Wash. 315, 38 L. R. A. 259, 47 Pac. 1103, 49 Pac. 542 [1897].

⁵ *Williams, Treasurer v. Eggleston*, 170 U. S. 304, 42 L. 1047, 18

S. 617 [1898]; (affirming, *State v. Williams*, 68 Conn. 131, 48 L. R. A. 465, 35 Atl. 24, 421 [1896]).

⁶ *Watkins v. State ex rel. Van Auken*, 151 Ind. 123, 49 N. E. 69, 51 N. E. 79 [1898].

⁷ *Watkins v. State ex rel. Van Auken*, 151 Ind. 123, 49 N. E. 69, 51 N. E. 79 [1898].

⁸ *Ellis v. Workman*, 144 Cal. 113, 77 Pac. 822 [1904]; *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882].

⁹ *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882].

¹⁰ *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882].

¹¹ *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882].

must be the public official whose action it is sought to control.¹² If mandamus is brought by bondholders to compel the levy of an assessment to pay the interest upon such bonds, it is sufficient to make the county commissioners parties, if they are the officials whose duty it is to levy such assessment, and it is not necessary to make the assessment district a party,¹³ especially if the legality of such bonds has been already determined in another action in which such assessment district was a party.¹⁴

§ 1474. Pleadings.

The petition or application for a writ of mandamus must set forth the facts which show the existence of a clear and non-discretionary legal duty, and the refusal of the public corporation or public officers chargeable therewith to perform the same.¹ In an application for mandamus to compel a public corporation to levy an assessment, it is sufficient to plead the fact that such assessment was made and confirmed, and it is not necessary to plead the facts which gave jurisdiction of the parties and subject-matter to the court which confirmed such assessment.² A petition for a writ of mandate to compel the cancellation of a street improvement bond, under which the realty of the petitioner has been sold, is insufficient if it does not allege facts showing that the sale was unauthorized or irregular.³ An averment in an answer in mandamus denying the truth of the facts alleged to show the interest of the relator is sufficient.⁴

§ 1475. Statute of limitations.

An application for mandamus cannot be brought after the time fixed by statute.¹ Omission to sue for an injunction to prevent

¹² *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064 [1890]; *State of Washington on the Relation of Witherop v. Brown*, 19 Wash. 383, 53 Pac. 548 [1898].

¹³ *State of Washington on the Relation of Witherop v. Brown*, 19 Wash. 383, 53 Pac. 548 [1898].

¹⁴ *State of Washington on the Relation of Witherop v. Brown*, 19 Wash. 383, 53 Pac. 548 [1898].

¹ *Ellis v. Workman*, 144 Cal. 113, 77 Pac. 822 [1904]; *Commissioners of Highways of Town of Dix v. Big Four Drainage District of Ford County*, 207 Ill. 17, 69 N. E. 576

[1904]; *City of Indianapolis v. Patterson*, 33 Ind. 157 [1870]; *Chapin v. Osborn*, 29 Ind. 99 [1867]; *People on the Relation of Butler v. Board of Supervisors of Saginaw Co.*, 26 Mich. 22 [1872].

² *Commissioners of Highways of Town of Dix v. Big Four Drainage District*, 207 Ill. 17, 69 N. E. 576 [1904].

³ *Ellis v. Workman*, 144 Cal. 113, 77 Pac. 822 [1904].

⁴ *Brownell v. Board of Supervisors of Gratiot County*, 49 Mich. 414, 13 N. W. 798 [1882].

¹ *Frey v. Town of Mt. Vernon*, 42

the collection of an erroneous assessment, and a delay for a considerable period of time in applying for a writ of mandamus, has been held to prevent the plaintiffs from obtaining a writ of mandamus to order a re-assessment.² Delay which amounts to laches may bar relief in mandamus.³

§ 1476. Procedure.

In some jurisdictions, issues of fact on a petition for mandamus will be referred to some inferior court, to be found and certified back.¹ If proper demand has been made upon a public corporation to levy an assessment, and the public corporation has refused or neglected so to do, it is proper to award costs against such public corporation in awarding a writ of mandamus.² A proceeding in mandamus by a drainage district, to compel the levy and collection of a tax to pay a drainage assessment which has been confirmed against a town, is a proceeding relating to the revenue, and an appeal lies from the supreme court to the circuit court.³

H.—QUO WARRANTO.

§ 1477. Quo warranto.

The writ of *quo warranto* is in some cases a remedy of which advantage can be taken by a property owner who seeks to resist the assessment. It is in some jurisdictions the appropriate method for determining the validity of the creation of an assessment district and of the addition of territory thereto.¹ Such remedy is

Wash. 268, 84 Pac. 864 [1906]; *Woodruff v. State of Mississippi*, 77 Miss. 68, 25 So. 483 [1899]. (Six year period of limitations held to apply.)

² *Frye v. Town of Mt. Vernon*, 42 Wash. 268, 84 Pac. 864 [1906].

³ *Simpson v. City of Kansas City*, 52 Kans. 88, 34 Pac. 406 [1893].

¹ *The People ex rel. Thatcher v. Village of Hyde Park*, 117 Ill. 462, 6 N. E. 33 [1887].

² *Commissioners of Highways of Town of Dix v. Big Four Drainage District*, 207 Ill. 17, 69 N. E. 576 [1904].

³ *Commissioners of Highways of*

Town of Dix v. Big Four Drainage District, 207 Ill. 17, 69 N. E. 576 [1904].

¹ *Shanley v. People ex rel. Goedtnner*, 225 Ill. 579, 80 N. E. 277 [1907]; *People ex rel. Selby v. Dyer*, 205 Ill. 575, 69 N. E. 70 [1903]; *Tucker v. People ex rel. Wall*, 156 Ill. 108, 40 N. E. 451 [1895]; *Smith v. The People ex rel. Detrick*, 140 Ill. 355, 29 N. E. 676 [1893]; *The People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294 [1892]; *Wabash Eastern Railway Company of Illinois v. Commissioners of East Lake Fork Special Drainage District*, 134 Ill. 384, 10 L. R.

the only one available for this purpose, at least in the absence of fraud.² An information in *quo warranto* which merely showed the improper exercise of corporate authority, but which does not question the existence of such authority, does not state a case for interference by such writ.³ If a property owner outside of a drainage district voluntarily connects his land with the drains of such district, it becomes by statute the duty of the commissioners of such district to include such land therein, irrespective of whether they believe that such connection was necessary or not.⁴ An information will not lie against a gravel road company for failure on the part of appraisers appointed by the county commissioners, over whom such company has no control, to list all the lands benefited.⁵ Under some statutes a proceeding may be had for establishing in advance the validity of the assessment.⁶ Such statutes have been held to be valid on the ground that the proceeding was an *ex parte* proceeding only for the purpose of securing evidence, and hence was not a taking of property without due process of law, and, accordingly, no federal question was presented in the record.⁷ In such proceeding the property owner may show that the assessment of his property was excessive and unfair.⁸

A. 285, 25 N. E. 781 [1891]; Bodman v. Lake Fork Special Drainage, 132 Ill. 439, 24 N. E. 630 [1891]; Evans v. Lewis, 121 Ill. 478, 13 N. E. 246 [1889]; Keigwin v. Drainage Commissioners of Hamilton Township, 115 Ill. 347, 5 N. E. 575 [1886]; Osborn v. People, 103 Ill. 224 [1882]. "If the boundaries of the district were not lawfully extended and the drainage commissioners undertake to exercise powers or franchises over or upon lands not lawfully within the bounds of the district their right or authority to act as to these lands may be called into question by *quo warranto*, but a bill to enjoin the collection of the assessment is not the proper remedy." Evans v. Lewis, 121 Ill. 478, 482, 13 N. E. 246 [1889]; (quoted in The People ex rel. Wood v. Jones, 137 Ill. 35, 41, 27 N. E. 294 [1892].

² People ex rel. Samuel v. Cooper, 139 Ill. 461, 29 N. E. 872 [1893].

³ The People ex rel. Samuel v. Cooper, 139 Ill. 461, 29 N. E. 872 [1893].

⁴ Commissioners of Lake Fork Special Drainage District v. The People ex rel. Bodman, 138 Ill. 87, 27 N. E. 857 [1892].

⁵ State on the Relation of Lingenfelter v. Danville and North Salem Gravel Road Co., 33 Ind. 133 [1870].

⁶ Tregea v. Modesto Irrigation District, 164 U. S. 179, 41 L. 395, 17 S. 52 [1896]; (dismissing appeal from Board of Directors of Modesto Irrigation District v. Tregea, 88 Cal. 334, 26 Pac. 237 [1891].

⁷ Tregea v. Modesto Irrigation District, 164 U. S. 179, 41 L. 395, 17 S. 52 [1896]; (dismissing appeal from Board of Directors of Modesto Irrigation District v. Tregea, 88 Cal. 334, 26 Pac. 237 [1891].

⁸ Reclamation District No. 551 v. Runvan, 117 Cal. 164, 49 Pac. 131 [1897].

I.—RECOVERY OF PAYMENT OF ASSESSMENT

§ 1478. General principles applicable to recovery of payment.

Property owners not infrequently attempt to test the validity of an assessment by paying the amount thereof and then bringing suit to recover the amount thus paid. If the assessment is valid, or in substantial compliance with the statute,¹ or if such irregularities as are shown can be taken advantage of only at a prior stage of the proceedings,² such attempt necessarily fails. Different considerations obtain where the assessment is not in substantial compliance with the statutes, and the defects therein are such as would have enabled the property owner to resist the collection of the assessment had he seen fit to do so. The right of the property owner to recover in such action does not follow as a matter of course from the fact that the assessment is invalid, since the attempt to maintain such action is often defeated by the general rule that a payment of an unjust claim, if made voluntarily, that is, with full knowledge of the material facts and without duress or legal restraint, cannot be recovered. Accordingly, in the absence of statute, a voluntary payment of an assessment cannot be recovered, even if the assessment itself could not have been enforced.³ Thus, if there is no statutory authority for

¹ *Atlanta v. First Presbyterian Church*, 86 Ga. 730, 12 L. R. A. 852, 13 S. E. 252 [1890]; *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22 [1897]; *Remsen v. Wheeler*, 121 N. Y. 685, 24 N. E. 704 [1890].

² *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 25 Pac. 249, 24 Pac. 600 [1890].

³ *Justice v. Robinson*, 142 Cal. 199, 75 Pac. 776 [1904]; (citing, *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655); *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220 [1873]; *Bank of Woodland v. Webber*, 52 Cal. 73 [1877]; *Wills v. Austin*, 53 Cal. 152 [1878]; *Dear v. Varnum*, 80 Cal. 86, 22 Pac. 76 [1889]; *Elston v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361 [1866]; *Churchman v. City*

of Indianapolis, 110 Ind. 259, 11 N. E. 301 [1886]; *Brands v. City of Louisville*, 111 Ky. 56, 63 S. W. 2 [1901]; *Hopkins v. City of Butte*, 16 Montana, 103, 40 Pac. 171 [1895]; *Mayor and Aldermen of Jersey City v. Riker*, 38 N. J. L. (9 Vr.) 225, 20 Am. Rep. 386 [1876]; *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 125 N. Y. 617, 26 N. E. 721 [1891]; (reversing, *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 53 Hun (N. Y.) 36, 6 N. Y. Supp. 48 [1889]); *Pooley v. City of Buffalo*, 124 N. Y. 206, 26 N. E. 624 [1891]; *Vanderbeck v. City of Rochester*, 122 N. Y. 285, 10 L. R. A. 178, 25 N. E. 408 [1890]; *Phelps v. Mayor, Aldermen and Commonalty of the City of New York*, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408

including in the assessment the item of interest thereon, but such amount is paid voluntarily, and the amount paid in does not exceed the amount paid by the city to the contractor, including interest due on the contract prices, such interest cannot be recovered.⁴ In addition to showing the invalidity of the assessment, a property owner who seeks to recover a payment once made, must be able to show the presence either of duress or legal restraint on the one hand, or of mistake and misrepresentation or fraud on the other, as the direct and moving cause of such payment. It will also be noted later, that where an assessment is levied and collected before the improvement is constructed, a property owner may have a right to recover a payment in case the improvement is abandoned by the public corporation on grounds which are analogous to the right of recovery in case of a breach of a contract which amounts to total failure of consideration.⁵ The rules which govern the right of recovering a payment, apply only in case of a payment; that is, in cases where the money is furnished by the property owner under the express or implied understanding that it is to be applied to the discharge of the alleged assessment. If payment of an unlawful or excessive assessment may be recovered, interest is given thereon from the date of the payment.⁶

§ 1479. Recovery not allowed for technical irregularities.

If the improvement has been constructed in substantial compliance with the necessary requirements, and if the property which is assessed has, in fact, been benefited thereby, a property owner who has paid an assessment cannot recover on the ground of duress, even if technical irregularities existed for which he

[1889]; *Nash v. Mayor, etc.*, of New York, 9 Hun (N. Y.) 218 [1876]; *Peyser v. Mayor, etc.*, of the City of New York, 8 Hun (N. Y.) 413 [1876]; *Sanford v. Mayor, etc.*, of the City of New York, 20 Howard, 298 [1860]; *Wilcox v. Mayor, etc.*, of New York City, 53 N. Y. Sup. Ct. Rep. 436 [1886]; *Redmond v. Mayor, etc.*, of New York, 26 Abb. N. C. 341 [1891]; *Sanford v. Mayor, etc.*, of New York, 12 Abb. Pr. 23 [1860]; *City of Marietta v. Slocomb*, 6 O. S.

471 [1856]; *McCarty v. City of Toledo*, 11 Ohio C. C. 67 [1895]; *Peebles v. City of Pittsburgh*, 101 Pa. St. 304, 47 Am. Rep. 714 [1882]; *Davie's Executors v. City of Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145 [1897].

⁴ *City of Chicago v. McGovern*, 226 Ill. 403, 80 N. E. 895 [1907].

⁵ See § 1490.

⁶ *Mayor and Aldermen of Jersey City v. O'Callaghan*, 41 N. J. L. (12 Vr.) 349 [1879].

might have resisted payment,¹ or if the public corporation has sought an improper remedy in enforcing the payment of such assessment,² or has employed an irregular and defective procedure in such collection.³ A property owner cannot maintain an action to recover an assessment on the ground of irregularities which have been adopted at his instance;⁴ nor where other facts of estoppel exist.⁵

§ 1480. Recovery not allowed where property owner has waived legal rights.

If the property owner fails to object at the proper stage of proceedings, he cannot thereafter pay such assessment and recover upon the ground of duress.¹ A different rule has been applied in the case of payment of assessments induced by fraud and it has been held that failure to appeal from the assessment as provided for by statute does not prevent the owner from recovering such payment.² A defect in the assessment proceedings for which an adequate remedy is provided in the nature of a direct attack upon the assessment, must ordinarily be attacked in the method provided, and if the property owner omits to take advantage of such method, he cannot recover the payment thus made by him on the ground of duress, since no compulsion would exist if he had taken advantage of the remedies given to him by law.³ Thus, where certiorari lies if the assessment is erroneous because land which is benefited is omitted, and land which is not benefited is included, a property owner cannot omit to prosecute certiorari, pay such assessment, and then maintain an action to recover such payment.⁴ Where fraud is shown to exist, the right

¹ *Cone v. City of Hartford*, 28 Conn. 363 [1859]; *Newcomb v. City of Davenport*, 86 Ia. 291, 53 N. W. 232 [1892]; *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887]; *Hayford v. City of Belfast*, 69 Me. 63 [1879]; *Sandford v. Mayor, etc., of the City of New York*, 33 Barb. 147 [1860]; *Sanford v. Mayor, etc., of New York*, 12 Abb. Pr. 23 [1860]; *Aumann v. Black*, 15 W. Va. 773 [1879].

² *Dittoe v. City of Davenport*, 74 Ia. 66, 36 N. W. 895 [1887].

³ *Hayford v. City of Belfast*, 69 Me. 63 [1879]; *Aumann v. Black*, 15 W. Va. 773 [1879].

⁴ *Second Universalist Society in Providence v. City of Providence*, 6 R. I. 235 [1859].

⁵ See § 1010 *et seq.*

¹ *Sandford v. Mayor, etc., of the City of New York*, 33 Barb. (N. Y.) 147 [1860].

² *Harrison v. City of Milwaukee*, 49 Wis. 247, 5 N. W. 326 [1880].

³ *Butler v. City of Worcester*, 112 Mass. 541 [1873]; *Sanford v. Mayor, etc., of New York*, 12 Abb. Pr. 23 [1860].

⁴ *Butler v. City of Worcester*, 112 Mass. 541 [1873].

of appeal has been held not to preclude the right to recover a payment made by reason of such fraud.⁵ If provision is made for filing a remonstrance, and obtaining a hearing upon the questions thus raised, a property owner who does not file such remonstrance cannot subsequently maintain an action to recover such payment.⁶

§ 1481. Statutory provisions limiting right to vacate assessment.

Statutory provisions which prevent the reduction or vacation of assessments except by the proceedings authorized by statute, and under the restrictions therein set forth, apply only to assessments which are liens upon the property assessed, and, accordingly, do not prevent recovery of payments by duress or mistake.¹ The right of recovering a payment made under duress is not controlled by a statute requiring the presentation of claims to certain public officers for audit and allowance, as a condition precedent to bringing a suit.²

§ 1482. Effect of statutory provision for repayment.

Under some statutes, specific provision is made requiring public corporations to repay to property owners assessments which are levied without legal authority, and recovery may be had under such statutes, according to their terms, without reference to the general principles applicable in the absence of statute to the recovery of voluntary payments.¹ A party who attempts to take advantage of such statute, must comply in a substantial manner with the terms thereof.² Thus, if such remedy is given

⁵ *Harrison v. City of Milwaukee*, 49 Wis. 247, 5 N. W. 326 [1880].

⁶ *Spaulding v. North San Francisco Homestead and Railroad Association*, 87 Cal. 40, 25 Pac. 249, 24 Pac. 600 [1890].

¹ *Poth v. Mayor, Aldermen and Commonalty of the City of New York*, 151 N. Y. 16, 45 N. E. 372 [1896]; *Poth v. Mayor, Aldermen and Commonalty of the City of New York*, 77 Hun (N. Y.) 225, 28 N. Y. S. 365 [1894]; *Jex v. Mayor, Aldermen and Commonalty of the City of New York*, 103 N. Y. 536, 9 N. E. 39 [1886]; *De Montcaulnin v. Mayor, Aldermen and Commonalty of the*

City of New York, 46 Hun, 188 [1887].

² *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899]; *Howell v. City of Buffalo*, 15 N. Y. 512 [1857].

¹ *City of South Omaha v. McGavock*, 72 Neb. 382, 100 N. W. 805 [1904]; *Murphy v. City of Omaha*, 1 Neb. (Unoff.) 488, 95 N. W. 680 [1901]; *Smith v. Mayor and Aldermen of Jersey City*, 52 N. J. L. (23 Vr.) 174, 18 Atl. 1050 [1889].

² *City of South Omaha v. McGavock*, 72 Neb. 382, 100 N. W. 805 [1904]; *Murphy v. City of Omaha*, 1 Neb. (Unoff.) 488, 95 N. W. 680 [1901].

only if the full amount of taxes due from the property owner is paid before they are delinquent; a property owner cannot recover under such statutory provisions unless he has made such payments as are required by statute.³ A statute allowing an action to recover state and county taxes has no application to local assessments;⁴ though such statutes do not prevent recovery upon common law principles, as where duress is shown to exist.⁵ The statute which applies to general taxation may be adopted by the legislature and made applicable to local assessments. Under a statute providing: "If such tax shall be paid under protest, the reasons therefor shall be specified and the same procedure observed as is or may be required by the general tax law," the court said: "While the proper construction of this language is not free from doubt, we are of the opinion that the legislature by its enactment intended to give to persons assessed for drain taxes the same right of paying under protest as is given to taxpayers by the general tax law."⁶

§ 1483. Voluntary repayment of voluntary payment.

A public corporation may refund a voluntary payment of an assessment if statutory authority for such repayment exists,¹ but in the absence of such statutory authority a city cannot refund such payments.²

§ 1484. Recovery of payment under duress—What constitutes duress.

A property owner can recover a payment of an invalid assessment if made under duress.¹ Under the question of what consti-

³ *City of South Omaha v. McGavock*, 72 Neb. 382, 100 N. W. 805 [1904]; *Murphy v. City of South Omaha*, 1 Neb. (Unoff.) 488, 95 N. W. 680 [1901].

⁴ *Justice v. Robinson*, 142 Cal. 199, 75 Pac. 776 [1904]; *Davis v. City and County of San Francisco*, 115 Cal. 67, 46 Pac. 863 [1896]; *Williams v. Merritt*, — Mich. —, 116 N. W. 386 [1908]; *Thompson v. City of Detroit*, 114 Mich. 502, 72 N. W. 320 [1897].

⁵ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899].

⁶ *Williams v. Merritt*, — Mich. 116 N. W. 386, 387 [1908].

¹ *Tallant v. City of Burlington*, 39 Ia. 543 [1874]; *Robinson v. City of Burlington*, 50 Ia. 240 [1878]; *Warder v. Commissioners*, 38 O. S. 639 [1883]; *Lea v. City of Memphis*, 68 Tenn. (9 Baxter) 103 [1877]; *State v. Butler*, 79 Tenn. (11 Lea) 418 [1883].

² *Churchman v. City of Indianapolis*, 110 Ind. 259, 11 N. E. 301 [1886]; *State, Norris, Pros. v. City of Elizabeth*, 51 N. J. L. (22 Vr.) 485, 18 Atl. 302 [1889].

³ *Tallant v. City of Burlington*, 39 Ia. 543 [1874]; *Smith v. City of Boston*, 194 Mass. 31, 79 N. E. 786 [1907]; *Adams v. Bay City*, 78 Mich.

tutes duress sufficient to authorize the recovery of payments, there is a wide divergence of judicial opinion. The mere fact that a protest is made when such assessment is paid, does not of itself establish duress in the absence of a statute making protest sufficient;² although the absence of protest may tend to show that no duress existed. It is said that an actual and existing duress is necessary to authorize recovery.³ This principle is, however, too vague to be of great practical aid, and a discussion of the specific types of duress is, accordingly, necessary. If property is seized and sold by the public corporation at involuntary sale, and the proceeds received by the public corporation and applied to the payment of an assessment,⁴ or if payment is ordered by a court before which foreclosure proceedings have been instituted, out of the funds raised by such foreclosure,⁵ such payments are not regarded as voluntary. A threat of instituting an action to enforce an assessment is not duress, if, under the procedure in force the property owner is given an opportunity to be heard upon the question of the validity of the assessment.⁶ A threat of selling property at summary sale, by proceedings in which the property owner is given no opportunity of being heard as to the validity of the assessment, is held to be duress in many jurisdictions,⁷

211, 44 N. W. 138 [1889]; *Bowns v. May*, 120 N. Y. 357, 24 N. E. 947 [1890]; *Bruecher v. Village of Port Chester*, 101 N. Y. 240, 4 N. E. 272 [1886]; *Harrison v. City of Milwaukee*, 49 Wis. 247, 5 N. W. 326 [1880].

² *Justice v. Robinson*, 142 Cal. 199, 75 Pac. 776 [1904]; *Hoke v. City of Atlanta*, 107 Ga. 416, 33 S. E. 412 [1899]; *Fleetwood v. City of New York*, 4 N. Y. Sup. Ct. Rep. 475 [1849]; *Peebles v. City of Pittsburgh*, 101 Pa. St. 304, 47 Am. Rep. 714 [1882]; *Davie's Executors v. City of Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145 [1897].

³ *Elston v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361 [1866].

⁴ *Judson v. City of Bridgeport*, 25 Conn. 426 [1857].

⁵ *Brehm v. Mayor, Aldermen and Commonalty of the City of New York*, 104 N. Y. 186, 10 N. E. 158 [1887]; *Brehm v. Mayor, Aldermen and Com-*

monalty of the City of New York, 39 Hun. (N. Y.) 533 [1886]; *Horn v. Town of New Lots*, 83 N. Y. 100, 38 Am. Rep. 402 [1880].

⁶ *City of Marietta v. Slocomb*, 6 O. S. 471 [1856].

⁷ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899]; *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220 [1873]; *Bradford v. City of Chicago*, 25 Ill. 349, 79 Am. Dec. 333 [1861]; *Dexter v. City of Boston*, 176 Mass. 247, 79 Am. St. Rep. 306, 57 N. E. 379 [1900]; *Poth v. Mayor, Aldermen and Commonalty of the City of New York*, 151 N. Y. 16, 45 N. E. 372 [1896]; *Pooley v. City of Buffalo*, 122 N. Y. 592, 26 N. E. 16 [1890]; *Bruecher v. The Village of Port Chester*, 101 N. Y. 240, 4 N. E. 272 [1886]; *Bruecher v. Village of Port Chester*, 17 Abb. N. C. 361 [1886]; *Stephan v. Daniels*, 27 O. S. 527 [1875].

This broad rule is not, however, applied in some jurisdictions where the question of the existence of a cloud on the title is regarded as essential to duress or legal constraint,⁸ even if the assessment is void on its face.⁹ Payment induced by the seizure of personal property, together with a threat to remove and sell it, if an assessment is not paid within a certain time, is not a voluntary one.¹⁰ Payment of an assessment in order to enable the owner to complete a contract of sale, and to prevent a threatened summary public sale,¹¹ or a payment to enable the owner to obtain a loan upon the property assessed,¹² are regarded as payments under duress.¹³ Payment of an assessment when no steps have been taken to enforce the payment thereof, is generally held not to be a payment under duress.¹⁴ If a judgment of sale has been rendered, but no execution or order of sale has issued, the existence of such judgment has been held not to be duress.¹⁵ If process has been issued to enforce the payment of an assessment, the existence of such process has been held in some jurisdictions not to constitute duress.¹⁶ In other jurisdictions the issuing of such process is held to constitute duress or legal compulsion,¹⁷ even if the process is invalid.¹⁸ Levy and advertisement of property for sale is held, in some jurisdictions not to constitute duress.¹⁹ Notice to a property owner to pay an assess-

⁸ See § 1485.

⁹ *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220 [1873].

¹⁰ *Wetmore v. Campbell*, 4 N. Y. Sup. Ct. Rep. 341 [1849], (collector held liable in trespass).

¹¹ *Vaughn v. Village of Port Chester*, 135 N. Y. 460, 32 N. E. 137 [1892]; *Vaughn v. Village of Port Chester*, 43 Hun (N. Y.) 427 [1887]; *Bruecher v. Village of Port Chester*, 31 Hun (N. Y.) 550 [1884].

¹² *Redmond v. Mayor, etc., of the City of New York*, 58 N. Y. Sup. Ct. Rep. 348, 11 N. Y. S. 782 [1890].

¹³ *Contra*, *Redmond v. Mayor, etc., of New York*, 26 Abb. N. C. 341 [1891].

¹⁴ *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 125 N. Y. 617, 26 N. E. 721 [1891]; *Vanderbeck v. City of Roch-*

ester, 122 N. Y. 285, 10 L. R. A. 178, 25 N. E. 408 [1890]; *Nash v. Mayor, etc., of the City of New York*, 9 Hun (N. Y.) 218 [1876]; *McCall v. City of Rochester*, 89 N. Y. S. 766, 44 Misc. Rep. 129 [1904]; *Wilcox v. Mayor, etc., of New York City*, 53 N. Y. Sup. Ct. Rep. 436 [1886].

¹⁵ *Elston v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361 [1866].

¹⁶ *Hoke v. City of Atlanta*, 107 Ga. 416, 33 S. E. 412 [1899]; *New v. Village of New Rochelle*, 91 Hun (N. Y.) 214, 36 N. Y. S. 211 [1895].

¹⁷ *Bradford v. City of Chicago*, 25 Ill. 349, 79 Am. Dec. 333 [1861].

¹⁸ *Nicodemus v. City of East Saginaw*, 25 Mich. 456 [1872].

¹⁹ *Davie's Executors v. City of Galveston*, 16 Tex. Civ. App. 13, 41 S. W. 145 [1897], (even if paid under protest).

ment and a threat to add interest,²⁰ or to impose a penalty,²¹ has been held not to constitute duress. A threat to shut water off from property which is so constructed that its use is necessary to the proper enjoyment of such property, has been held to amount to duress.²² Refusal to turn water on has, however, been regarded as not amounting to duress.²³

§ 1485. Doctrine of necessity of cloud on title.

In some jurisdictions it has been said that an assessment must constitute a cloud on the title, in order that its existence and admitted enforcement may amount to duress or legal consideration. The nature of a cloud on the title is discussed elsewhere.¹ Under this theory the existence of an assessment the record of which discloses the invalidity relied upon, is not duress.² If the defect does not appear upon the record, but the party seeking to enforce the assessment will be obliged, in order to get possession of the property sold, to introduce evidence which will disclose the facts with reference to which the defect is claimed to exist, duress does not exist.³ If the assessment appears to be valid upon its face,⁴ or if the deed or certificate given to the vendee at the sale to satisfy the lien of such assessment will be *prima facie* evidence of the validity of the assessment and of the sale,⁵ duress may exist if the other elements of constraint are present. If, by statute, the assessment is a *prima facie* lien after confirmation, payment to

²⁰ *Tripler v. Mayor, etc.*, of New York, 26 Abb. (N. C.) 325 [1891].

²¹ *Hopkins v. City of Butte*, 16 Mont. 103, 40 Pac. 171 [1895].

²² *City of Chicago v. Northwestern Mutual Life Insurance Company*, 218 Ill. 40, 1 L. R. A. (N. S.) 770, 75 N. E. 803 [1905]; *Panton v. Duluth Gas & Water Co.*, 50 Minn. 175, 36 Am. St. Rep. 635, 52 N. W. 527 [1892].

²³ *City of Philadelphia v. Cooke*, 30 Pa. St. (6 Casey) 56 [1858]. (In this case, however, it appears that the owner wished to use the water upon the property, but that water had not been used in connection therewith, and that apparently its use was not essential to the proper enjoyment of the property.)

¹ See § 1427.

² *Wilcox v. Mayor, etc.*, of New York City, 53 N. Y. Sup. Ct. Rep. 436 [1886]; *Fleetwood v. City of New York*, 4 N. Y. Sup. Ct. Rep. 475 [1949].

³ *Pooley v. City of Buffalo*, 122 N. Y. 592, 26 N. E. 16 [1890]; *New v. Village of New Rochelle*, 91 Hun 214, 36 N. Y. S. 211 [1895].

⁴ *Pooley v. City of Buffalo*, 124 N. C. 206, 26 N. E. 624 [1891]; (*distinguishing Phelps v. Mayor, Aldermen and Commonalty of the City of New York*, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408 [1889]); *Redmond v. Mayor, etc.*, of the City of New York, 58 N. Y. Sup. Ct. Rep. 348, 11 N. Y. S. 782 [1890].

⁵ *Gill v. City of Oakland*, 124 Cal. 335, 57 Pac. 150 [1899].

discharge such lien has been held to be payment under duress, even if no steps have been taken to enforce the collection of such assessment.⁶

§ 1486. Necessity of vacating assessment.

In some jurisdictions an assessment is regarded as analogous to a judgment, and, accordingly, if an assessment has been set aside, the payments made thereon can be recovered.¹ If an assessment has been set aside, and a re-assessment levied for a smaller amount, the property owner may recover the difference between the original assessment and the re-assessment.² If the assessment is set aside, the right of recovery clearly follows, if the payment was made under compulsion³ or under mistake of fact.⁴ This right of recovery is allowed, in some jurisdictions, even if the original payment was apparently a voluntary one,⁵ on the theory that the fact of such voluntary payment should have been set up to prevent the vacation of such assessment, and that such judgment of vacation is conclusive as to the fact that the payment was not voluntary.⁶ In other jurisdictions, it is held that a voluntary payment cannot be recovered, even if the assessment has been subsequently set aside.⁷ If an assessment has been vacated,

⁶ *Thompson v. City of Detroit*, 114 Mich. 502, 72 N. W. 320 [1897].

¹ *Keehn v. McGillicuddy*, 19 Ind. App. 427, 49 N. E. 609 [1898]; *Mayor, etc., of Jersey City v. Green*, 42 N. J. L. (13 Vr.) 627 [1880]; *Mayor and Aldermen of Jersey City v. O'Callaghan*, 41 N. J. L. (12 Vr.) 349 [1879]; *City of Elizabeth v. Hill*, 39 N. J. L. (10 Vr.) 555 [1877]; *Mayor and Aldermen of Jersey City v. Riker*, 38 N. J. L. (9 Vr.) 225, 20 Am. Rep. 386 [1876]; *Schultze v. Mayor, Aldermen and Commonalty of the City of New York*, 103 N. Y. 307, 8 N. E. 528 [1886]; *Peyser v. Mayor, Aldermen and Commonalty of the City of New York*, 70 N. Y. 497, 26 Am. Rep. 624 [1877]; *Jones v. Mayor, Aldermen and Commonalty of the City of New York*, 37 Hun (N. Y.) 513 [1885].

² *Mayor and Aldermen of Jersey City v. O'Callaghan*, 41 N. J. L. (12 Vr.) 349 [1879].

³ *Keehn v. McGillicuddy*, 19 Ind. App. 427, 49 N. E. 609 [1898]; *Peyser v. Mayor, Aldermen and Commonalty of the City of New York*, 70 N. Y. 497, 26 Am. Rep. 624 [1877].

⁴ *Delano v. Mayor, Aldermen and Commonalty of the City of New York*, 32 Hun (N. Y.) 144 [1884].

⁵ *Mayor and Aldermen of Jersey City v. O'Callaghan*, 41 N. J. L. (12 Vr.) 349 [1879]; *City of Elizabeth v. Hill*, 39 N. J. L. (10 Vr.) 555 [1877]; *Mayor and Aldermen of Jersey City v. Riker*, 38 N. J. L. (9 Vr.) 225, 20 Am. Rep. 386 [1876]; *Jones v. Mayor, Aldermen and Commonalty of the City of New York*, 37 Hun 513 [1885].

⁶ *Jones v. Mayor, Aldermen and Commonalty of the City of New York*, 37 Hun (N. Y.) 514 [1885].

⁷ *Union Building Association v. City of Chicago*, 61 Ill. 439 [1871]; *Dewey v. Board of Supervisors of*

a re-assessment cannot be levied until the money paid upon the original assessment has been refunded.⁸ If the assessment was absolutely void for want of jurisdiction, it is not necessary that the assessment be set aside in order to enable the property owner to recover for duress or mistake.⁹ It has been suggested that in any event the property owner may have the assessment declared a nullity in the same action in which he brings suit to recover such payment.¹⁰ If the assessment is not absolutely void, it is necessary, in jurisdictions which regard an assessment as having the force of a judgment, that the assessment be vacated in a direct proceeding for that purpose, before payment can be recovered on the ground of mistake or duress.¹¹

§ 1487. What constitutes vacation of assessment.

It is, accordingly, important in some cases, to determine whether an assessment has been set aside or not, so that a payment may be recovered. The fact that the city has claimed, in an action brought against it by the contractor, that the assessment was invalid,¹ or that an assessment has been vacated in a suit

the County of Niagara, 2 Hun (N. Y.) 392 [1874]; (assessment held invalid in *People ex rel. Williams v. Haines*, 49 N. Y. 587).

⁸ *Mayor and Council of the City of Bayonne v. Morris*, 61 N. J. L. (32 Vr.) 127, 38 Atl. 819 [1897].

⁹ *Mutual Life Insurance Company of New York v. Mayor, Aldermen and Commonalty of the City of New York*, 144 N. Y. 494, 39 N. E. 386 [1895]; *Jex v. Mayor, Aldermen and Commonalty of the City of New York*, 111 N. Y. 339, 19 N. E. 52 [1888]; *Bruecher v. Village of Port Chester*, 101 N. Y. 240, 4 N. E. 272 [1886]; *Horn v. Town of New Lots*, 83 N. Y. 100, 38 Am. Rep. 402 [1880]; *McCall v. City of Rochester*, 89 N. Y. S. 766, 44 Misc. Rep. 129 [1904]; *In re City of New York*, 100 N. Y. S. 140 [1906].

¹⁰ *Jex v. Mayor, Aldermen and Commonalty of the City of New York*, 103 N. Y. 536, 9 N. E. 39 [1886]; *Knapp v. City of Brooklyn*, 97 N. Y. 520 [1884].

¹¹ *Fuller v. City of Elizabeth*, 42

N. J. L. (13 Vr.) 427 [1880]; *Campion v. City of Elizabeth*, 41 N. J. L. (12 Vroom) 355 [1879]; *Trimmer v. City of Rochester*, 130 N. Y. 401, 29 N. E. 746 [1892]; *Diefenthaler v. Mayor, Aldermen and Commonalty of the City of New York*, 111 N. Y. 331, 19 N. E. 48 [1888]; *Strusburgh v. Mayor, Aldermen and Commonalty of the City of New York*, 45 N. Y. Sup. Ct. Rep. 508 [1879]; (distinguishing as cases in which the assessment was either void originally or else had been vacated judicially. *Peyser v. Mayor, Aldermen and Commonalty of the City of New York*, 70 N. Y. 497, 26 Am. Rep. 624 [1877]; *Newman v. Supervisors of Livingston County*, 45 N. Y. 676 [1871]; *Bank of Commonwealth v. Mayor, etc., of the City of New York*, 43 N. Y. 184 [1870]).

¹ *Havens v. Mayor, etc., of City of New York*, 67 App. Div. 90, 73 N. Y. S. 678 [1901]; (affirmed in *Haven v. Mayor, Aldermen and Commonalty of the City of New York*, 173 N. Y. 611, 66 N. E. 1110 [1903]).

by other property owners where an assessment is for such purposes regarded as several as to each distinct tract of property,² does not constitute a vacation of the assessment. In the absence of statute the act of a city council in setting aside an assessment, does not amount to a vacation thereof.³ If an assessment is set aside upon the application of the lessor as property owner, a lessee who by his lease is bound to pay assessments, and who has paid them, may recover.⁴ If an assessment has been set aside by a court of competent jurisdiction, recovery is allowed, even if the payment of the assessment was ordered in a foreclosure decree and such decree has not been vacated or reversed.⁵

§ 1488. Payment under mistake.

A payment of an assessment under mistake of fact, which goes to one of the essential elements of the transaction, may be recovered.¹ If mistake is claimed, the existence or non-existence of duress is immaterial.² A party who pays in ignorance of facts which make invalid an assessment which is apparently valid upon its face, may recover upon learning his mistake,³ though in some jurisdictions, under the rule already suggested,⁴ it is necessary that he first have the assessment set aside. In case of a proper showing of mistake, a property owner may have the assessment

² *Jamison v. City of New Orleans*, 12 La. Ann. 346 [1857]; *Trimmer v. City of Rochester*, 130 N. Y. 401, 29 N. E. 746 [1892]; *Wilkes v. Mayor, Aldermen and Commonalty of the City of New York*, 8 Daly (N. Y.) 407 [1870].

³ *Campion v. City of Elizabeth*, 41 N. J. L. (12 Vroom) 355 [1879].

⁴ *Pursell v. Mayor, Aldermen and Commonalty of the City of New York*, 85 N. Y. 330 [1881].

⁵ *Brehm v. Mayor, Aldermen and Commonalty of the City of New York*, 104 N. Y. 186, 10 N. E. 158 [1887].

¹ *Pinchbeck v. Mayor, etc., of the City of New York*, 12 Hun (N. Y.) 556 [1878]; *Redmond v. Mayor, etc., of New York*, 26 Abb. N. C. 341 [1891].

² *Bartlett v. City of Boston*, 182 Mass. 460, 65 N. E. 827 [1902]. It is assumed in some cases, however,

that ignorance of the invalidity of the assessment and coercion must both exist. *Redmond v. Mayor, etc., of New York*, 26 Abb. N. C. 341 [1891]; *Redmond v. Mayor, etc., of the City of New York*, 58 N. Y. Sup. Ct. Rep. 348, 11 N. Y. S. 782 [1890].

³ *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 139 N. Y. 1, 34 N. E. 729 [1893]; *Trimmer v. City of Rochester*, 130 N. Y. 401, 29 N. E. 746 [1892]; *Strusburgh v. Mayor, Aldermen and Commonalty of the City of New York*, 87 N. Y. 452 [1882]; *Boas v. Mayor, Aldermen and Commonalty of the City of New York*, 85 Hun (N. Y.) 311, 32 N. Y. S. 967 [1895]; *Mutual Life Insurance Company of New York v. Mayor, Aldermen and Commonalty of the City of New York*, 79 Hun 482, 29 N. Y. S. 980 [1894].

⁴ See § 1486.

set aside in the action in which it is sought to recover such payment.⁵ Thus, payment made in ignorance of the fact that a contract was void because let without advertisement for bids,⁶ or because the expense of excavating rock was fixed by contract and not by competitive bidding,⁷ or payment of an assessment upon the wrong lot by mistake,⁸ can be recovered. A payment made with full knowledge of the facts, and under a mistake of law, cannot be recovered in the absence of duress.⁹

§ 1489. Payment induced by fraud.

A payment which has been induced by fraud may be recovered.¹ Thus, if items have been added by fraud,² or payment induced by fraudulent representations of public officials made to a property owner who was ignorant of the total cost of the improvement, that such property owner was assessed with only one-half of the cost thereof,³ such payments may be recovered.

§ 1490. Recovery on theory of failure of consideration.

If an assessment has been levied and collected and the money raised thereby has not been expended upon the construction of an improvement, and such improvement has been abandoned by the public corporation, such payments may be recovered upon the theory of failure of consideration.¹ Such recovery, however, can

⁵ *Trimmer v. City of Rochester*, 130 N. Y. 401, 29 N. E. 746 [1892].

⁶ *Mutual Life Insurance Company of New York v. Mayor, Aldermen and Commonalty of the City of New York*, 79 Hun 482, 29 N. Y. S. 980 [1894].

⁷ *Mutual Life Insurance Company of New York v. Mayor, Aldermen and Commonalty of the City of New York*, 144 N. Y. 494, 39 N. E. 386 [1895].

⁸ *Pinchbeck v. Mayor, etc., of the City of New York*, 12 Hun (N. Y.) 556 [1878]; *Allen v. Mayor, Aldermen and Commonalty of the City of New York*, 4 Smith C. P. (N. Y.) 404 [1855]. See *contra*, *Delaney v. Gault*, 30 Pa. St. (6 Casey) 63 [1858].

⁹ *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220 [1873]; *Elston v.*

City of Chicago, 40 Ill. 514, 89 Am. Dec. 361 [1866]; *Brands v. City of Louisville*, 111 Ky. 56, 63 S. W. 2 [1901]; *Pooley v. City of Buffalo*, 122 N. Y. 592, 26 N. E. 16 [1890]; *Vanderbeck v. City of Rochester*, 122 N. Y. 285, 10 L. R. A. 178, 25 N. E. 408 [1890]; *Phelps v. Mayor, Aldermen and Commonalty of the City of New York*, 112 N. Y. 216, 2 L. R. A. 626, 19 N. E. 408 [1889]; *New v. Village of New Rochelle*, 91 Hun (N. Y.) 214, 36 N. Y. S. 211 [1895].

¹ *Knapp v. City of Brooklyn*, 97 N. Y. 520 [1884].

² *Knapp v. City of Brooklyn*, 97 N. Y. 520 [1884].

³ *Harrison v. City of Milwaukee*, 49 Wis. 247, 5 N. W. 326 [1880].

⁴ *Kerr v. Butz*, 34 Ill. App. 220 [1889]; *McConville v. City of St. Paul*, 75 Minn. 383, 74 Am. St. Rep.

not be had in an action of interpleader brought by the city to compel the contractor and the property owners to interplead.² If the improvement is delayed beyond a reasonable time, the property owner may treat this as an abandonment of the improvement, and may recover.³ If, however, the money raised by the assessment is actually expended upon the improvement for which it was levied, and some benefits may inure to the property owner thereby, such payments cannot be recovered, even if the funds thus raised have proved insufficient to complete the improvement, and, accordingly, the full benefits which were expected have not been realized.⁴ A property owner cannot recover a payment on the ground that the public officers have improperly applied such payment to the discharge of assessments on property not owned by him.⁵ His remedy is to treat such payment as freeing his land from the assessments upon which it was made.⁶ If an assessment has been levied before the improvement is constructed, and such assessment exceeds the total amount of the items proper to be included therein, the property owner may recover his proportionate share of such excess in the action of assumpsit.⁷ He will not be required to sue in mandamus,⁸ at least where such objection is raised only after the public corporation has practically denied to the property owner the right of recovering in any manner whatever.⁹ A statute which directs the transfer of balances of special funds to the general funds, is not applicable to the proceeds of a local assessment.¹⁰ If an assessment has been reduced by expunging an unlawful item which

508, 43 L. R. A. 584, 77 N. W. 993 [1899]; *Germania Bank v. City of St. Paul*, 79 Minn. 29, 81 N. W. 542 [1900].

² *City of Los Angeles v. Amidor*, 140 Cal. 400, 73 Pac. 1049 [1903].

³ *Bradford v. City of Chicago*, 25 Ill. 349, 79 Am. Dec. 333 [1861].

⁴ *Rogers v. City of St. Paul*, 79 Minn. 5, 47 L. R. A. 537, 81 N. W. 539 [1900]; *Strickland v. City of Stillwater*, 63 Minn. 43, 65 N. W. 131 [1895].

⁵ *Perdue v. Mayor, etc., of New York*, 12 Abb. Prac. 31 [1861].

⁶ *Perdue v. Mayor, etc., of New York*, 12 Abb. Prac. 31 [1861].

⁷ *City of Chicago v. McGovern*, 226

Ill. 403, 80 N. E. 895 [1907]; *People ex rel. Keeney v. City of Chicago*, 152 Ill. 546, 38 N. E. 744 [1894]; *City of Chicago v. Paulsen*, 125 Ill. App. 595 [1906]; *City of Chicago v. McCormick*, 124 Ill. App. 639 [1906]; *City of Chicago v. Fisk*, 123 Ill. App. 404 [1905]; *City of Chicago v. Singer*, 116 Ill. App. 559 [1904]; *Eno v. Mayor, Aldermen and Commonalty of the City of New York*, 68 N. Y. 214 [1877].

⁸ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

⁹ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

¹⁰ *Thayer v. City of Grand Rapids*, 82 Mich. 298, 46 N. W. 228 [1890].

was carried into the assessment, a property owner may resort to equity to compel the application upon his assessment of a proportionate part of the amount saved.¹¹

§ 1491. Recovery of deposit under special contract.

If money is deposited by a property owner under an agreement that it is to be returned to him if the assessment is held to be invalid, and that it is to be applied on the assessment only if the assessment is held to be valid, such payment may be recovered by the property owner if the assessment is held to be invalid, and the ordinary restrictions upon the right of the property owner to recover a voluntary payment do not apply.¹ So, under an ordinance which requires payment of a water license in advance every six months, with the understanding that the difference between the cost as thus estimated in advance and the cost of the amount actually consumed should be repaid by the city, such difference may be recovered.²

§ 1492. Statutes of limitation.

The party who is entitled to recover an assessment which has been paid in, must maintain his action within the time specified by statute. In the absence of any specific provision, this is the time fixed by the statute of limitations for maintaining an action to recover upon an implied contract.¹ Under some statutes, a special period of limitation is fixed which, by terms, is applicable to such actions.² The period of limitations runs from the time of payment,³ even if the assessment must first be set aside,⁴ or if

¹¹ *Mayer v. Mayor, Aldermen and Commonalty of the City of New York*, 101 N. Y. 284, 4 N. E. 336 [1886]; *Mayer v. Mayor, Aldermen and Commonalty of the City of New York*, 28 Hun, 587 [1883]; (interest can be abated only upon the amount by which the assessment was thus reduced).

¹ *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564 [1887]; *Murtland v. City of Pittsburg*, 189 Pa. St. 371, 41 Atl. 1113 [1899].

² *American Brewing Co. v. City of St. Louis*, — Mo. —, 108 S. W. 1 [1907, 1908]; (demurrer to petition in foregoing case overruled in *Amer-*

ican Brewing Co. v. St. Louis, 187 Mo. 367, 86 S. W. 129).

¹ *Jex v. Mayor, Aldermen and Commonalty of the City of New York*, 111 N. Y. 339, 19 N. E. 52 [1888]; *Diefenthaler v. Mayor, Aldermen and Commonalty of the City of New York*, 111 N. Y. 331, 19 N. E. 48 [1888].

² One year. *Groesbeck v. City of Cincinnati*, 51 Ohio St. 365, 37 N. E. 707 [1894].

³ *Groesbeck v. City of Cincinnati*, 51 Ohio St. 365, 37 N. E. 707 [1894]; *City of Dallas v. Kruegel*, 95 Tex. 43, 64 S. W. 922 [1901].

⁴ *Trimmer v. City of Rochester*,

the existence of the mistake is not discovered for some time after the payment is made.⁵ If a city is allowed by its charter thirty days after a claim is presented within which it may pay such claim, and during which time the claimant cannot bring suit, the period of limitations runs from the time when suit can first be brought and the thirty-day period should be added to the period of limitations, since the accrual of the cause of action is deferred until the end of such thirty-day period.⁶ It is, however, sufficient to plead that the cause of action did not accrue within six years, without specifically referring to the thirty-day period.⁷ Under some statutes, however, it is held that the cause of action does not accrue until the assessment is set aside, and, accordingly, limitations runs from the judgment setting aside such assessment.⁸ A statute which provides that the right to recover an assessment is not barred until six years after a judgment setting the assessment aside, does not revive causes of action which are already barred.⁹ The fact that an injunction suit is pending, to determine whether a given item of the total amount of the assessment should be paid or not, does not suspend the running of the period of limitations.¹⁰ Under statutes which impose upon a public corporation the duty of refunding assessments which have been vacated, it is held that the ordinary statute of limitations has no application.¹¹ A statute which prevents a property owner from recovering a payment after a certain period of time, does not prevent him from recovering excessive payments upon earlier installments to be credited upon later installments, even if such

130 N. Y. 401, 29 N. E. 746 [1892]; *Diefenthaler v. Mayor, Aldermen and Commonalty of the City of New York*, 111 N. Y. 331, 19 N. E. 48 [1888]; *Parsons v. City of Rochester*, 43 Hun 258 [1887].

⁵ *Groesbeck v. City of Cincinnati*, 51 Ohio St. 365, 37 N. E. 707 [1894].

⁶ *Brehm v. Mayor, Aldermen and Commonalty of the City of New York*, 104 N. Y. 186, 10 N. E. 158 [1887]; (distinguishing *Dickinson v. Mayor, Aldermen and Commonalty of the City of New York*, 92 N. Y. 584 [1883]); *Brehm v. Mayor, Aldermen and Commonalty of the City*

of New York, 39 Hun (N. Y.) 533 [1886].

⁷ *Jex v. Mayor, Aldermen and Commonalty of the City of New York*, 111 N. Y. 339, 19 N. E. 52 [1888].

⁸ *Mayor, etc., of Jersey City v. Green*, 42 N. J. L. (13 Vr.) 627 [1880].

⁹ *Dennison v. City of New York*, 182 N. Y. 24, 74 N. E. 486 [1905]; (affirming 87 N. Y. S. 1132, 93 App. Div. 612 [1904]).

¹⁰ *City of Dallas v. Kruegel*, 95 Tex. 43, 64 S. W. 922 [1901].

¹¹ *Smith v. Mayor and Aldermen of Jersey City*, 52 N. J. L. (23 Vr.) 184, 18 Atl. 1050 [1889].

later installments fall due more than a year after the time that such excessive payments are made.¹²

§ 1493. Laches.

The property owner may be prevented from recovering a payment by delay, even if for a period less than that fixed by the statute of limitations, during which the city has acted in reliance upon the apparent efficacy of the payment, and has altered its position so that it will be materially prejudiced if the property owner is permitted ultimately to recover.¹ Thus, if a property owner has delayed suit until the public corporation has paid the contractor, and has thereby lost the right to protect itself by levying a re-assessment, such delay amounts to laches, and prevents him from recovering.² The fact, however, that the property owner has delayed until the city has paid bonds which were issued in anticipation of the assessments, does not amount to laches if such bonds were a valid debt of the city, and must be paid in any event.³

§ 1494. Who may recover payment.

A party who is injured by the defects or irregularities in the assessment which are complained of, and who has paid such assessment under legal compulsion or mistake, can recover. A party on whose behalf successful proceedings to vacate an assessment have been instituted may recover the amount paid in.¹ Thus, A. bought land and paid for it but "for convenience sake" had it conveyed to B. and C., his sons. B. then conveyed to C. An assessment was levied on such land; C. instituted proceedings to have it vacated; pending such proceedings A. was obliged to pay the assessment; and thereafter the assessment was vacated. A. then died; C. and X. were appointed executors; and C. as an

¹² *Manns v. City of Cincinnati*, 10 Ohio C. C. 549 [1895]; (reversed on theory that property owner was estopped by his representations as to his frontage from claiming that the prior payments were excessive. *City of Cincinnati v. Manss*, 54 O. S. 257, 43 N. E. 687 [1896]).

¹ *Pabst Brewing Co. v. City of Milwaukee*, 126 Wis. 110, 105 N. W. 563 [1905].

² *Pabst Brewing Co. v. City of Milwaukee*, 126 Wis. 110, 105 N. W. 563 [1905].

³ *Horn v. Town of New Lots*, 83 N. Y. 100, 38 Am. Rep. 402 [1880].

¹ *Schultze v. Mayor, Aldermen and Commonalty of the City of New York*, 103 N. Y. 307, 8 N. E. 528 [1886].

individual conveyed his interest in such property to C. and X. as executors. It was held that such executors could recover such payment.² One property owner cannot take advantage of a mistaken over-payment by another property owner, and have such mistaken payment credited upon the shares of the remaining property owners.³ A vendor who has paid an invalid assessment under mistake, or duress, may recover,⁴ even after he has sold the property upon which such assessment was levied.⁵ A vendee of the party who has paid such assessment, cannot recover the amount paid by his vendor,⁶ even if the assessment is vacated, the improvement abandoned, the amount of the assessment repaid to the vendor, and if subsequently the improvement is ordered again and the vendee is required to pay an assessment therefor.⁷ A vendee at a foreclosure sale, who pays in the amount of his bid, cannot recover the portion thereof which is applied to an assessment which is subsequently held to be invalid,⁸ even if such vendee then has to pay a subsequent assessment upon such property for the same improvement.⁹

§ 1495. Who is liable to refund.

A public corporation which has received a payment under mistake or duress, is liable only for the amount received by it for its own use.¹ A township is not liable for amounts paid to the township treasurer which do not become the property of the township, but are special funds, held by such treasurer for special purposes.²

²Schultze v. Mayor, Aldermen and Commonalty of the City of New York, 103 N. Y. 307, 8 N. E. 528 [1886].

³Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421 [1901].

⁴Pinchbeck v. Mayor, etc., of the City of New York, 12 Hun (N. Y.) 556 [1878].

⁵Pinchbeck v. Mayor, etc., of the City of New York 12 Hun (N. Y.) 556 [1878].

⁶Smith v. City of Minneapolis, 95 Minn. 431, 104 N. W. 227 [1905].

⁷Smith v. City of Minneapolis, 95 Minn. 431, 104 N. W. 227 [1905].

⁸Day v. Town of New Lots, 107 N. Y. 148, 13 N. E. 915 [1887]; (reversing Day v. Town of New Lots,

36 Hun 263). See also, Horn v. Town of New Lots, 83 N. Y. 100, 38 Am. Rep. 402 [1880].

⁹Day v. Town of New Lots, 107 N. Y. 148, 13 N. E. 915 [1887]; (reversing Day v. Town of New Lots, 36 Hun 263).

¹Wallace v. Sortor, 52 Mich. 159, 17 N. W. 798 [1883]; Camp v. Township of Algansee, 50 Mich. 4, 14 N. W. 672 [1883]; Wallace v. Mayor, Aldermen and Commonalty of the City of New York, 52 Hun (N. Y.) 587, 5 N. Y. Sup. 705 [1889].

²Wallace v. Sortor, 52 Mich. 159, 17 N. W. 798 [1883]; Camp v. Township of Algansee, 50 Mich. 4, 14 N. W. 672 [1883].

A county is not liable for a payment made to it, and paid over by it to drainage commissioners without notice of the claim of the property owner.³ A public corporation is not liable for the amount paid by the property owner to the vendee at a public sale, which is had for the purpose of satisfying the lien of the public corporation, in order to redeem the property from such vendee.⁴ It is liable only for the amount paid by such vendee to the city in excess of the amount to which the assessment has finally been reduced.⁵ If money is awarded as damages for change of grade, and a part thereof is with the consent of the party apparently entitled thereto applied to the discharge of certain assessments on such property, a contesting claimant cannot recover from the city for the amount paid to the collector of assessments.⁶ One district cannot be compelled to reimburse another, where the latter district has paid an excessive proportion of the assessment,⁷ in an action brought by the taxpayers of the latter district.⁸ A township which is sued to recover assessments paid in cannot compel the property owners who thus sue to recover to interplead with the holders of warrants payable out of the proceeds of such assessments.⁹ Under statutes which specifically provide that a given public officer shall be a party defendant to a suit to set aside an assessment, he must be made a defendant in an action to recover an assessment paid in, although such assessment has been paid to another public officer.¹⁰

§ 1496. Pleadings.

A petition in an action to recover payments must aver the facts which show the illegality of the assessment, and the existence of duress or mistake,¹ and not merely legal conclusions.² A general

³ *Dewey v. Board of Supervisors of the County of Niagara*, 2 Hun (N. Y.) 392 [1874]; (assessment held invalid, *People ex rel. Williams v. Haines*, 49 N. Y. 587 [1872]).

⁴ *Wallace v. Mayor, Aldermen and Commonalty of the City of New York*, 52 Hun (N. Y.) 587, 5 N. Y. Sup. 705 [1889].

⁵ *Wallace v. Mayor, Aldermen and Commonalty of the City of New York*, 52 Hun (N. Y.) 587, 5 N. Y. Sup. 705 [1889].

⁶ *Hatch v. Mayor, etc., of the City*

of New York, 45 N. Y. Sup. Ct. Rep. 599 [1879].

⁷ *Crescent Hotel Co. v. Bradley*, 81 Ark. 286, 98 S. W. 971 [1906].

⁸ *Crescent Hotel Co. v. Bradley*, 81 Ark. 286, 98 S. W. 971 [1906].

⁹ *Wallace v. Sortor*, 52 Mich. 159, 17 N. W. 798 [1883].

¹⁰ *Godkin v. Rutterbush*, 147 Mich. 116, 110 N. W. 505 [1907].

¹ *Pelton v. Bemis*, 44 O. S. 51, 4 N. E. 714 [1886].

² *Pelton v. Bemis*, 44 O. S. 51, 4 N. E. 714 [1886].

avermment that the assessment is illegal and void is insufficient.³ Averments of fact which tend to show that the assessment was illegal should not be stricken out.⁴ Performance of conditions precedent should be alleged specifically.⁵ Thus, if payment of all taxes actually is a condition precedent to the recovery of payments of invalid assessments, such payment of valid taxes should be alleged.⁶ In order to be sufficient, an answer must negative one or more of the essential averments of the petition, or must set up new facts which obviate the legal effect of the facts alleged in the petition. Thus, if the petition seeks recovery on the ground of duress, an answer averring the knowledge of the property owner, is insufficient.⁷ If, by statute, the city can compel the property owners and the parties entitled to the proceeds of the assessment to interplead, the property owner cannot change the action by a cross-petition to one to recover such assessment from the city on the ground of failure of consideration by reason of the abandonment of the improvement.⁸

§ 1497. Evidence.

In an action to recover a payment, the burden of proof as to the validity of the assessment is upon the property owner who claims it to be invalid.¹ There is, in such cases, a presumption that official acts are performed in a proper manner.² If it is shown by the records of the proper board that it adjourned for the purpose of giving notice, it will be presumed that such notice was given, in the absence of evidence to the contrary.³ The burden of proof is upon the party who seeks recovery, to establish the fact of the mistake, if he claims the right to recover on the ground of mistake.⁴ It may be presumed that the property owner has knowledge of the facts appearing in the record of the

³ *Pelton v. Bemis*, 44 O. S. 51, 4 N. E. 714 [1886].

⁴ *Tregea v. Owens*, 94 Cal. 317, 29 Pac. 643 [1892].

⁵ *Murphy v. City of Omaha*, 1 Neb. (Unoff.) 488, 95 N. W. 680 [1901].

⁶ *Murphy v. City of Omaha*, 1 Neb. (Unoff.) 488, 95 N. W. 680 [1901].

⁷ *Stephan v. Daniels*, 27 O. S. 527 [1875].

⁸ *City of Los Angeles v. Amidor*, 140 Cal. 400, 73 Pac. 1049 [1903].

¹ *Pooley v. City of Buffalo*, 124

N. Y. 206, 26 N. E. 624 [1891]; *Remsen v. Wheeler*, 121 N. Y. 685, 24 N. E. 704 [1890].

² *Murphy v. Dobben*, 137 Mich. 565, 100 N. W. 891 [1904]; *Pooley v. City of Buffalo*, 124 N. Y. 206, 26 N. E. 624 [1891].

³ *Murphy v. Dobben*, 137 Mich. 565, 100 N. W. 891 [1904].

⁴ *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 139 N. Y. 1, 34 N. E. 729 [1893].

assessment proceedings,⁵ but such presumption may be rebutted, and the question is one of fact for the jury.⁶ A property owner who shows that he has by mistake paid an assessment upon a tract which does not belong to him, has made out a *prima facie* case, entitling him to recovery.⁷ Under a statute which provides that a certificate or deed issued at a public sale to satisfy the lien of an assessment shall be *prima facie* valid, the judgment of a court of competent jurisdiction that such a deed or certificate is invalid, is *prima facie* evidence of its invalidity, notwithstanding such statutory provisions.⁸

⁵ *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 125 N. Y. 617, 26 N. E. 721; (reversing *Tripler v. Mayor, Aldermen and Commonalty of the City of New York*, 53 Hun (N. Y.) 36, 6 N. Y. Supp. 48 [1889]).

⁶ *Tripler v. Mayor, Aldermen and Commonalty of the City of New*

York, 139 N. Y. 1, 34 N. E. 729 [1893].

⁷ *Allen v. Mayor, Aldermen and Commonalty of the City of New York*, 4 E. D. Smith (N. Y.) 404 [1855].

⁸ *Willius v. City of St. Paul*, 82 Minn. 273, 84 N. W. 1009 [1901].

CHAPTER XXVI.

LIABILITY OF PUBLIC CORPORATION OR OFFICER ARISING OUT OF ASSESSMENT PROCEEDINGS.

§ 1498. Liability of public corporation upon contract in absence of contractual or statutory restriction.

The question of the liability of the public corporation for the cost of an improvement which is constructed upon the assessment plan, is one which has been presented to the courts repeatedly for adjudication. In the absence of a statutory provision, or of a term in the contract restricting the liability of the public corporation in some way, such public corporation is liable to the contractor, or to the parties who constructed the improvement under a contract with the city, if the contract itself is one which the city has power to make.¹ Even if it expects to reimburse itself subsequently for the cost of the improvement by levying assessments therefor,² in the absence of restrictive statutory or contractual provisions, the city is liable for the difference between the contract price and the amount which can be raised by assessment.³ Thus, where by statute the assessment is limited to one-fourth of the actual value of the property assessed, the city may provide for raising a general fund by taxation, to pay the difference be-

¹*In re Opening and Grading of Market Street*, 49 Cal. 546 [1875]; *Corey v. City of Ft. Dodge*, 133 Ia. 666, 111 N. W. 6 [1907]; *Bucroft v. City of Council Bluffs*, 63 Ia. 646, 19 N. W. 807.

²*Board of Commissioners of Franklin County v. Gardiner Savings Institution*, 119 Fed. 36 [1902]; *Maher v. City of Chicago*, 38 Ill. 266 [1865]; *City of Garden City v. Trigg*, 57 Kan. 632, 47 Pac. 524 [1897]; *Atchison v. Leu*, 48 Kan. 138, 29 Pac. 467 [1892]; *Sleeper v. Bullen*, 6 Kan. 300 [1870]; *Kiley v. City of St. Joseph*, 67 Mo. 491 [1878];

Moore v. Mayor, Aldermen and Commonalty of the City of New York, 73 N. Y. 238, 29 Am. Rep. 134 [1878]; *City of Cincinnati v. Diekmeyer*, 31 O. S. 242 [1877]; *Portland Lumbering & Manufacturing Co. v. City of East Portland*, 18 Or. 21, 6 L. R. A. 290, 22 Pac. 536 [1878]; *Addyston Pipe & Steel Co. v. City of Corry*, 197 Pa. St. 41, 80 Am. St. Rep. 812, 46 Atl. 1035 [1900]; *Warren Bros. Co. v. Taylor*, — R. I. —, 69 Atl. 303 [1908].

³*Corey v. City of Ft. Dodge*, 133 Ia. 666, 111 N. W. 6 [1907].

tween the cost of the improvement and the aggregate amount of the assessments.⁴ In some jurisdictions it is especially provided by statute that the city is liable for deficiencies in the contract price caused by failure or inability to collect the total amount of the assessments from the property owner.⁵ The city is liable if it agrees to pay any deficiency if the assessments are insufficient to meet the cost of the improvement.⁶ While in some jurisdictions it is said that the city's liability is rather that of an agent, or a trustee, and that it is not primarily liable,⁷ such remarks are rather in the nature of *obiter*, and the city must be regarded as liable primarily in the absence of statutory or contractual terms restricting its liability. In the absence of specific statutory provisions as to the manner in which a public corporation may bind itself by contract, an acknowledgment of an indebtedness, and the promise to pay it, may render the public corporation liable for benefits actually received from extra work done by the contractor under the direction of public officers;⁸ and a resolution passed by the common council, directing that the amount which arbitrators have reported as due to the contractor for such extra work be added to the assessment, is "substantially acknowledging the extent of the debt and a promise to pay it;" and if the contractor assents to such resolution the liability thus created cannot be avoided without the mutual consent of the contractor and the public corporation.⁹ If the public corporation has the power to enter into the contract in question, but has no power to levy the assessment by means of which it agrees to pay the contractor, the public corporation is liable personally in the absence of a statute freeing it from liability.¹⁰ In the absence of

⁴ *Corey v. City of Ft. Dodge*, 133 Ia. 666, 111 N. W. 6 [1907].

⁵ *Morton v. Sullivan*, — Ky. —, 96 S. W. 807 [1906]; *Terrell v. City of Paducah*, — Ky. —, 5 L. R. A. (N. S.) 289, 92 S. W. 310, 28 Ky. L. R. 1237 [1906].

⁶ *City of Garden City v. Trigg*, 57 Kan. 632, 47 Pac. 524 [1897]; *Morton v. Sullivan*, — Ky. —, 96 S. W. 807 [1906].

⁷ *Lucas Turner & Co. v. City of San Francisco*, 7 Cal. 463, 474 [1857].

⁸ *Brady v. Mayor, etc., of Brooklyn*, 1 Barb. (N. Y.) 584 [1847].

⁹ *Brady v. Mayor, etc., of Brooklyn*, 1 Barb. (N. Y.) 584 [1847].

¹⁰ *Barber Asphalt Paving Co. v. City of Denver*, 72 Fed. Rep. 336, 19 C. C. A. 139, 36 U. S. App. 499 [1896]; *Barber Asphalt Paving Co. v. City of Harrisburg*, 64 Fed. 283, 12 C. C. A. 100, 28 U. S. App. 108 [1894]; (reversing 62 Fed. 565 [1894]); *Maher v. City of Chicago*, 38 Ill. 266 [1865]; *Terrell v. City of Paducah*, — Ky. —, 5 L. R. A. (N. S.) 289, 92 S. W. 310 [1906]; *City of Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625 [1896]; *Oster v. City of Jefferson*, 57 Mo. App. 485 [1894].

a provision against liability on the part of the public corporation, the public corporation has been held liable if the property owners refuse or neglect to pay their assessments.¹¹ In the absence of any statutory or contractual provision against the liability of the public corporation, the contractor may proceed against the city in the first instance, and need not exhaust his remedies against the property owner.¹² If no power over the construction of the improvement is given to the corporation, and it has no duty with reference thereto, but the entire control of the work is placed in the hands of certain commissioners, the public corporation is not liable on either an express or implied contract between the commissioners and the property owners.¹³ The city may be liable for benefits to its property, like any other property owner, as long as its limit of indebtedness is not exceeded thereby.¹⁴ A city cannot be held liable for an assessment upon county property.¹⁵ If by contract a city is to be liable only for inter-sections, it cannot be held liable on a paving contract because it has retained a market place in the center of the street.¹⁶

§ 1499. Liability if contract is invalid.

The public corporation is not liable to the contractor if the contract is not authorized by statute.¹ Upon this principle it is held in some cases that a public corporation is not liable to a contractor for work done in constructing a street or road upon land in which the public corporation has no interest.² Under statutes which provide the method in which a public corporation may bind itself by contract, a contract made in violation of provisions which are either made mandatory by their express terms, or which are inserted for the benefit of taxpayers, is invalid, and the public

¹¹ *Cronan v. Municipality No. One*, 5 La. Ann. 537 [1850].

¹² *Bueroff v. City of Council Bluffs*, 63 Ia. 646, 19 N. W. 807.

¹³ *Astoria Heights Land Co. v. City of New York*, 179 N. Y. 579, 72 N. E. 1139 [1904]; (affirming 86 N. Y. S. 651, 89 App. Div. 512).

¹⁴ *Barber Asphalt Paving Co. v. City of St. Joseph*, 183 Mo. 451, 82 S. W. 64 [1904].

¹⁵ *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295 [1898].

¹⁶ *Howell v. Philadelphia*, 38 Pa. (2 Wright) 471 [1861].

¹ *Daly v. City and County of San Francisco*, 72 Cal. 154, 13 Pac. 321 [1887]; *Philbrook v. Inhabitants of the County of Kennebec*, 17 Me. 196 [1840]; *Mayor and City Council of Baltimore v. Eisbach*, 18 Md. 276 [1861]; *Brady v. Mayor, etc., of the City of New York*, 18 Howard (N. Y.) 343 [1859].

² *Philbrook v. Inhabitants of the County of Kennebec*, 17 Me. 196 [1840].

corporation is not liable thereon.³ The public corporation is not liable upon a contract which it had no power to make, even if it has agreed to levy an assessment which it has no power to levy, as the sole means of payment therefor.⁴ If a contract is invalid because it is executed irregularly, the city cannot, after voluntarily paying the contractor, recover such payment from him.⁵ A public corporation is liable to a contractor for the amount deposited by him to secure his entering into a contract, if, after advertising for bids, the public corporation has made the assessment payable in installments and the contractor has no notice of such fact when he submits his bids.⁶

§ 1500. Liability for improvement not required by contract.

A public corporation is not liable for work done by the contractor in excess of the requirements of his contract,¹ even if he is directed to do such work by public officials who have no power to bind the city by contract.² If the contract provides that grading shall be done in accordance with plans on file, and that the contractor shall conform to the directions of the city engineer, as to the mode of doing the work, the city is not liable for work not provided for by the contract, even if it is performed by the contractor by reason of a mistake of the city engineer.³ Under a contract requiring the contractor to keep the streets in repair for five years, the contractor is not liable to make good injuries which are sustained by the bursting of a water main. Accordingly, if a contractor makes good such injuries he is a mere volunteer, and cannot recover against the city, even if the negligence of the city was the primary cause of the injury.⁴ The acceptance of

³ *Murphy v. City of Louisville*, 72 Ky. (9 Bush.) 189 [1872]; *Saxton v. City of St. Joseph*, 60 Mo. 153 [1875]; *Jardine v. Mayor, Aldermen and Commonalty of the City of New York*, 11 Daly, 116 [1882].

⁴ *Trustees of Belleview v. Hohn* 82 Ky. 1 [1884].

⁵ In addition to the doctrine that voluntary payments can not be recovered, it is said that the city is liable in any event for the reasonable value of benefits conferred upon it. *Cathers v. Moores*, — Neb. —, 113 N. W. 119 [1907]; — affirming

Cathers v. Moores, 110 N. W. 689 [1907].

⁶ *Village of Morgan Park v. Gahan*, 35 Ill. App. 646 [1890].

¹ *City of Huntington v. Force*, 152 Ind. 368, 53 N. E. 443 [1898]; *Green River Asphalt Co. v. City of St. Louis*, 188 Mo. 576, 87 S. W. 985 [1905].

² *Wilson v. City of St. Joseph*, 125 Mo. App. 460, 102 S. W. 600 [1907].

³ *Wilson v. City of St. Joseph*, 125 Mo. App. 460, 102 S. W. 600 [1907].

⁴ *Green River Asphalt Company v. City of St. Louis*, 188 Mo. 576, 87 S. W. 985 [1905].

work done under the contract imposes a liability upon the city to pay therefor if the contract is not void, and if the statute does not imperatively require an improvement ordinance as a foundation for the subsequent proceeding.⁵ By special terms of the contract the city may withhold money due to the contractor, in order to indemnify the city against the consequences of actual or threatened litigation, due to the improper conduct of the work, or the negligence of the contractor.⁶ If, by statute, the members of a ditching association are primarily liable for work and labor done in constructing ditches, the fact that uncollected assessments for benefits are outstanding sufficient in amount to pay such indebtedness, is no defense to the members in an action brought by the party entitled to such compensation.⁷

§ 1501. Liability in case of non-performance.

If the contractor has not performed the contract on his part, and the assessment fails for that reason, the city is not liable to him,¹ even if it does not levy a re-assessment, since, under these facts no re-assessment could be valid by reason of the contractor's default.² The act of the officials of a public corporation in accepting an improvement may operate as a waiver of irregularities or defects in performance. If the contractor is to obtain from the city engineer a certificate of performance in order to be entitled to payment, a certificate is sufficient which shows that the work done prior to a resolution of the council which modifies the contract as to that work, complies with such modification, and that the rest of the work complies with the original contract.³ If a resolution of the council which modifies a contract is obtained by means of fraud and corruption, such facts may be shown as a defense by the city when sued by the contractor.⁴ If the contractor fails to perform his contract, an agreement by the

⁵ *Bonnet v. City and County of San Francisco*, 65 Cal. 230, 3 Pac. 815 [1884]; *Murphy v. City of Albina*, 20 Or. 379, 26 Pac. 234 [1891].

⁶ *Sweeten v. City of Millville*, — N. J. L. —, 66 Atl. 923 [1907].

⁷ *Shafer v. Moriarty*, 46 Ind. 9 [1874]; *Marion Township Union Draining Co. v. Norris*, 37 Ind. 424 [1871].

¹ *Crawford v. Mason*, 123 Ia. 301, 98 N. W. 785 [1904]; (assessment

held invalid in *Mason v. City of Des Moines*, 108 Ia. 658, 79 N. W. 389 [1899]).

² *Crawford v. Mason*, 123 Ia. 301, 98 N. W. 795 [1904].

³ *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899].

⁴ *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899].

public corporation to pay his bondsmen for completing such contract is valid.⁵

§ 1502. Liability upon bonds.

Under some statutes, bonds may be issued for the cost of an improvement, even if the cost thereof is to be met ultimately by assessments upon the property benefited.¹ A special statute authorizing a levee district to issue bonds overrides a prior general statute forbidding levee districts to issue bonds.² By statutory authority, such bonds may be issued directly to the contractor in compensation for the work done;³ and he may bring suit upon such bonds, or upon the lien created by the assessment.⁴ If the bonds are to be paid out of the proceeds of an assessment, it is not necessary that the bondholders demand payment from the city before suing to enforce the lien of the assessment,⁵ or that the city council pass a resolution authorizing such bondholders to sue.⁶ A public corporation is liable upon its bonds for a public improvement, even if it expects to be reimbursed therefor by local assessment in the absence of specific statutory or contractual provisions against such liability, as long as it has power to incur indebtedness and to issue bonds therefor.⁷ Power to issue bonds to a limited amount for money borrowed for a public improve-

¹ *Abernathy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306 [1894].

² *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531 [1891]; *Edwards House Co. v. City of Jackson*, — Miss. —, 45 So. 14 [1907].

³ *Alzheimer v. Plum Bayou Levee District*, 79 Ark. 229, 95 S. W. 140 [1906].

⁴ *Yarnold v. City of Lawrence*, 15 Kan. 126 [1875]; *Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490 [1906].

⁵ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

⁶ *Scott v. Hayes*, 162 Ind. 548, 70 N. E. 879 [1903].

⁷ *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 45 L. 280, 21 S. 174; (reversing *Loeb v. Trustees of Columbia Township*, Hamilton County, Ohio, 91 Fed. 37 [1899]);

United States v. Ft. Scott, 99 U. S. 152, 25 L. 348 [1878]; *Vickrey v. City of Sioux City*, 115 Fed. 437 [1902]; *Burlington Sav. Bank v. City of Clinton*, 106 Fed. 269 [1901]; *City of Gladstone v. Throop*, 71 Fed. Rep. 341, 18 C. C. A. 61, 37 U. S. App. 481 [1895]; *City of Wyandotte v. Zeitz*, 21 Kan. 649 [1879]; *City of Lexington on Appeal*, 96 Ky. 258, 28 S. W. 665 [1894]; *State v. Commissioners*, 37 O. S. 526 [1882]; (assessment enjoined in *Hays v. Jones*, 27 O. S. 218 [1875]); *Gable v. Altoona*, 200 Pa. St. 15, 49 Atl. 367 [1901]; *Commonwealth ex rel. Whelen v. Select and Common Councils of the City of Pittsburg*, 88 Pa. St. (7 Norris) 66 [1878]; *Austin v. City of Seattle*, 2 Wash. 667, 27 Pac. 557 [1891]; *Fowler v. City of Superior*, 85 Wis. 411, 54 N. W. 800 [1893].

ment does not prevent the public corporation from contracting debts for such improvements in excess of the amount thus designated.⁸ The public corporation may incur debts in excess of such amount and may issue written evidences of such indebtedness bearing six per cent. interest.⁹ Where provision must be made for issue of bonds and the bonds must be described, a description of them as "serial bonds bearing interest at the rate of six per cent. per annum and extending over a period of ten years from their date of issue to represent the cost and expenses of the work described in the assessment and in the manner and form prescribed by law," has been held to be a sufficient description.¹⁰ A *de facto* corporation is liable upon bonds issued by it for a public improvement for which assessments are to be levied,¹¹ since the question of the validity of its incorporation is one which can be raised only by the state. Under a statute authorizing a city to issue bonds to pay its part of the cost of specific improvements, it may issue such bonds,¹² though it cannot issue them until after the passage of an improvement ordinance,¹³ but it cannot issue bonds to provide a fund from which to pay its share of the cost of such improvements as may be made thereafter.¹⁴ Statutes which apply to the issuing of bonds for which the city is to be reimbursed by special assessment, and which require the name of the street, or the name and number of the sewer district to appear upon the bond, do not apply to bonds issued by the city to pay its part of the cost of such improvement.¹⁵ If the bonds issued by the city are irregular because they not only pledge the sum raised by a special assessment, but also pledge the faith and credit of the city, and no election has been had consenting to an indebtedness as provided for by the constitution,¹⁶ the provision pledging the faith and credit of the city is void, but the provisions pledging the special assessments are valid.¹⁷ The city is, accord-

⁸ *Alzheimer v. Plum Bayou Levee District*, 79 Ark. 229, 95 S. W. 140 [1906].

⁹ *Alzheimer v. Plum Bayou Levee District*, 79 Ark. 229, 95 S. W. 140 [1906].

¹⁰ *Hadley v. Dague*, 130 Cal. 207, 62 Pac. Rep. 500 [1900].

¹¹ *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 46 L. 773, 22 S. 531 [1902].

¹² *Heffner v. City of Toledo*, 75 O. S. 413, 80 N. E. 8.

¹³ *Heffner v. City of Toledo*, 75 O. S. 413, 80 N. E. 8.

¹⁴ *Heffner v. City of Toledo*, 75 O. S. 413, 80 N. E. 8.

¹⁵ *Heffner v. City of Toledo*, 75 O. S. 413, 80 N. E. 8.

¹⁶ Constitution of Kentucky, § 157.

¹⁷ *Gedge v. City of Covington*, — Ky. —, 80 S. W. 1160, 26 Ky. Law Rep. 273 [1904].

ingly, entitled to collect such assessments, and when they are collected, it is bound to apply them solely to discharge the debt incurred by reason of the improvement.¹⁸ Bonds must be issued in compliance with the form prescribed by statute.¹⁹ If a statute provides that each bond must be payable in installments of a certain percentage each year, an order for issuing bonds making such percentage of the entire issue of bonds payable in the designated years, is not in compliance with the statute.²⁰ A quasi public corporation which has certain specific powers conferred upon it by statute, cannot issue bonds in the absence of statutory authority therefor.²¹ Thus, if special drainage districts are authorized to issue bonds for unpaid assessments for their own indebtedness, they cannot issue bonds for the indebtedness of a sub-district.²² If the statute does not provide that contractors may be required to take their pay in bonds, but the contract so provides, taxpayers who do not interpose such objection before the public officials, and who have not raised such question in their suit for an injunction until they file an amendment to the petition at the close of the testimony, and at the commencement of the argument, are held to waive such ground of objection.²³

§ 1503. Liability of public corporation on warrants.

A city is liable upon warrants issued by it for public improvements, if such warrants are not expressly made payable out of the proceeds of special assessments exclusively, and if the city has power to issue general warrants.¹ A city cannot pay for a public improvement by issuing general certificates of indebtedness under a statute which provides that the improvement is to be paid for by assessments upon the property especially benefited.² If an

¹⁸ *Gedge v. City of Covington*, — Ky. —, 80 S. W. 1160, 26 Ky. Law Rep. 273 [1904].

¹⁹ In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 675, 28 Pac. 272 [1891].

²⁰ In the Matter of the Bonds of the Madera Irrigation District, 92 Cal. 296, 27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 675, 28 Pac. 272 [1891].

²¹ *People ex rel. Pollard v. Swigert*, 130 Ill. 608, 22 N. E. 787 [1890].

²² *People ex rel. Pollard v. Swigert*, 130 Ill. 608, 22 N. E. 787 [1890].

²³ *Wood v. Hall*, — Ia. —, 110 N. W. 270 [1907].

¹ *King v. City of Frankfort*, 2 Kans. App. 530, 43 Pac. 983 [1895]; *Dahlman v. City of Milwaukee*, 131 Wis. 427, 110 N. W. 479, 111 N. W. 675 [1907].

² In the Matter of the Application

order is payable out of the proceeds of special assessments, no recovery can be had against the city unless it is shown that there are funds in the treasury created by such special assessment sufficient to pay such order.³ A city is not liable generally upon warrants payable out of a special fund, if such fund does not exist, even if it cannot be created.⁴ If an order upon a drain assessment fund is not paid for lack of sufficient funds, and a subsequent assessment is levied for cleaning out and extending the drain, and it is therefore levied in part upon territory upon which the first assessment was not levied, the holder of such order cannot be paid out of any unexpended balance produced by such assessment.⁵ Under an entire contract for improving a street by which the city is to pay a certain amount for the cost of intersections and crossings, the amount to be paid by the city is a part of the special fund from which warrants for such improvement may be paid.⁶ Warrants issued against a special assessment fund are not negotiable,⁷ and a *bona fide* purchaser acquires no better right than his assignor.⁸ Under a contract by which the city agrees to pay in money, with an option on its part to pay any city orders, assessments, certificates or improvement bonds, such alternative right of payment is lost if the city fails to exercise it when payment is due, and the contractor may recover from the city in money.⁹ Under some statutes, where a reclamation district includes parts of two or more counties, the assessment upon each tract is to be paid into the treasury of the county in which such contract is situated, and is to be paid out for the work of reclamation upon the warrants of the trustees approved by the board of supervisors of that county.¹⁰ A contractor cannot recover against the city upon certificates issued to him, if no ordinance is shown authorizing such transfer.¹¹ One

of Drake for a Writ of Certiorari to the Board of Sewer Commissioners of the Village of Port Richmond, 69 Hun (N. Y.) 95, 23 N. Y. S. 264 [1893].

³ Village of Marysville v. Schoonover, 78 Ill. App. 189 [1898]

⁴ Soule v. Town of Ocosta, — Wash. —, 95 Pac. 1083 [1908].

⁵ Dean v. Treasurer of Clinton County, 146 Mich. 645, 109 N. W. 1113 [1906].

⁶ Hemen v. City of Ballard, 40 Wash. 81, 82 Pac. 277 [1905].

⁷ Morrison v. Austin State Bank, 213 Ill. 472, 104 Am. St. Rep. 225, 72 N. E. 1109 [1905].

⁸ Morrison v. Austin State Bank, 213 Ill. 473, 104 Am. St. Rep. 225, 72 N. E. 1109 [1905].

⁹ Herman v. City of Oconto, 100 Wis. 391, 76 N. W. 364 [1898].

¹⁰ Cosner v. Board of Supervisors of Colusa County, 58 Cal. 274 [1881].

¹¹ Louisiana Improvement Co. v. Baton Rouge Electric & Gas Co., 114 La. 534, 38 So. 444 [1905].

who buys assessment certificates is charged with notice of the proceedings under which such certificates were issued,¹² and, accordingly, he is charged with notice that the owner has a right to pay such assessment in installments.¹³

§ 1504. Restrictions on indebtedness of public corporations.

Constitutional or statutory provisions sometimes limit the indebtedness which a public corporation may incur. Some restrictions, however, do not limit the power of the city to incur obligations for public improvements. A restriction upon the power of a public corporation to borrow money for "general purposes" is held not to prevent the city from contracting for street improvements, or from borrowing money for such improvements if the cost of the improvements is to be paid ultimately by local assessment.¹ Under a constitutional provision to the effect that a city can incur debts only for necessary expenses, maintaining streets is a necessary expense.² The constitutional provision, to the effect that whenever a public corporation "is authorized to contract an indebtedness it shall be required at the same time to provide for the collection of an annual tax sufficient to pay the interest," and to provide a sinking fund for the payment of the principal is not self-executing, but requires legislation to make it operative;³ and in the absence of such legislation, contracts increasing the indebtedness of the city, may be made.⁴ If the public corporation has reached the limit of indebtedness allowed to it by constitutional or statutory provisions, it cannot incur any general liability for public improvements, such as streets,⁵ which are to be paid for ultimately by local assessments. If a personal liability is imposed upon a city by the contract, the contract is invalid in such case.⁶ Accordingly, if the city has incurred such a debt, and has actually paid the contractor, it has been held that

¹² *Talcott Brothers v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899].

¹³ *Talcott Brothers v. Noel*, 107 Ia. 470, 78 N. W. 39 [1899].

¹ *Hitchcock v. Galveston*, 96 U. S. 341 [1877]; *Galveston v. Loonie*, 54 Tex. 517 [1881]; *City of Galveston v. Heard*, 54 Tex. 420 [1881].

² *Commissioners of Town of Hendersonville v. Webb*, — N. C. —, 61 S. E. 670 [1908].

³ *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893].

⁴ *Holzhauser v. City of Newport*, 94 Ky. 396, 22 S. W. 752 [1893].

⁵ *Atkinson v. City of Great Falls*, 16 Mont. 372, 40 Pac. 877 [1895]; *German-American Savings Bank v. City of Spokane*, 17 Wash. 315, 38 L. R. A. 259, 49 Pac. 542, 47 Pac. 1103 [1897].

⁶ *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

bonds which are payable out of a special assessment, and which are issued to reimburse the city for money thus paid to the contractor, are themselves invalid.⁷ Under such facts, the assessment itself is held to be invalid.⁸ If the debt limit is not exceeded, a contract by which there is incurred a debt, which, together with the existing indebtedness exceeds such limit, is valid up to the limit of indebtedness, and void as to the excess.⁹ Under statutes which provide that the city or other public corporation cannot incur an indebtedness in excess of a certain amount, or of a certain per cent. of the total valuation for taxation of the property therein, a contract which, by its terms, imposes no liability on the city, but which provides that the contractor shall look for compensation solely to the assessments levied therefor, is not regarded as invalid, even if the debt limit of the city is already reached, or if the contract in question would exceed the debt limit, if it imposed a personal liability upon the city.¹⁰ The question of the power of the city to construct an improvement after it has exhausted its constitutional power to incur a debt cannot be raised to defeat a proceeding to construct an improvement partly by special assessment and partly by general taxation. The question can be raised only when the city seeks to borrow money or to incur a debt.¹¹ If the debt limit has been reached and the city enters into a contract by which the contractors agree to look to the assessments for their compensation, and the city agrees to levy such assessments, the question as to the liability of the city, which is presented when the city fails or neglects to levy a valid assessment, is one upon which there is some conflict of authority. In some jurisdictions it is held that the

⁷ *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

⁸ *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

⁹ *Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge*, 115 Ia. 568, 89 N. W. 7 [1902].

¹⁰ *Denny v. City of Spokane*, 79 Fed. Rep. 719, 25 C. C. A. 164, 48 U. S. App. 282 [1897]; *Lucas, Turner & Company v. San Francisco*, 7 Cal. 463 [1857]; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; *Grunewald v. City of Cedar Rapids*, 118 Iowa, 222, 91 N. W. 1059

[1902]; *City of Clinton v. Walliker*, 98 Ia. 655, 68 N. W. 431 [1896]; *Tuttle v. Polk and Hubbel*, 92 Ia. 433, 60 N. W. 733 [1894]; *Davis v. City of Des Moines*, 71 Ia. 500, 32 N. W. 470; *Atkinson v. City of Great Falls*, 16 Mont. 372, 40 Pac. 877 [1895]; *Little v. City of Portland*, 26 Ore. 235, 37 Pac. 911 [1894]; *Smith v. City of Seattle*, 25 Wash. 300, 65 Pac. 612 [1901]; *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462 [1891].

¹¹ *The Jacksonville Railway Co. v. City of Jacksonville*, 114 Ill. 562, 2 N. E. 478 [1886].

city is liable, and that the constitutional or statutory restrictions upon the indebtedness of the city have no application, since the liability of the city arises out of its own act or omission, and not primarily out of the improvement contract.¹² In other jurisdictions it is held that the city is not liable for its failure to levy the assessment if the limit of its indebtedness is thereby exceeded, on the theory that its duty to levy such assessment arises solely out of the contract.¹³

§ 1505. Statutory provisions against personal liability.

A public corporation, or quasi corporation, which has no power to make contracts, or to incur liabilities personally, but which has power only to make charges upon funds to be raised by local assessments, cannot incur a personal obligation of any sort upon a contract.¹ Accordingly, if by statute the public corporation is not liable, the contractor can receive compensation only by the collection of the assessments levied for the improvement in question, and if such assessments fail for any reason, the contractor cannot receive compensation of any kind.² Thus, if by statute, and by the terms of the contract, the contractor depends entirely upon special assessments for his compensation, he cannot maintain assumpsit against the city, even though the city has been enjoined from collecting the assessment, and it has omitted to take steps, either to establish the validity of such assessment or to make a new assessment.³ If, by statute, a city has power to issue special tax bills which are a lien upon the property assessed,

¹² Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902]; Addyston Pipe and Steel Co. v. City of Corry, 197 Pa. St. 41, 80 Am. St. Rep. 812, 46 Atl. 1035 [1900].

¹³ Soule v. City of Seattle, 6 Wash. 315, 33 Pac. 384, 1080 [1893].

¹ Hensley v. Reclamation District No. 556, 121 Cal. 96, 53 Pac. 401 [1898]; Badger v. Inlet Drainage District, 141 Ill. 540, 31 N. E. 170 [1893]; Board of Commissioners of County of Monroe v. Harrell, 147 Ind. 500, 46 N. E. 124 [1896].

² Badger v. Inlet Drainage District, 141 Ill. 540, 31 N. E. 170 [1893]; Badger v. Inlet Swamp

Drainage District, 42 Ill. App. 79 [1890]; City of New Albany v. Conger, 18 Ind. App. 230, 47 N. E. 852 [1897]; City of Louisville v. American Standard Asphalt Co., — Ky. —, 102 S. W. 806 [1907]; Caldwell v. Rupert, 73 Ky. (10 Bush.) 179 [1873]; Second National Bank of Lansing v. City of Lansing, 25 Mich. 207 [1872]; Kelly v. City of St. Joseph, 67 Mo. 491 [1878]; Soule v. Town of Ocosta, — Wash. —, 95 Pac. 1083 [1908]; Hall v. City of Chippewa Falls, 47 Wis. 267, 2 N. W. 279 [1879]; Fletcher v. City of Oshkosh, 18 Wis. 228 [1864].

³ Affeld v. City of Detroit, 112 Mich. 560, 71 N. W. 151 [1897].

and if, by contract, such bills are to be received in full payment by the contractor, the city is not liable where tax bills were issued against property of the county, and it was then held that the county was not liable,⁴ and subsequently the contractor requested the public corporation to levy a re-assessment, charging the entire cost of the improvement upon the property owners, other than the county, and upon the refusal of the city to issue such bills, such re-assessment was compelled by mandamus proceedings, and new bills were issued as a result of such mandamus proceedings, and on the refusal of the property owners to pay such new bills the contractor tendered the bills to the city and demanded payment.⁵ If, by the statute under which the contract was let, the engineer may diminish the amount of work at any time before completion without any compensation to the contractor for damages or for anticipated profits, he cannot recover damages for the increased cost of constructing the rest of the improvement where certain sub-drains were omitted.⁶ If, by statute, a city has no power to incur a personal liability, but it enters into a contract by the terms of which it attempts to assume a personal liability, such contractual provision is invalid.⁷ If, by statute a public corporation has power to issue bonds chargeable upon a fund to be raised by special assessments, but has no power to issue bonds which are a general liability of the public corporation, such public corporation is not liable for any deficiency caused by inability to collect the assessment.⁸ In some jurisdictions authority to construct certain improvements at the cost of the abutting property owner is held to prevent a city from incurring any personal liability thereon,⁹ even if no provision is made by statute for the method in which the charge upon the property owners is to be determined.¹⁰ Under a statute which provides that a city may issue bonds payable out of the proceeds of an assessment, but does not provide that the city shall not be

⁴ City of Clinton to use of Thornton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494 [1893].

⁵ Thornton v. City of Clinton, 148 Mo. 648, 50 S. W. 295 [1898]. See also Steffen v. St. Louis, 135 Mo. 44, 36 S. W. 31.

⁶ City and County of Denver v. Hindry, — Colo. —, 90 Pac. 1028 [1907].

⁷ Allen v. City of Davenport, 107 Ia. 90, 77 N. W. 532 [1898].

⁸ Uncas National Bank v. City of Superior, 115 Wis. 340, 91 N. W. 1004 [1902].

⁹ Findley v. Hull, 13 Wash. 236, 43 Pac. 28 [1895].

¹⁰ Findley v. Hull, 13 Wash. 236, 43 Pac. 28 [1895].

personally liable thereon, and bonds are issued under a city ordinance which provides that such bonds "shall be paid, principal and interest, solely from special assessments," this provision has been held to refer to the relative liability of the city and the property owners, and not to apply as between the city and the bondholders on the theory that the city did not apparently mean to make the ordinance any narrower than the statute, and, accordingly, the city is personally liable upon such bonds.¹¹ If, by statute, the city is not to be liable personally, it is not liable in the absence of fraud, even if its official records falsely show that the conditions necessary for a valid assessment have been fulfilled, and that a valid assessment has been levied.¹² The fact that the city has voluntarily paid a part of the contract price does not make it liable on the remainder.¹³ The freedom of the city from liability is purely a matter of statute,¹⁴ and the legislature may charge upon the city the cost of an improvement begun under a statute making such cost payable solely out of assessments, if the legislature could originally have charged such expense on the city.¹⁵ If the only statute which prevents a city from incurring a personal liability is unconstitutional because of an improper classification of cities, and under other statutes a city may enter into contracts and incur a personal liability thereon, the city is personally liable upon its contracts.¹⁶

§ 1506. Contractual provisions against personal liability.

The right of the contractor to prompt payment in cash may be restricted by statutory provisions or by the terms of the contract into which he enters with the city. If the power of the city to make contracts is so restricted by statute as to limit its power to incur personal liability, the provisions of the contract on that subject are ordinarily immaterial, since the city cannot by contract incur any liability which is denied to it by statute.¹ If,

¹¹ *United States v. Ft. Scott*, 99 U. S. 152, 25 L. 348 [1878].

¹² *Zwietusch v. City of Milwaukee*, 55 Wis. 369, 13 N. W. 227 [1882]. (Whether the city would under such circumstances be liable if fraud were shown, was considered in this case, but not decided).

¹³ *City of New Albany v. Conger*,

18 Ind. App. 230, 47 N. E. 852 [1897].

¹⁴ *O'Neill v. City of Hoboken*, 72 N. J. L. 67, 60 Atl. 50 [1905].

¹⁵ *O'Neill v. City of Hoboken*, 72 N. J. L. 67, 60 Atl. 50 [1905].

¹⁶ *Pittsburg's Petition for Board of Viewers*, 138 Pa. St. 401, 21 Atl. 757, 759, 761 [1890].

¹ See § 1505.

however, the city has power to bind itself by contract so as to incur personal liability, the terms of the contract with reference to such liability are final and conclusive. Under a contract whereby the contractor is to be paid out of the assessments exclusively, a public corporation which orders such improvement is not liable if a valid assessment is levied, and if the funds raised thereby are not misappropriated.² Under some statutes, a public corporation is not liable to the contractor except as to the amount raised by special assessment for the improvement in question,³ at least if it is not shown that the city has failed to perform its contract, and to act in compliance with the statutory directions which control. If the administration of a contractor sells tax bills for a small amount, he cannot recover from the city the difference between the amount for which such tax bills were issued and the amount for which he sells them if the contract and the ordinance provide that the contractor shall have no claim upon the city in any event.⁴ If the contractor agrees to take his pay in assessments, to look for his compensation solely to such assessments, and to take all risk of the invalidity thereof, the city is not liable if the assessments prove invalid.⁵ Under a contract by which the city is not in any event to be liable except for such assessments as might be levied upon city property, the city is not liable if the assessments prove insufficient to pay the contract price, because the assessments could not by statute exceed fifty per cent. of the valuation of the property assessed.⁶ If the contract contains provisions to the effect that the city shall not be liable personally,

² *Quick v. Parratt*, 167 Ind. 31, 78 N. E. 232 [1906]; *City of Huntington v. Force*, 152 Ind. 368, 53 N. E. 443 [1898]; *Porter v. City of Tipton*, 141 Ind. 347, 40 N. E. 802 [1895]; *Robinson v. City of Valparaiso*, 136 Ind. 616, 36 N. E. 644 [1893]; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890]; *Dalton v. City of Poplar Bluff*, 173 Mo. 39, 72 S. W. 1068 [1902]; *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295 [1898]; *Lake v. Trustees of the Village of Williamsburg*, 4 Denio, 520 [1847]; *Goodale v. Fennell*, 27 O. S. 426, 22 Am. Rep. 321 [1875].

³ *City of Huntington v. Force*, 152

Ind. 368, 53 N. E. 443 [1898]; *Porter v. City of Tipton*, 141 Ind. 347, 40 N. E. 802 [1895]; *Robinson v. City of Valparaiso*, 136 Ind. 616, 36 N. E. 644 [1893]; *Quill v. City of Indianapolis*, 124 Ind. 292, 7 L. R. A. 681, 23 N. E. 788 [1890].

⁴ *Dalton v. City of Poplar Bluff*, 173 Mo. 39, 72 S. W. 1068 [1902].

⁵ *Farrell v. City of Chicago*, 198 Ill. 558, 65 N. E. 103 [1902]; (affirming, *City of Chicago v. Farrell*, 100 Ill. App. 204 [1902]). See also *Welker v. City of Toledo*, 18 O. S. 452 [1869].

⁶ *Ryan & Company v. City of Cincinnati*, 1 Cin. Sup. Ct. 245 [1871].

the city is not liable.⁷ Under a contract by which the contractors agree "to look exclusively to the said special tax for their pay," the city is not liable for an irregularity which causes delay if a valid assessment has subsequently been levied, and is in course of collection when the suit is brought.⁸ If the contractor agrees specifically to take all chances as to the validity of the assessments, it has been held that the public corporation is not liable for failure to comply with the statutory provisions which regulate the levy and collection of assessments.⁹ Even if the contractor takes all risks as to the validity of the assessment, it is held to be the duty of the city to take every step necessary to maintain the validity of the assessments, and, accordingly, the city has the right to appeal from a judgment which vacates the entire assessment.¹⁰ Under a contract whereby the city is not to be liable except as a property owner, it is not liable if it levies an assessment in compliance with the terms of the statute, even if the full amount of such assessment cannot be collected.¹¹ Under a contract by which the contractor is to take special tax bills in full payment of his compensation, the city is not liable if certain tax bills are ultimately held to be unenforceable because issued against property held by the county for county purposes.¹² Under this theory, the city is liable only if neglect or collusion with the property owners is shown.¹³ It has been held, however, that

⁷ *Dolese v. McDougall*, 78 Ill. App. 629 [1897]; *City of Alton v. Foster*, 74 Ill. App. 511 [1897]; *Little v. City of Chicago*, 46 Ill. App. 534 [1892]; *Welker v. City of Toledo*, 18 O. S. 452 [1869].

⁸ *Casey v. City of Leavenworth*, 17 Kan. 189 [1876].

⁹ *Farrell v. City of Chicago*, 198 Ill. 558, 65 N. E. 103 [1902]; *Wheeler v. City of Poplar Bluff*, 149 Mo. 36, 49 S. W. 1088 [1898].

¹⁰ *State ex rel. Shintgen v. Mayor and Common Council of the City of La Crosse*, 101 Wis. 208, 77 N. W. 167 [1898]. "Now although the contractor may by the provisions of the charter, assume the risk of collection of the special assessments, still there is a manifest duty resting upon the corporate officers to maintain the integrity and validity of the assessments if possible and take ev-

ery step necessary and proper to that end. In this view the city officials remain throughout the entire proceeding an adversary party, interested in their official capacity in the enforcement of the assessments, and so must necessarily have the right to appeal from a judgment which vacates the entire proceeding." *State ex rel. Shintgen v. Mayor and Common Council of the City of La Crosse*, 101 Wis. 208, 77 N. W. 167 [1898].

¹¹ *Goodale v. Fennell*, 27 O. S. 426. 22 Am. Rep. 321 [1875]; *Welker v. Toledo*, 18 O. S. 452 [1869]; *Creighton v. City of Toledo*, 18 O. S. 447 [1869].

¹² *Thornton v. City of Clinton*, 148 Mo. 648, 50 S. W. 295 [1898].

¹³ *Eilert v. City of Oshkosh*, 14 Wis. 586 [1861].

in the absence of a statutory provision therefor, there is no authority for confining a contractor to the assessments for his payment.¹⁴

§ 1507. Effect of provision for payment of contractor by assessments.

A provision whereby the contractor is to be paid in assessments does not, of itself, relieve the city from liability if the assessment is invalid. Under a contract by which the contractors agree "to receive in payment for their work the assessments upon the property made liable by law to pay the costs and expenses of the improvement," and agree not to bring any suit against the city under the contract for any further compensation that may be due them under the laws of the state and the ordinances of the city, it will be understood that the provision for "assessments" means valid and legal assessments in an amount equal to the contract price.¹ Accordingly, if the assessments fail to equal the contract price because they are by statute restricted to twenty-five per cent. of the value of the property assessed, the city is liable to the contractor for the difference thus caused.² If the contractor agrees to wait for his compensation until the city collects the assessment for such improvement, and the city is unable to collect a part of the assessments because it has made an express contract with the owner of the property assessed, whereby his property is exempt from such assessment, the contractor may recover from the city the amount to which he would have been entitled if the entire assessment had been collected.³ Under a contract by which the contractor is to be paid in assessments, without any provision against the liability of the city, the city is liable if the assessments do not equal the contract price, because the amount of the assessment is limited to twenty-five per cent. of the value of the property after the improvement is completed.⁴ A contractor may receive compensation in a method different from that prescribed by contract under a subsequent valid agreement for such modification.⁵

¹⁴ *Weld v. People ex rel. Kern*, 149 Ill. 257, 36 N. E. 1006 [1894].

¹ *Keszler v. City of Cincinnati*, 3 Ohio C. C. 223 [1888]. See also *Creighton v. City of Toledo*, 18 O. S. 447 [1869].

² *City of Cincinnati v. Diekmeier*, 31 O. S. 242 [1877]; *Keszler v. City*

of Cincinnati, 3 Ohio C. C. 223 [1888].

³ *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870].

⁴ *City of Cincinnati v. Diekmeier*, 31 O. S. 242 [1877].

⁵ *Hines v. City of Leavenworth*, 3 Kan. 180 [1865].

§ 1508. Liability for failure to exercise power to levy assessment.

If a public corporation agrees to pay a contractor in assessments, and it has power to levy such assessments, it is held in many jurisdictions that if the city does not levy a valid assessment, it is liable to the contractor, either in contract or in tort.¹ As to the exact nature of the liability, there is a conflict of authority. In some cases the liability of the city is discussed as if it were contractual in its nature;² while in other jurisdictions the liability of the city is said to be in tort.³ An action against a public corporation for a failure to levy a valid assessment has been said to be "not strictly an action *ex contractu*, nor yet strictly an action on a tort."⁴ A public corporation has been

¹Farson v. City of Sioux City, 106 Fed. 278 [1901]; Barber Asphalt Paving Co. v. City of Denver, 72 Fed. Rep. 336, 19 C. C. A. 139, 36 U. S. App. 499 [1896]; Barber Asphalt Paving Co. v. City of Harrisburg, 64 Fed. 283, 12 C. C. A. 100, 28 U. S. App. 108 [1894]; (reversing, Barber Asphalt Paving Co. v. Harrisburg, 62 Fed. 565 [1894]); City of Chicago v. People of the State of Illinois, 56 Ill. 327 [1870]; City of Dunkirk v. Wallace, 19 Ind. App. 298, 49 N. E. 463 [1897]; Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902]; Heller v. City of Garden City, 58 Kan. 263, 48 Pac. 841 [1898]; City of Atchison v. Byrnes, 22 Kan. 65 [1879]; City of Leavenworth v. Stille, 13 Kan. 539 [1874]; City of Leavenworth v. Mills, 6 Kan. 288 [1870]; Kearney v. City of Covington, 58 Ky. (1 Metcalf) 339 [1858]; Armstrong v. Police Jury of Madison, 6 La. Ann. 177 [1851]; Knapp v. Mayor and Council of the City of Hoboken, 38 N. J. L. (9 Vr.) 371 [1876]; Weston v. City of Syracuse, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899]; Reilly v. City of Albany, 40 Hun, 405 [1886]; Beard v. City of Brooklyn, 31 Barb. 142 [1860]; Bowery National Bank v. Mayor, etc., of the City of New York, 8 Hun (N. Y.) 224 [1876];

Smith v. City of Buffalo, 44 Hun (N. Y.) 156 [1887]; Quinn v. City of Buffalo, 26 Hun (N. Y.) 234 [1882]; Cummings v. Mayor, Aldermen and Commonalty of Brooklyn, 11 Paiges' Chan. Rep. 596 [1845]; Lowden v. City of Cincinnati, 2 Disney, 203 [1858]; Little v. City of Portland, 26 Ore. 235, 37 Pac. 911 [1894]; Philadelphia Mortgage & Trust Co. v. City of New Whatcom, 19 Wash. 225, 52 Pac. 1063 [1898]; Soule v. City of Seattle, 6 Wash. 315, 33 Pac. 184, 1080 [1893].

²Barber Asphalt Paving Co. v. City of Harrisburg, 64 Fed. 283, 12 C. C. A. 100, 28 U. S. App. 108 [1894]; City of Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625 [1896]; Heller v. City of Garden City, 58 Kan. 263, 48 Pac. 841 [1898]; City of Leavenworth v. Mills, 6 Kan. 288 [1870]; Oster v. City of Jefferson, 57 Mo. App. 485 [1894].

³Reilly v. City of Albany, 40 Hun, 405 [1886]; Beard v. City of Brooklyn, 31 Barb. 142 [1860]. (The form of action is said to be trespass on the case, for negligence.)

⁴Thornton v. City of Clinton, 148 Mo. 648, 50 S. W. 295 [1898]. (The action was said to be in the nature of trespass on the case, though no liability was held to exist under the facts presented.)

held liable to a contractor for work done in front of property belonging to the contractor's wife, and occupied by the contractor and his wife as a homestead, if the city fails to levy an assessment upon such property.⁵ Relief has been given in equity, and the public corporation has been compelled to pay the contractor out of its general funds, with power to reimburse itself out of any valid assessments which it might levy in the future for the cost of such improvement, where the property owner did not object to the jurisdiction of equity until the evidence in the case was all in.⁶ A public corporation is liable if the assessment is not confirmed with reasonable diligence.⁷ If a city fails to levy an assessment, and refuses to issue bonds to the contractor as compensation for the work, the city is personally liable to the contractor for the balance due.⁸ If a public corporation is prevented by an injunction obtained at the instance of property owners, from levying an assessment, such public corporation is liable to the contractor if it does not have the injunction dissolved within a reasonable time.⁹ If the public corporation stops the improvement, and prevents the property owners from receiving a benefit by reason thereof, and thus makes it impossible to collect the assessment, the city is liable to the contractors.¹⁰ If the city levies a re-assessment, and in making such levy it does not include interest, the city is liable to the creditor for interest, even

⁵ *City of Leavenworth v. Stille*, 13 Kan. 539 [1874].

⁶ *Cummings v. Mayor, Aldermen and Commonalty of Brooklyn*, 11 Paiges' Chan. Rep. 596 [1845].

⁷ *Bowery National Bank v. Mayor, etc., of the City of New York*, 8 Hun (N. Y.) 224 [1876].

⁸ *City of Atchison v. Byrnes*, 22 Kan. 65 [1879].

⁹ *Bowery National Bank v. Mayor, etc., of the City of New York*, 8 Hun (N. Y.) 224 [1876].

¹⁰ *New Orleans v. Warner*, 180 U. S. 199, 45 L. 597, 21 S. 353 [1901]; *New Orleans v. Warner*, 175 U. S. 120, 44 L. 96, 20 S. 44 [1899]; (modified on rehearing, 176 U. S. 92, 44 L. 385, 20 S. 280); *Warner v. New Orleans*, 167 U. S. 467, 42 L. 239, 17 S. 892 [1897]; *Warner v. City of New Orleans*, 87 Fed. Rep. 829, 31

C. C. A. 238, 59 U. S. App. 131 [1898]; *Warner v. City of New Orleans*, 81 Fed. 645, 26 C. C. A. 508, 52 U. S. App. 348 [1897]. In the case of *Peake v. New Orleans*, 139 U. S. 342, 377, 35 L. 131, 11 S. 541 [1891]; *Peake v. City of New Orleans*, 38 Fed. Rep. 779 [1889] which concerned the same transaction but on somewhat different evidence the opposite result was reached.

To the effect that the city is liable if the improvement is abandoned, see also, *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. 659 [1877]; *City of Chicago v. Weber*, 94 Ill. App. 561 [1900]; *City of Dunkirk v. Wallace*, 19 Ind. App. 298, 49 N. E. 463 [1897]; *Weston v. City of Syracuse*, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899].

if he has taken no steps to have interest included in such re-assessment.¹¹

§ 1509. Liability for levying invalid assessment.

If the contractor agrees to receive compensation by assessments, and the city levies assessments which are invalid and unenforceable, it is held in many jurisdictions, that the city is liable to the contractor.¹ The city is liable to the contractor if it does not take the steps necessary to make the assessment valid.² Under a contract by which the contractor is to be paid by assessments, the city is liable if it fails to take the steps required by statute to make the assessment valid,³ even if the work which was done was for constructing a street upon ground in which the city had no interest.⁴ If a public corporation is not liable by statute, it has been held that such corporation is not liable, even if the work done consists in the construction of a street upon property in which the city has no interest.⁵ Even if the contractor is entitled to mandamus, it is not his exclusive remedy.⁶ A decree in an injunction suit to which the property owners, the city and the contractor are all parties, holding the assessment to be invalid, conclusively determines the liability of the city.⁷ If, however, the

¹¹ Philadelphia Mortgage & Trust Co. v. City of New Whatcom, 19 Wash. 225, 52 Pac. 1063 [1898].

¹ Barber Asphalt Paving Co. v. City of Denver, 72 Fed. Rep. 336, 19 C. C. A. 139, 36 U. S. App. 499 [1896]; Gafney v. City and County of San Francisco, 72 Cal. 146, 13 Pac. 467 [1887]; Iowa Pipe & Tile Co. v. Callanan, 125 Iowa, 358, 106 Am. St. Rep. 311, 67 L. R. A. 408, 101 N. W. 141 [1904]; Ft. Dodge Electric Light & Power Co. v. City of Ft. Dodge, 115 Ia. 568, 89 N. W. 7 [1902]; Polk County Savings Bank v. State of Iowa, 69 Ia. 24, 28 N. W. 416 [1886]; Scofield v. City of Council Bluffs, 68 Ia. 695, 28 N. W. 20 [1886]; Kearney v. City of Covington, 58 Ky. (1 Metcalf) 339 [1858]; Armstrong v. Police Jury of Madison, 6 La. Ann. 177 [1851]; Tournier v. Municipality Number One, 5 La. Ann. 298 [1850]; Folz v. City of Cincinnati, 2 Handy, 261 [1855].

² Maher v. City of Chicago, 38 Ill. 266 [1865]; Sleeper v. Bullen, 6 Kan. 300 [1870]; Kearney v. City of Covington, 58 Ky. (1 Met.) 339 [1858]; City of Louisville v. Hyatt, 44 Ky. (5 B. Mon.) 199 [1844]; Fisher v. City of St. Louis, 44 Mo. 482 [1869]; Manice v. City of New York, 8 N. Y. 120 [1853]; Cumming v. Mayor, Aldermen and Commonalty of Brooklyn, 11 Paige Chan. 596 [1845]; Baldwin v. City of Oswego, 2 Keyes Ct. App. 132 [1865].

³ Kearney v. City of Covington, 58 Ky. (1 Metcalf) 339 [1858].

⁴ Kearney v. City of Covington, 58 Ky. (1 Metcalf) 339 [1858].

⁵ Carroll v. City of St. Louis, 4 Mo. App. 191 [1877].

⁶ Northern Pacific Lumbering & Manufacturing Co. v. East Portland, 14 Ore. 3, 12 Pac. 4 [1886].

⁷ Kearney v. City of Covington, 58 Ky. (1 Metcalf) 339 [1858].

city has levied a valid assessment, but such assessment has been erroneously held to be invalid, and the city has not prosecuted error, the city is not personally liable to the holders of certificates which are payable solely out of the funds raised by special assessments.⁸ If, however, the defect in the assessment is one which may be remedied on appeal, and the contractor is given an opportunity of taking such appeal, he cannot hold the city liable for such a defect if he omits to take such appeal.⁹ The city is said not to be liable if the assessment is valid.¹⁰

§ 1510. Liability for delay in levying assessment.

If the city delays levying an assessment, and the rights of the contractor are thereby barred by the statute of limitations, the city is liable for such delay.¹ The city is liable for unreasonable delay in levying an assessment,² even if the contractor has agreed to look solely to the fund.³ Delay for five years without taking any steps to levy an assessment has been held to make a city liable if it has power to levy such assessment.⁴ Mere delay, however, has been held not to render the city liable to the contractor.⁵ Thus, it has been held that if a city agrees that it will duly and without neglect collect certain special assessments out of which the contractor is to be paid, neglect on the part of the city to levy such assessments does not make the city liable upon the contract, if the improvement is constructed solely upon the assessment plan and there is no attempt to construct it at the expense of the city.⁶ The fact that an assessment has been levied, and has been vacated on certiorari, is an excuse for delay in levy-

⁸ *Roter v. City of Superior*, 115 Wis. 243, 91 N. W. 651 [1902].

⁹ *Smith v. Cofran*, 34 Cal. 310 [1867].

¹⁰ *Kearney v. City of Covington*, 58 Ky. (1 Metcalf) 339 [1858].

¹ *Denny v. City of Spokane*, 79 Fed. 719, 25 C. C. A. 164, 48 U. S. App. 282 [1897]; *McEwan v. City of Spokane*, 16 Wash. 212, 47 Pac. 433 [1896].

² *Smith v. City of Buffalo*, 44 Hun (N. Y.) 156 [1887].

³ *Little v. City of Portland*, 26 Ore. 235, 37 Pac. 911 [1894]; (following *Commercial National Bank v.*

City of Portland, 24 Or. 188, 41 Am. St. Rep. 854, 33 Pac. 532 [1893]).

⁴ *Stephens v. City of Spokane*, 11 Wash. 41, 39 Pac. 266 [1895]; *Soule v. City of Seattle*, 6 Wash. 315, 33 Pac. 384, 1080 [1893].

⁵ *German-American Savings Bank v. City of Spokane*, 17 Wash. 315, 38 L. R. A. 259, 49 Pac. 542, 47 Pac. 1103 [1897]; (overruling *McEwan v. City of Spokane*, 16 Wash. 212, 47 Pac. 433 [1896]).

⁶ *Northwestern Lumber Co. v. City of Aberdeen*, 20 Wash. 102, 54 Pac. 935 [1898]; *Thomas & Co. v. City of Olympia*, 12 Wash. 465, 41 Pac. 191 [1895].

ing and collecting an assessment.⁷ If a contract is entered into for sprinkling streets, and the contractor is to be paid solely out of the proceeds of assessments, it is not necessary to levy an assessment every month; but an assessment may be levied at the end of the season for the entire cost of the sprinkling,⁸ especially if the cost cannot be determined in advance.⁹

§ 1511. Liability for failure to collect assessments.

If the city neglects to collect an assessment which it is bound to collect for the benefit of the contractor, it is liable personally therefor,¹ even if there are contractual,² or statutory,³ provisions against a personal liability of the city. Thus, a contract contained the following provision: "It is expressly understood that the fund for the payment of the above contract price is to be derived from assessments upon the city and abutting property owners according to benefits, and as to assessments upon abutting properties the city is liable to the contractor only for amounts actually collected. . . . The city solicitor shall, within six months from date of confirmation of the final assessment by the court, file liens for all said assessments which are not paid." The city solicitor neglected to file the liens within six months and many assessments were thus lost. It was held that the city was liable to the contractor.⁴ So under a statutory provision that "any persons taking any contracts with the city and who agree to be paid from special assessments, shall have no claim or lien upon the city in any event, except from the collections of the special assessments made for the work contracted for," it is held that if the city has not levied such assessments as it agreed to

⁷ *Flemming v. Mayor and Council of the City of Hoboken*, 40 N. J. L. (11 Vr.) 270 [1878].

⁸ *Keigher v. City of St. Paul*, 69 Minn. 78, 72 N. W. 54 [1897].

⁹ *Keigher v. City of St. Paul*, 69 Minn. 78, 72 N. W. 54 [1897].

¹ *Knapp v. Mayor and Council of the City of Hoboken*, 38 N. J. L. (9 Vr.) 371 [1876].

² *Little v. City of Portland*, 26 Or. 235, 37 Pac. 911 [1894]; *Commercial National Bank v. City of Portland*, 24 Ore. 188, 41 Am. St. Rep. 854, 33 Pac. 532 [1893]; *Dime Deposit and*

Discount Bank of Scranton v. Scranton, 208 Pa. St. 383, 57 Atl. 770 [1904]; *O'Hara v. Scranton City*, 205 Pa. St. 142, 54 Atl. 713 [1903]; *Gable v. Altoona*, 200 Pa. St. 15, 49 Atl. 367 [1901].

³ *Lyon v. District of Columbia*, 20 D. C. 484 [1892]; *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870].

⁴ *O'Hara v. Scranton City*, 205 Pa. St. 142, 54 Atl. 713 [1903]; *Dime Deposit and Discount Bank of Scranton v. Scranton*, 208 Pa. St. 383, 57 Atl. 770 [1904].

levy, the contractor may enforce a personal liability.⁵ A city is liable to the holders of warrants payable out of the proceeds of special assessments for the amount lost by a compromise entered into between the city and the property owners.⁶ The city is not liable if the land which is assessed does not sell for the amount of the assessment,⁷ as under a contract which provides that the contractor is to be paid "in the following manner," namely, by having the city levy assessments and assign them to the contractor.⁸ In the absence of some express provision against liability on the part of the public corporation, it has, however, been held that the contractor may recover from the public corporation if the land sells for less than the amount of the assessment.⁹ If the contractor is to be paid solely out of the funds raised by special assessment, the city is not liable for a deficiency caused by the fact that the benefits which enure from the improvement do not in the aggregate equal the contract price.¹⁰ In the absence of fraud or collusion the city is not liable to a contractor who is to be paid in assessments.¹¹ A contractor who agrees to receive his pay in assessments cannot hold the city as a guarantor that the contemplated fund will, in fact, be raised.¹² If the city has levied an assessment and offered the property for sale, and it has failed to sell, the city is not liable, even though it does not offer the property for sale for the second time.¹³

§ 1512. Liability of city for assessments paid in.

The funds raised by special assessment are trust funds, and the city must apply them to the payment of the improvement,¹ even if the statute under which the bonds are issued and the bonds themselves are void.² Since the fund thus raised is a trust fund

⁵ *City of Chicago v. People of the State of Illinois*, 56 Ill. 327 [1870].

⁶ *Sheafe v. City of Seattle*, 18 Wash. 298, 51 Pac. 385 [1897].

⁷ *City of New Albany v. Sweeney*, 13 Ind. 245 [1859]; *Creighton v. City of Toledo*, 18 O. S. 447 [1869].

⁸ *Creighton v. City of Toledo*, 18 O. S. 447 [1869].

⁹ *Knox v. Police Jury of West Baton Rouge*, 4 La. Ann. 62 [1849].

¹⁰ *Potter v. City of Whatecom*, 25 Wash. 207, 65 Pac. 197 [1901].

¹¹ *Eilert v. City of Oshkosh*, 14 Wis. 586 [1861].

¹² *Richardson v. City of Brooklyn*, 34 Barb. 569 [1861]; *Stephens v. City of Spokane*, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31 [1896].

¹³ *People ex rel. Crowell v. Lawrence*, 36 Barb. 178 [1862].

¹ *Town of Aurora v. Chicago, Burlington & Quincy Railroad*, 19 Bradwell (Ill.) 360 [1885].

² Statute held void: *Ryan v. Lynch*, 68 Ill. 160 [1873]; *Miller v. Goodwin*, 70 Ill. 659 [1873]; Bonds held void: *Town of South Ottawa v. Perkins*, 94 U. S. 260 [1876]; *Post v. Supervisors*, 105 U. S. 667 [1881];

in the hands of the city, equity will compel such application,³ and if the trust fund is misappropriated by the city, it is liable for the amount of such misappropriation,⁴ even if the debt limit of the city is thereby exceeded.⁵ Under this theory, however, the city is not liable for the amount of assessments which it has not received.⁶ Accordingly, if the city bids in property at a sale, to satisfy the lien of an assessment, the city is not liable until the property owner redeems.⁷ If the treasurer sells the property, and issues a certificate, but does not require the purchaser to pay the money in, the city is not liable for money had and received,⁸ but the remedy of the contractor, if any exists, is in some other form of action.⁹ If a voucher is issued payable only out of the proceeds of special assessments, and such assessments have been collected, a public corporation is liable in assumpsit.¹⁰ If a city has issued bonds which are to be paid out of the fund raised by special assessments, equity may entertain a suit for an accounting brought by the bondholder, to compel the city to account as trustee.¹¹ If action is brought against the city on the theory that it has improperly diverted funds realized by assessment, and has not paid plaintiff's warrants, which were drawn upon such funds, the burden rests upon plaintiff to prove that his warrants were drawn upon a fund, and that there was credited to such fund an amount sufficient to pay such warrants.¹² Such facts impose upon the city the burden of showing that the fund was not, in

city held liable for funds thus raised. *Town of Aurora v. Chicago, Burlington & Quincy Railroad*, 19 Ill. App. 360 [1885].

³ *Town of Aurora v. Chicago, Burlington & Quincy Railroad*, 19 Bradwell (Ill.) 360 [1885].

⁴ *Lucas, Turner & Company v. San Francisco*, 7 Cal. 463 [1857]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532. [1898]; *City of Lansing v. Van Gorder*, 24 Mich. 456 [1872]; *Chaffee v. Granger*, 6 Mich. 51 [1858]; *Pine Tree Lumber Company v. City of Fargo*, 12 N. D. 360, 96 N. W. 357 [1903]; *Frush v. City of East Portland*, 6 Or. 281 [1877]; *City of Dallas v. Brown*, 10 Tex. Civ. App. 612, 31 S. W. 298 [1895]; *New York Security & Trust Co. v. City of Tacoma*, 30 Wash. 661, 71 Pac. 194 [1903].

⁵ *Lucas, Turner & Co. v. San Francisco*, 7 Cal. 463 [1857]; *Allen v. City of Davenport*, 107 Ia. 90, 77 N. W. 532 [1898].

⁶ *Lovell v. City of St. Paul*, 10 Minn. 290 [1865].

⁷ *Lovell v. City of St. Paul*, 10 Minn. 290 [1865].

⁸ *Silkman v. City of Milwaukee*, 31 Wis. 555 [1872]; *Finney v. City of Oshkosh*, 18 Wis. 209 [1864].

⁹ *Silkman v. Milwaukee*, 31 Wis. 555 [1872].

¹⁰ *City of Chicago v. McNichols*, 98 Ill. App. 447 [1900].

¹¹ *Farson v. City of Sioux City*, 106 Fed. 278 [1901].

¹² *Pine Tree Lumber Co. v. City of Fargo*, 12 N. D. 360, 96 N. W. 357 [1903].

fact, formed, or that credits thereto were made improperly.¹³ The theory that such fund is a trust fund is applicable only where the city makes default. A city may by ordinance provide for paying water rate funds into the public treasury and paying the cost of the waterworks by appropriation out of the general treasury.¹⁴

§ 1513. Liability as affected by power to re-assess.

Under many statutes the city has the right to re-assess,¹ or to levy a supplemental assessment,² in case the original assessment is invalid or insufficient. Where the power of levying a re-assessment exists, a public corporation is not liable personally to a contractor if the contractor is to be paid out of a special fund to be derived from the assessments upon the property benefited, and if the city has in good faith levied an assessment which has been declared to be invalid and it is proceeding to levy a re-assessment.³ If the city has power to levy a re-assessment, it must be given an opportunity to re-assess,⁴ especially where the contractor has agreed to look solely to the assessment for his compensation, taking the risk of its invalidity,⁵ and it is not liable until its neglect or refusal to levy a re-assessment is shown.⁶

§ 1514. Change of statute as to liability of city.

If under the statutes in force when the contract is entered into the contractor is to be paid by special assessments, such statutory provisions form a part of the contract, and the contractor must look solely to such fund, even though such statutory provisions have subsequently been modified.¹ It has been said, however, that a contractor who has performed work under a statute which

¹³ *Pine Tree Lumber Co. v. City of Fargo*, 12 N. D. 360, 96 N. W. 357 [1903].

¹⁴ *Sinclair v. Brightman*, — Mass. —, 84 N. E. 453 [1908].

¹ See Chapter XVII.

² *Town of Cicero v. Green*, 211 Ill. 241, 71 N. E. 884 [1904]; *City of Alton v. Foster*, 74 Ill. App. 511 [1897]; *Board of Commissioners of Montgomery County v. Fullen*, 111 Ind. 410, 12 N. E. 298 [1887].

³ *Thomas & Co. v. City of Olympia*, 12 Wash. 465, 41 Pac. 191 [1895].

⁴ *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76 [1898].

⁵ *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76 [1898].

⁶ *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76 [1898]; *Citizens' Bank of Des Moines, Iowa, v. City of Spencer*, 126 Ia. 101, 101 N. W. 643 [1904]; *Stephens v. City of Spokane*, 14 Wash. 298, 44 Pac. 541, 45 Pac. 31 [1896].

¹ *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384, 1080 [1893].

expressly provides that the city shall in no event be liable for any portion of the expense, may recover compensation from the city under a special statute whereby the city is required to pay him.² If a contractor agrees to look solely to the assessment, the legislature cannot by a statute passed after such contract was entered into, reduce the amount for which the assessment can be levied.³

§ 1515. Amount of recovery.

If the assessment has been held to be invalid, so that the contractor's remedy is against the public corporation, such corporation, whether liable in contract or in tort, is liable for the contract price and not merely for reasonable compensation for the improvement.¹ In some jurisdictions the liability of the city to the contractor is said to include interest.² Interest is said to run from the time that the adjudication of the invalidity of the assessment becomes final.³ Under a contract by which the city is to pay the contractor when the assessments are collected, and if the assessments are not collected at the end of two years, the whole amount then due said contractor shall thereupon become due, interest does not run until the end of the two years.⁴ If the contractor is to look to the assessments for payment, the city is not liable for interest until the assessments are delinquent.⁵ Under a contract which provides for charging interest on advances made to the contractor, such interest may be charged, even though the public officials have in the past neglected to make such charges.⁶ If the city is liable to the contractor for the difference between the contract price and the amount raised by assessment, it is not liable for attorney fees,⁷ or court costs,⁸ or the cost of making an abstract of

² Creighton v. Board of Supervisors of the City and County of San Francisco, 42 Cal. 446 [1871].

³ Goodale v. Fennell, 27 O. S. 426, 22 Am. Rep. 321 [1875].

⁴ Scofield & Cavin v. City of Council Bluffs, 68 Ia. 695, 28 N. W. 20 [1886].

⁵ City of Toledo v. Goulden, 10 Ohio C. C. 161 [1895].

⁶ Gafney v. City and County of San Francisco, 72 Cal. 146, 13 Pac. 467 [1887].

⁷ Booth v. Pittsburgh, 154 Pa. St. 482, 25 Atl. 803 [1893].

⁸ Soule v. City of Seattle, 6 Wash. 315, 33 Pac. 384, 1080 [1893].

⁹ Fellows v. Mayor, Aldermen and Commonalty of the City of New York, 17 Hun (N. Y.) 249 [1879].

⁷ Gates v. City of Toledo, 57 O. S. 105, 48 N. E. 500 [1897]; Gates v. City of Toledo, 10 Ohio C. C. 160 [1895]; Gates v. Toledo, 7 Ohio N. P. 389 [1900]; City of Toledo v. Goulden, 10 Ohio C. C. 161 [1895]; City of Cincinnati v. Steadman, 8 Ohio C. C. 407 [1894].

⁸ Gates v. City of Toledo, 57 O. S. 105, 48 N. E. 500 [1897]; Gates v.

title,⁹ in an action in which the contractor has attempted to collect such assessments but without success.

§ 1516. Assignment by contractor.

A contractor who is to be paid out of a special fund, may assign his rights in such fund.¹ A written order given upon the public corporation by the contractor, and directing that the amount of the order be charged to the contractor's account as against such fund, is sufficient to operate as an equitable assignment of a part of such fund.² A contractor who has assigned his claim, but has subsequently taken a re-assignment of it from his assignee, may recover against the public corporation.³

§ 1517. Liability to sub-contractors.

Under some statutes a public corporation is liable to laborers and material-men who furnish work or material for public improvements, or public works, if the public corporation does not exact a bond from the contractor for the protection of such parties.¹ Under such statutes a public corporation is liable to the laborers and material-men for loss caused by failure to exact a bond, even if under its contract with the contractor it is liable for only one-third of the cost of the improvement, and if the remaining two-thirds of the cost of the improvement is to be collected from the property owners.² If the contractor is solvent and is able to discharge all his obligations to sub-contractors, material-men and laborers, the public corporation is not liable to the latter.³ Under a statute which gives a lien to a sub-contractor upon the fund due to the main contractor, the city is not personally liable if the fund proves insufficient to pay the sub-contractors.⁴ Such statutes do not contemplate a cross action

City of Toledo, 10 Ohio C. C. 160 [1895]; Gates v. Toledo, 7 Ohio N. P. 389 [1900].

⁹ Gates v. City of Toledo, 57 O. S. 105, 48 N. E. 500 [1897]; Gates v. City of Toledo, 10 Ohio C. C. 160 [1895]; Gates v. Toledo, 7 Ohio N. P. 389 [1900].

¹ Dolese v. McDougall, 182 Ill. 486, 55 N. E. 547 [1899].

² Dolese v. McDougall, 182 Ill. 486, 55 N. E. 547 [1899]; Dolese v. McDougall, 78 Ill. App. 629 [1897].

³ Quin v. City of Buffalo, 26 Hun (N. Y.) 234 [1882].

¹ Rounds v. Whatcom County, 22 Wash. 106, 60 Pac. 139 [1900].

² Rounds v. Whatcom County, 22 Wash. 106, 60 Pac. 139 [1900].

³ Wileox Lumber Co. v. School District Number 268 of Otter Tail County, — Minn. —, 114 N. W. 262 [1907].

⁴ United States Fidelity & Guaranty Co. v. City of Newark, — N. J. —, 66 Atl. 904 [1907].

by the contractor against the public corporation for an accounting in the suit by the lien holders to subject the fund to the payment of their liens.⁵

§ 1518. Mandamus as remedy for failure to levy assessment.

In some cases it has been held that if a public corporation has power to levy an assessment, but omits or neglects to levy a valid assessment, the remedy of the contractor is neither tort nor contract, but the sole remedy is mandamus to compel the public officials to take the steps necessary to the levy of a valid assessment.¹ Thus, it has been said that if a fund has been raised by a special assessment, mandamus will lie to compel payment out of such fund, while if such fund has not been raised, mandamus will lie to compel the levy of an assessment to create such fund.² In other cases the right of the contractor to maintain mandamus has been recognized, but it is said that the contractor may sue in mandamus or in case;³ while it has elsewhere been held that if the public corporation has merely failed to levy the assessment the contractor's remedy is mandamus, while if it has disabled itself from performing by such action on its part as makes the assessment void, or if it refuses to perform, the contractor's remedy is an action *ex contractu* against the city.⁴ In other jurisdictions it has been held that

⁵United States Fidelity & Guaranty Co. v. City of Newark, — N. J. Eq. —, 66 Atl. 904 [1907].

¹Heine v. Levee Commissioners, 86 U. S. (19 Wall.) 655, 22 L. 223 [1873]; (affirming Heine v. Levee Commissioners, 11 Fed. Cas. 1033, 1 Woods 246); City of Pontiac v. Talbot Paving Co., 94 Fed. 65, 36 C. C. A. 88, 48 L. R. A. 326 [1899]; City of Alton v. Foster, 207 Ill. 150, 69 N. E. 783 [1904]; (reversing Alton v. Foster, 106 Ill. App. 475 [1902]); Farrell v. City of Chicago, 198 Ill. 558, 65 N. E. 103 [1902]; Town of Tipton v. Jones, 77 Ind. 307 [1881]; City of Greencastle v. Allen, 43 Ind. 347 [1873]; Crawford v. Mason, 123 Ia. 301, 98 N. W. 795 [1904]; The Second National Bank of Lansing v. Lansing, 25 Mich. 207 [1872]; Kiley v. City of St. Joseph, 67 Mo. 491 [1878]; Carroll v. St. Louis, 5 Mo.

App. 584 [1878]; Tone v. The Mayor, etc., of New York, 6 Daly (N. Y.) 343 [1876]; Abernethy v. Town of Medical Lake, 9 Wash. 112, 37 Pac. 306 [1894]; Fletcher v. City of Oshkosh, 18 Wis. 228 [1864]; Whalen v. City of La Crosse, 16 Wis. 271 [1862]. "Where the party complaining could have secured relief by compelling action by the city council in a proper case he should resort to that remedy rather than to a suit for damages." Crawford v. Mason, 123 Ia. 301, 304, 98 N. W. 795 [1904].

²The Second National Bank of Lansing v. City of Lansing, 25 Mich. 207 [1872].

³Little v. City of Chicago, 46 Ill. App. 534 [1892].

⁴Weston v. City of Syracuse, 158 N. Y. 274, 70 Am. St. Rep. 472, 43 L. R. A. 678, 53 N. E. 12 [1899].

mandamus is not a remedy to which the contractor is entitled.⁵ In jurisdictions in which the contractor is entitled to mandamus, such writ has been granted to compel the levy of a tax.⁶ Thus, the holder of warrants payable out of a fund to be raised by special assessment may compel the city officers to proceed to collect such assessments, and may have a writ of mandamus to compel such action.⁷ A contractor may have mandamus to compel the payment to him of money which has been paid voluntarily by the property owners assessed for such improvement.⁸ Mandamus cannot be awarded to compel the levy of a tax if there are no officers who are authorized to levy such tax.⁹ Under special stipulation between the parties, mandamus has been awarded to compel the payment of a claim as distinct from compelling the levy of a tax therefor.¹⁰ Equity has no power to levy a tax;¹¹ but if such levy is to be compelled it must be by some writ addressed to officers having the power to levy taxes.¹² If a contractor is to be paid partly in money and partly in special tax bills, and if by mistake he is paid more money than he is entitled to, he cannot by mandamus compel the city to issue the tax bills until he returns the amount paid to him by mistake.¹³

§ 1519. Liability of public corporation for property appropriated.

Under constitutional provisions which forbid the taking of private property for a public purpose without making compensation to the owner thereof, such compensation is usually held to be necessarily pecuniary in its character.¹ Unless the con-

⁵ *Knapp v. Mayor and Council of City of Hoboken*, 38 N. J. L. (9 Vr.) 371 [1876].

⁶ *United States ex rel. Brown v. Memphis*, 97 U. S. 284, 24 L. 937 [1877]; *United States ex rel. Kilpatrick v. Capdevielle*, 118 Fed. 809, 55 C. C. A. 421 [1902]; *Higgins v. City of Chicago*, 18 Ill. 276 [1857]; *State ex rel. Burbank v. City of Superior*, 81 Wis. 649, 51 N. W. 1014 [1892].

⁷ *German-American Savings Bank v. City of Spokane*, 17 Wash. 315, 38 L. R. A. 259, 49 Pac. 542 [1897].

⁸ *People of the State of New York ex rel. Ready v. Mayor and Common*

Council of the City of Syracuse, 65 Hun 321, 20 N. C. Supp. 236 [1892].

⁹ *Barkley v. Levee Commissioners*, 93 U. S. 258, 23 L. 893 [1876]. The same principle has been applied in general taxation. *Rees v. Watertown*, 86 U. S. (19 Wall.) 107, 22 L. 72 [1873].

¹⁰ *Chicago v. The People of the State of Illinois*, 56 Ill. 327 [1870].

¹¹ *Meriwether v. Garrett*, 102 U. S. 472, 26 L. 197 [1880].

¹² *Meriwether v. Garrett*, 102 U. S. 472, 26 L. 197 [1880].

¹³ *State ex rel. Stifel v. Flad*, 26 Mo. App. 500 [1887].

¹ *Weekler v. City of Chicago*, 61 Ill. 142 [1871].

stitutional provisions require payment in cash, payment may be made by issuing bonds to be paid for by special assessments if they are sufficient in amount; but if they should prove insufficient, to be paid for by general taxation.² A provision for paying for such property solely by means of a fund raised by special assessments has been held insufficient in some jurisdictions,³ though it is apparently regarded as sufficient in others.⁴ If compensation out of assessments exclusively is not just compensation, a statute will, if possible, be construed so as to impose liability on the city, since any other construction would render it unconstitutional.⁵ If the fund is actually raised by local assessment and deposited for the benefit of the property owner, it is immaterial whether the money so deposited was obtained by legal assessment or not.⁶ By statute damages may be made payable when possession is taken of the land appropriated.⁷ So the council may delay payment until the assessment of benefits is made if it is empowered to delay opening the street until damages have been paid and if damages are not due until the street has been opened.⁸ Under some statutes, possession of the land which is appropriated may be taken before damages are paid, but if payment of damages is demanded such payment must be made or possession surrendered.⁹ If it is agreed that benefits may be deducted from damages, the property owners cannot recover damages until they have requested an assessment of benefits.¹⁰ In the absence of a statutory provision limiting the liability of the public corporation which appropriates property for a public purpose, such corporation is primarily liable for the value of the property which is taken, and for the injury to the residue thereof,¹¹ and the property

² In the Matter of Church, 92 N. Y. 1 [1883].

³ Sage v. City of Brooklyn, 89 N. Y. 189 [1882]. See also City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127 [1901].

⁴ State of Maryland on Relation of McClellan v. Graves, 19 Md. 351, 81 Am. Dec. 639 [1862].

⁵ Sage v. City of Brooklyn, 89 N. Y. 189 [1882].

⁶ City of Alameda v. Cohen, 133 Cal. 5, 65 Pac. 127 [1901].

⁷ Averill v. City of Boston, 193 Mass. 488, 80 N. E. 583 [1907].

⁸ Holden v. City of Crawfordsville, 143 Ind. 558, 41 N. E. 370 [1895].

⁹ Meserole v. Mayor and Common Council of Brooklyn, 8 Paiges' Chan. Rep. 198 [1840].

¹⁰ Boston Water Power Co. v. City of Boston, 194 Mass. 571, 80 N. E. 598 [1907].

¹¹ City of Terre Haute v. Blake, 9 Ind. App. 403, 36 N. E. 932 [1893]; Friedrich v. City of Milwaukee, 114 Wis. 304, 90 N. W. 174 [1902].

owner is entitled to immediate payment;¹² even if such public corporation may reimburse itself by levying a special assessment.¹³ The payment of damages for property appropriated, does not depend upon the collection of the special assessments.¹⁴ If a public corporation is sued for the amount of a judgment rendered against it in a condemnation proceeding, in which damages and benefits were assessed, the city cannot set up the invalidity of its own proceedings,¹⁵ as that the assessment roll did not show that the assessors were disinterested freeholders.¹⁶ A public corporation is liable for property appropriated or injured, even if the proceedings are ultimately abandoned.¹⁷ If the damages for property which is appropriated or injured are payable in the first instance out of special assessments, the city is bound to levy such assessments.¹⁸ If the city neglects or omits to levy such assessment, it is liable to the property owner in damages.¹⁹ The injured party may sue in case for negligence,²⁰ or he may sue for the value of the land taken, waiving the tort.²¹ Assumpsit has been said to be the proper form of action,²² and it has been said that mandamus would not lie.²³ On the other hand, it has been held that a judgment denying the writ of mandamus is a final adjudication, and prevents the property owner from bringing an action of debt thereafter.²⁴ Under some statutes the city is liable only for the amount that

¹² *City of Lafayette v. Shultz*, 44 Ind. 97 [1873]. (He need not wait for the levy and collection of the assessment.)

¹³ *City of Omaha v. State of Nebraska ex rel. Metzger*, 69 Neb. 29, 94 N. W. 979 [1903].

¹⁴ *Terre Haute & Logansport Ry. Co. v. Town of Flora*, 29 Ind. App. 442, 64 N. E. 648 [1902]; *City of Omaha v. State of Nebraska ex rel. Metzger*, 69 Neb. 29, 94 N. W. 979 [1903].

¹⁵ *City of Chicago v. Wheeler*, 25 Ill. 478, 79 Am. Dec. 342 [1861].

¹⁶ *City of Chicago v. Wheeler*, 25 Ill. 478, 79 Am. Dec. 342 [1861].

¹⁷ *Application of Mayor and First Municipality of New Orleans, for Extension of Barrack Street*, 2 Robinson (La.) 491 [1842].

¹⁸ *Clark v. City of Elizabeth*, 61 N.

J. L. (32 Vr.) 565, 40 Atl. 616, 737 [1898].

¹⁹ *Clayburgh v. City of Chicago*, 25 Ill. 535, 79 Am. Dec. 346 [1861].

²⁰ *Clayburgh v. City of Chicago*, 25 Ill. 535, 79 Am. Dec. 346 [1861].

²¹ *Clayburgh v. City of Chicago*, 25 Ill. 535, 79 Am. Dec. 346 [1861].

²² *Wheeler v. City of Chicago*, 24 Ill. 105, 76 Am. Dec. 736 [1860]; *People on the Relation of Dikeman v. President and Trustees of the Village of Brooklyn*, 1 Wend. (N. Y.) 318, 19 Am. Dec. 502 [1828].

²³ *People on the Relation of Dikeman v. President and Trustees of the Village of Brooklyn*, 1 Wend. (N. Y.) 318, 19 Am. Dec. 502 [1828].

²⁴ *Village of Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238 [1889].

cannot be raised by legal assessment.²⁵ Under such statutes the city is not liable until it has either collected the money upon the assessment, or until proper steps have been taken to cause the city to prosecute the collection of such assessments and such effort has failed, and the right to enforce the collections has been lost.²⁶ In other cases it has been said that the city is not liable primarily without deciding the nature of its liability if it does not collect the assessments.²⁷ The city is liable if it is unable to collect the assessment which it has levied.²⁸ If a bond is given to indemnify the owners of property injured by the opening of a street, the primary fund out of which such payment is to be made is that which is raised by special assessments, and such fund must be exhausted before recourse is had to the bond.²⁹ If the city omits a proper assessment of benefits and damages, it is liable to the property owner for the injury done by the public improvement.³⁰ Under statutes which restrict the compensation of the property owner to the special assessments levied for the improvement, the city is not liable personally for the amount of a condemnation judgment,³¹ and neither debt³² nor assumpsit³³ will lie therefor. Even if the city takes possession of the land condemned without collecting assessments therefor, the amount payable for such property does not become a part of the general indebtedness of the city.³⁴ A city which has appropriated property by eminent domain must issue warrants therefor, even if the fund is not all collected by special assessment.³⁵ If the assessment is partially paid in, the fund thus raised should be pro-rated among the claimants, and not paid in the order in which the demands are presented.³⁶ If the grade of a street is changed by proceedings

²⁵ *Seavey v. City of Seattle*, 17 Wash. 361, 49 Pac. 517 [1897].

²⁶ *Seavey v. City of Seattle*, 17 Wash. 361, 49 Pac. 517 [1897]; (following *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462 [1891]).

²⁷ *Shaffner v. City of St. Louis*, 31 Mo. 264 [1860].

²⁸ *City of Chicago v. Smythe*, 33 Ill. App. 28 [1888].

²⁹ *City of Pittsburg v. Irwin's Executors*, 85 Pa. St. 420 [1877].

³⁰ *City of Anderson v. Bain*, 120 Ind. 254, 22 N. E. 323 [1889].

³¹ *City of Chicago v. Hayward*, 176

Ill. 130, 52 N. E. 26 [1898]; *Village of Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238 [1889].

³² *Village of Hyde Park v. Corwith*, 122 Ill. 441, 12 N. E. 238 [1889].

³³ *City of Chicago v. Hayward*, 176 Ill. 130, 52 N. E. 26 [1898].

³⁴ *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462 [1891].

³⁵ *State of Washington on the Relation of Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 348 [1904].

³⁶ *Sage v. City of Brooklyn*, 8 Abb. 279 [1880].

which are so defective as to be void, and the property owner is ordered to fill the street in front of his property to the new grade, and he does so, he is regarded as agreeing to accept the benefits and damages in full compensation of the work thus done, and he is not allowed to recover from the public corporation therefor.³⁷ If a street is widened so as to include ground occupied by the buildings of private owners, the material in such buildings belongs to the owners, and if the public corporation sells such material and receives money therefor, it is liable to such owners.³⁸ A property owner who receives notice and does not appeal from the assessments of damages and benefits is bound thereby, and cannot maintain an action for injury to his land by reason of the construction of such improvement.³⁹ Quasi corporations which possess limited and special statutory powers, are not liable in damages for the construction of an improvement, unless there is some statutory provision imposing such liability.⁴⁰ Limitations begins to run against the liability of a city to pay for property appropriated from the time when such payment should have been made.⁴¹

§ 1520. Liability of city to public officers.

The liability of the city to the officers concerned in the levy and collection of assessments, depends upon the terms of the statute which provides for such compensation. If the statute provides that the fees of such officers are to be paid out of the assessments, the city is not liable therefor if there is no default in the levy or collection of the assessments.¹ The city has been held liable upon an express agreement to pay such fees,² but apparently the city had opportunity to collect the assessment in this case, and to pay the fees therefrom. A public officer who collects an assessment and is entitled to fees, cannot retain his fees and pay the balance over to the public corporation, but

³⁷ *Owens v. City of Milwaukee*, 47 Wis. 461, 3 N. W. 3 [1879].

³⁸ *Peters v. Mayor, etc., of the City of New York*, 8 Hun (N. Y.) 405 [1876].

³⁹ *Powell v. Clelland*, 82 Ind. 24 [1882].

⁴⁰ *Elmore v. Drainage Commissioners*, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010 [1892].

⁴¹ As from the day that construction begins: *Averill v. City of Boston*, 193 Mass. 488, 80 N. E. 583 [1907].

¹ *Baker v. City of Utica*, 19 N. Y. 326 [1859].

² *Payne v. City of Brooklyn*, 52 Hun (N. Y.) 390, 5 N. Y. Sup. 281 [1889].

he can receive payment for such fees only upon a warrant issued to him.³ An officer who has collected an assessment is liable to the public corporation therefor, even if such fund were paid under compulsion.⁴ A city may maintain an action against a public officer who has, without authority of law, appropriated a part of the funds, raised an assessment, to his own use, under the claim that he is entitled thereto as lawful fees.⁵

§ 1521. Liability for sale of property to pay void assessment.

A city or other public corporation is liable in tort for the acts of its officers in selling property to pay a void local assessment.¹ If the assessment is not void but merely irregular, the property owner cannot recover in trespass for the seizure and sale of his property,² since the assessment cannot be thus attacked collaterally. If benefits and damages should both have been assessed, and the assessment levied only for the excess of the benefits over the damages; and, instead, the city levies an assessment for the full amount of the benefits and sells the realty therefor, and the owner of such property sues the city for such injury, the city cannot counter-claim the amount of the benefits assessed.³ A lessee of realty cannot recover damages from the city for failing to complete a sidewalk improvement which has been partially constructed.⁴

§ 1522. Liability of public officer.

A public officer who by his own violation of the law injures a property owner, may be personally liable therefor to the latter.¹ A mayor who countersigns a warrant for an illegal assessment, is liable personally for property taken under such assessment.² If, by statute, the street superintendent is liable to the property owners for certain acts, a clause in the contract for a public

³ *Perry v. Otay Irrigation District*, 127 Cal. 565, 60 Pac. 40 [1900].

⁴ *Perry v. Otay Irrigation District*, 127 Cal. 565, 60 Pac. 40 [1900].

⁵ *Perry v. Otay Irrigation District*, 127 Cal. 565, 60 Pac. 40 [1900]; *People of the State of New York v. Starkweather*, 42 N. Y. Sup. Ct. Rep. 325 [1877].

¹ *Durkee v. City of Kenosha*, 59 Wis. 123, 48 Am. Rep. 480, 17 N. W. 677 [1883].

² *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 283 [1864].

³ *Koller v. City of La Crosse*, 106 Wis. 369, 82 N. W. 341 [1900].

⁴ *Highland v. City of Galveston*, 54 Tex. 527 [1881].

¹ *Williams v. Brace*, 5 Conn. 190 [1824].

² *Williams v. Brace*, 5 Conn. 190 [1824].

improvement whereby the street superintendent is guaranteed immunity from such liability is void.³ Such clause does not invalidate the proceedings, and the property owner is liable for the assessment levied for such improvement.⁴ Public officers who borrow money in their official capacity, are not liable therefor to the party by whom such money is advanced, in the absence of misconduct on their part, which prevents the collection of such loan.⁵ An officer who diverts funds raised by special assessment, is directly and personally liable to persons who have advanced money for the construction of the public improvement in reliance upon such assessments.⁶

§ 1523. Liability of abstractor.

If one who is about to purchase property employs an abstractor to examine the record for assessment liens, and he fails to find an assessment which is in the name of one who owned the property when the proceedings were commenced, but who had ceased to be the owner thereof when the assessment was confirmed, a verdict finding the abstractor guilty of negligence has been sustained.¹ The fact that the grantee took under a deed in which was contained a covenant against assessments, was held to be no defense in the absence of a showing that they were available to preserve the purchaser from loss.²

§ 1524. Parties.

The owner of land at the time that a change of grade is actually made is entitled to damages therefrom, even if he acquired title after the change was ordered.¹ A city is not liable to property owners for damages for defective performance in an action in which the city is the nominal plaintiff for the benefit of the contractor who is the real party in interest.² If the contractor has the right to recover from the municipality the difference between the contract price and the amount that can

³ *Rauer v. Lowe*, 107 Cal. 229, 40 Pac. 337 [1895].

⁴ *McDonald v. Mezes*, 107 Cal. 492, 40 Pac. 808 [1895].

⁵ *Olmsted v. Dennis*, 77 N. Y. 378 [1879].

⁶ *Pugh v. Miller*, 126 Ind. 189, 25 N. E. 1040 [1890].

¹ *Morange v. Mix*, 44 N. Y. 315 [1871].

² *Morange v. Mix*, 44 N. Y. 315 [1871].

³ *Tyson v. City of Milwaukee*, 50 Wis. 78, 5 N. W. 914 [1880].

⁴ *St. Louis to use of Deppleheimer v. Newman*, 45 Mo. 138 [1869].

be collected by assessments, the action by the contractor to collect the assessments may be brought against the property owners, and the city may properly be made a party to such action.³

§ 1525. Pleadings.

The ordinary rules of pleading control in actions against a public corporation to enforce a liability growing out of a public improvement. In a petition to enforce a personal liability against a city, it is not necessary to aver the formalities which would be necessary to make a special assessment valid.¹ If the city is liable only in case the assessments prove insufficient or defective, the petition must aver facts which show a neglect on the part of the public officers to comply with the provisions of the charter requisite to a valid assessment.² A declaration in an action of debt which alleges an ordinance for condemnation proceedings, the condemnation proceedings thereunder, the condemnation judgment, and the fact that the city took possession of the land, refused to pay the judgment, and refused and neglected to avail itself of any means provided for by statute for raising a fund to pay such judgment, states a cause of action.³ A bill may seek to enforce two series of bonds held by the complainant and issued by the city, one series of which is to be paid for by general taxation, and the other by local assessment.⁴ Even if, by statute, a contract entered into by a public corporation must be in writing, the petition need not aver that it is in writing, since it will be presumed to be in sufficient form unless the contrary appears in the pleading.⁵ The fact that the property owner consented to a change of grade which is pleaded as an excuse for changing the grade without paying the damages in advance, is not a separate defense; and, accordingly, does not render bad for duplicity the rest of said defense to the effect that a legal assessment has been made as required by charter, and that such assessment

³ Morton v. Sullivan, — Ky. —, 96 S. W. 807 [1906].

¹ Knapp v. Mayor and Council of the City of Hoboken, 38 N. J. L. (9 Vr.) 371 [1876].

² Kearney v. City of Covington, 58 Ky. (1 Metcalf) 339 [1858].

³ Corwith v. Village of Hyde Park, 14 Bradwell (Ill.) 635 [1884].

⁴ Burlington Savings Bank v. City of Clinton, Iowa, 106 Fed. 269 [1901]. (Bill not multifarious.)

⁵ Stephens v. City of Spokane, 11 Wash. 41, 39 Pac. 266 [1895].

has never been appealed therefrom, but remains in full force and effect.⁶

§ 1526. Limitations.

The length of time within which a contractor may maintain an action against the city is governed by the statute of limitations in force in that jurisdiction.¹ In the absence of a specific statute the contractor may recover upon a written contract within the period of limitations fixed for bringing actions upon written contracts,² even if a much shorter period of limitations exists as between the contractor and the property owners, the latter liability being one created by statute.³ If the right of action against the city is based on the invalidity of the assessment, it accrues not later than the completion of the work,⁴ and if no mistake or fraud exists, it is barred within the period applicable to implied contracts.⁵ If the city diverts a fund raised by special assessment by paying warrants out of order, the statute of limitations does not run against the holder of one of the earlier warrants, payment of which has been omitted, until he learns of such diversion.⁶ An acknowledgment of an overdue warrant must be made to the holder of such warrant or to his legal representative, and must recognize a subsisting liability on the warrant, in order to remove the bar of the statute.⁷

⁶ *Gilpin v. City of Ansonia*, 68 Conn. 72, 35 Atl. 777 [1896].

¹ *King v. City of Frankfort*, 2 Kans. App. 530, 43 Pac. 983; (five years) [1895].

² *City of Louisville v. McNaughton*, 114 Ky. 333, 70 S. W. 841 [1902]. (Fifteen years.)

³ *Kirwin v. Nevin*, 111 Ky. 682, 64 S. W. 647, 23 Ky. L. R. 947 [1901]. (Five years.) *Gosnell v. City of Louisville*, 104 Ky. 201, 46 S. W. 722

20 Ky. L. R. 519 [1898]. (Five years.)

⁴ *Citizens' Bank of Des Moines v. City of Spencer*, 126 Ia. 101, 101 N. W. 643 [1904].

⁵ *Citizens' Bank of Des Moines v. City of Spencer*, 126 Ia. 101, 101 N. W. 643 [1904].

⁶ *New York Security & Trust Co. v. City of Tacoma*, 30 Wash. 661, 71 Pac. 194 [1903].

⁷ *King v. City of Frankfort*, 2 Kans. App. 530, 43 Pac. 983 [1895].

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